BOLI ORDERS

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Of The Oregon Bureau of Labor and Industries

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BOLI ORDERS

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INTRODUCTORY NOTE

This fourth 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 April 15, 1983, and April 1, 1985.

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.

TABLE OF FINAL ORDERS

In the Matter of **4 BOLI**

In the Matter of
CITY OF SALEM,
Police Department, Respondent.

Case Number 45-80
Amended Final Order of the Commissioner
Mary Wendy Roberts
Issued April 15, 1983.

SYNOPSIS

Female Complainant was not discriminated against on the basis of sex as Office Supervisor in Respondent's Police Department because the skill, effort, and responsibility she exercised were less than the male sergeants who had similar duties before her. Respondent committed an unlawful employment practice when it retaliated by demoting her because she filed a civil rights complaint with the Agency. The Commissioner awarded Complainant $1,305 for lost wages, interest, and $10,000 for mental anguish, and ordered Respondent to appoint Complainant to the next Shift Supervisor position, to compensate her at step six of that classification, and to cease discriminating against any employee for filing a complaint under ORS chapter 659. ORS 659.030(1)(a) and (d).

The above-entitled contested case came on regularly for hearing before Andrew Josephson, designated as Presiding Officer herein by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was convened on October 28, 1980, in Room F of the Labor and Industries Building, West Summer Street, Salem, Oregon. It continued on October 29 and 30 in other Salem locations and concluded on October 31, 1980. The Bureau of Labor and Industries was represented by Daryl Dodson Wilson, Assistant Attorney General. The Respondent, City of Salem-Police Department, was represented by Jeannette M. Launer, Assistant City Attorney. Complainant Eunice Penny was present.

The Agency called as witnesses, the Complainant; Donald J. Eilert, Sergeant in charge of Respondent's Records Section during some times material; Charles J. Esplin, Respondent's former employee; Richard Ries, Microfilm Supervisor for the City of Salem; and Nita Ybarra Valverde, Philip H. Robare, and Marion L. Willing, employees in Respondent's Records Section during some times material.

Respondent called as witnesses George P. Gura, a personnel analyst for the City of Salem during times material; David 0. Hunter, Commander of Respondent's Management Services Division during some times material; Michael E. Holden, Sergeant assigned to Respondent's Records Section during some times material; and Lyle R. Gembala, Commander of Respondent's Management Services Division.

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

FINDINGS OF FACT – PROCEDURAL

1) On January 31, 1978, Eunice Penny filed a verified complaint with

the Civil Rights Division of the Bureau of Labor and Industries. Her complaint alleged that she had been and continued to be discriminated against in connection with her employment by Respondent because of her sex.

2) On October 2, 1978, Ms. Penny filed a second verified complaint with the Civil Rights Division. This complaint alleged that she had been and continued to be discriminated against in connection with her employment by Respondent, because she had filed her January 31, 1978, complaint.

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

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

5) At hearing, the parties agreed that any back pay damages will be based upon compensation figures which were to be, and were, submitted to this forum with written closing argument.

6) At hearing, the parties stipulated that the Specific Charges are amended to delete "Police Service Aide II" and insert in its place "Police Service Aide I" on line 24 of page 2 and line 14 of page 3.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a department within the City of Salem, a municipality and political subdivision of the State of Oregon existing and duly organized as such under the laws of the State of Oregon.

2) At all times material herein, Respondent engaged or utilized, in the State of Oregon, the personal service of more than one employee, reserving the right to control the means by which such service was or would be performed.

3) During times material herein, Respondent was divided functionally into two parts: the Field Operations Division and Management Services Division. The Management Services Division consisted of approximately three subdivisions, the largest of which was the Records Section. The Records Section was responsible for the collection, analysis, retention, updating, and accessing of police information, as well as the generation and distribution of statistical data and reports based upon that information. As Respondent's memory, and the provider of the information which was essential to Respondent's decision-making, the Records Section was one of Respondent's most important units. Respondent's other departments and other city, county, state, and federal law enforcement, regulatory, service and judicial agencies; the public; and private sector organizations such as insurance companies also constantly utilized the Records Section.

4) During all times material herein, Respondent's Records Section was regularly staffed by a total of 13 to 15 people, who operated the Section seven days a week, 24 hours per day.

5) During times material herein (except as noted below), Respondent's Records Section was very busy and chronically understaffed both in personnel generally and in trained personnel. Because of the many different and constantly changing types of data with which the Section dealt and the upgrading of equipment it used, the Section's operation was based upon myriad procedures and practices, most of which changed very frequently. Because of the amount and complexity of Records Section work and its understaffing, and because of errors in information furnished to the Section, human error and delay in Records Section operation were inevitable. The Section's operation could not be characterized as smooth.

The Records Section was never totally current in its work. The highest priority was given to those Section activities relating to police officer welfare or to investigations.

6) Complainant is a female person.

7) On July 1, 1959, Respondent hired Complainant as a Clerk I and assigned her to perform entry level clerical work in its Records Section. Complainant was hired as a civilian rather than a sworn officer and has retained her civilian status throughout her employment with Respondent.

8) In the early 1960's, Respondent promoted Complainant one level to Clerk II. In the mid-1960's, Complainant's classification changed to Police Service Aide II (PSA-II), pursuant to Respondent's transition from city-wide to special police department classifications for its clerks.

9) In approximately 1968, Respondent promoted Complainant to the classification of PSA-III. She was assigned to be a Shift Supervisor of the Records Section. This promotion gave Complainant the additional responsibility of supervising a shift of 2 to 5 clerical employees. Complainant's classification and assignment remained the same until approximately September 6, 1974.

10) From December 1968 to July 1972 and from November 1972 to approximately April 1974, Complainant's immediate supervisor was Donald J. Eilert. Sergeant Eilert reported directly to Captain Robert Beesee (phonetic spelling), who commanded the Management Services Division until about December 1973.

Initially, Sgt. Eilert was responsible for and supervised Respondent's Records and Communications Sections. As time passed, he assumed, in addition, the duties of Respondent's jail supervisor, personnel officer, finance officer, Property Control Section supervisor, and data processing coordinator in charge of payroll and timekeeping. As finance officer, he was responsible for preparing and producing Respondent's budget. Sgt. Eilert also became quite involved in departmental planning and research, writing departmental policy and procedure. Finally, he was "involved" with statistics and Respondent's first participation in a computerized information system. Not all of the above duties and activities were concurrent; each new responsibility and activity was added to the old. When Sgt. Eilert resigned in 1974, he was no longer responsible for Respondent's Communications Section or jail. During the above-described time periods, the Records Section remained Sgt. Eilert's major responsibility, but his

duties and activities outside the Records Section were substantial.

Sgt. Eilert was not a "working" supervisor of the Records Section, i.e., he did not work beside his staff, on the same duties, when he was not actually supervising the Section. The opposite of a working supervisor is a "managing" supervisor, who performs administrative work such as developing guidelines to make staff work easier when he or she is not actually supervising that staff.

When Sgt. Eilert was absent, another of Respondent's sergeants replaced him.

During Sgt. Eilert's tenure as head of the Records Section, the Section's workload varied daily but increased overall. The Section suffered "a lot" of staff turnover because of a relatively low pay scale and the hours of work. Despite these and the other problems described in Finding of Fact 5 above, the Records Section improved and upgraded its operation during Sgt. Eilert's tenure. Several high-ranking officials from law enforcement agencies in Oregon and Washington told Sgt. Eilert during this time that Respondent's Records Section was "one of the finest" and most up-to-date.

11) In 1970, the cumulative workload of the above described responsibilities required that Sgt. Eilert be given an assistant. For that reason, from July 1970 until November 1972, Respondent assigned Sgt. Michael Holden to assist Sgt. Eilert by managing the Records Section, being report officer, and doing statistics. As such, Sgt. Holden reported to Sgt. Eilert and was Complainant's immediate supervisor. In addition, Sgt. Holden performed the non-Records Section work described below. During this time, Sgt. Eilert assisted Captain Beesee and performed the non-Records Section duties described in Finding of Fact 10 above.

During his assignment to the Records Section, Sgt. Holden spent 40 to 50 percent of his time working as report review officer and working with statistics. He spent the remainder overseeing the Records Section, preparing budgets, writing Respondent's policies and procedures and staff reports, and working on special departmental projects. His budget work consisted of preparing the Records Section budget and, with Sgt. Eilert, writing and compiling Respondent's budget. Like Sgt. Eilert, Sgt. Holden was not a working supervisor of the Records Section. In fact, he did little "direct actual work" in the Section and had even less direct daily contact with its activities than Sgt. Eilert had had. Sgt. Holden's report review and statistical work, and his work outside the Records Section, was substantial. When Sgt. Holden was absent, Sgt. Eilert replaced him.

12) When Sgt. Holden's Records Section assignment ended in November 1972, Sgt. Eilert assumed the same responsibilities he had had before Sgt. Holden's assignment. Sgt. Eilert was again Complainant's immediate supervisor.

13) Between 1968 and 1974, when Complainant's working title was Shift Supervisor, her actual work responsibilities steadily expanded. By 1974, she was responsible for directly supervising, training, evaluating, recommending discipline and training for, and

administering verbal reprimands to, the Records Section staff, as well as assisting in the development of new Records programs and procedures. Although she was responsible for day-to-day operation of primarily the day shift, Complainant also coordinated and made sure work was done on all shifts. She also brought to the attention of her supervisor problems on all shifts. This put her in the difficult position of supervising employees of her own rank and title. Even though Complainant was scheduled to be present at and physically in charge of just one shift each day, she was, at Sgt. Eilert's instigation, on call at all other times. Complainant was contacted when a problem arose, when a major event occurred, or when procedure needed clarifying, so that she would be apprised immediately of important developments and so she could advise staff when necessary. Neither Sgt. Eilert nor Holden instructed the Records Section staff that he could be called when not on duty. There is no evidence from anyone who supervised or worked with Complainant or observed her during this time that her "on call status" reflected mismanagement by her. This forum finds instead that Complainant's willingness to be on call reflects her complete commitment to achieving optimal Records Section operation.

Complainant's supervisory duties also included scheduling the work shifts of all Records Section personnel. This meant, among other things, making new shift assignments every three months. Finally, Complainant also coordinated the 1972 move of the Section from one building to another and the Section's conversion from one type of filing to another.

Complainant had front-line supervisory responsibility for the entire Records Section operation on a daily basis because her immediate supervisors, Sgts. Eilert and Holden, delegated that responsibility to her. Because they were able to do so, Sgts. Eilert and Holden could and did concentrate upon the other activities described in Findings of Fact 10 and 11 above. As they accrued more and more assignments, Sgts. Eilert and Holden relied on Complainant more and more, delegating to her more of their Records Section duties.

Unlike either Sgt. Holden or Sgt. Eilert, Complainant was a working supervisor, as defined in Finding of Fact 10 above. Because she was Respondent's most experienced Records Section employee and its only employee with complete knowledge of all Records Section procedures, individuals who wanted to utilize the services of the Section approached Complainant. Because of her knowledge and experience, Complainant reported directly to Respondent's Chief or Captain in charge of Management Services, without being required to go through her immediate supervisor, on many occasions.

Complainant never supervised Respondent's jail, never was Respondent's personnel officer, and never had direct responsibility for Respondent's Property Control Section. Although she prepared the Records Section budget request and aided in the typing of Respondent's budget, Complainant was never Respondent's finance officer and never responsible for

preparing or producing Respondent's budget. There is no evidence that Complainant was ever responsible for Respondent's Communications Section, was data processing coordinator in charge of payroll and time keeping, or "worked with statistics" as did Sgts. Eilert and Holden, so this forum must find that she was not and did not. Complainant did not work as report review officer during this time period. She was not involved in departmental planning per se. Her policy and procedure writing, her other work related to planning (such as her "involvement" with Sgt. Eilert in planning for Respondent's initial participation in a computerized information system), and her work on special projects was limited to that which concerned the Records Section.

14) Between 1968 and 1978, Complainant, like Respondent's other non-probationary employees, was formally evaluated once a year. There are no formal evaluations of Complainant's work between 1968 and 1974 on the record except an evaluation of Complainant's work between July 1, 1973, and September 1, 1973, by Sgt. Eilert. There is no evidence on the record as to why this evaluation pertained to just two months of work.

Sgt. Eilert graded Complainant in 31 specific performance areas, nine of which related just to supervisory employees. The potential grades were "Not Satisfactory," "Some Improvement Needed," "Meets Standards," and "Exceeds Standards." Complainant received no "Not Satisfactory" grades. Complainant was graded "Some Improvement Needed" in "Evaluating Subordinates," "Judgments and Decisions," and "Leadership." She was graded "Exceeds Standards" in "Public Contacts," "Employee Contacts," "Knowledge of Work," and "Initiative." In the other 24 areas, Complainant was graded "Meets Standards." In explanation, the narrative section stated that Complainant "continually meet(s) or exceed(s) all standards required for the efficient operation of the Records Section except as noted in Section E." Section E stated, in essence, that 1) Complainant's individual concern for each employee acted as a block to effective evaluation of subordinates, and 2) Complainant had difficulty delegating responsibilities to her fellow PSA-III's.

At hearing, Sgt. Eilert characterized Complainant's strengths at this point as her ability to get along with people and train others, and her extremely high knowledge of Records Section work. He said Complainant needed improvement only in her tendency to "over supervise" (not allow her subordinates to work for themselves) and that Complainant was "a bit lax on discipline of others." Sgt. Eilert attributed at least part of Complainant's over supervising to the fact that, as a working supervisor, Complainant worked alongside the people she supervised. He also felt that the high staff turnover which required Complainant to continually train employees made it easy for her to become accustomed to the training mode and thereby supervise when it was not necessary. In addition, Sgt. Eilert explained at the hearing that while he had thought, as evidenced in his 1973 evaluation of Complainant, that Complainant should be more militaristic (i.e., use more discipline) when dealing with her subordinates, he no longer felt that way. This forum finds that overall this evaluation was favorable.

15) Sometime in 1972, Respondent determined that it was no longer necessary to have a sergeant, or even a sworn police officer, in charge of the Records Section, because such persons possessed some skills, training, and experience which were not necessary to the person running the Section.

Because of their additional skills, training, and experience, Respondent's sworn officers were on higher pay scales than its civilian employees. Sgt. Eilert and Holden were the only sworn officers assigned to the Records Section between 1968 and 1974; all other Records Section employees were civilians.

16) Ben Myers was Respondent's Chief of Police during times material until approximately March 1974. Chief Myers and Captain Beesee felt that women should not hold positions as Respondent's managers or section supervisors. Chief Myers believed that a woman's place in the office was to serve the men. He made this attitude clear to his staff, and they were expected to implement it. At this time, Chief Myers had full and complete control of Respondent's personnel decisions.

During Chief Myers's tenure, Respondent had no female division or section heads; males were appointed to positions of authority. Male office hirees commonly started at top level pay classification, while only one female was hired above entry level.

At Chief Myers's request, Captain Beesee told Sgt. Eilert, Respondent's personnel officer, to appoint Phil Robare, a male person, and to hire Gene Pope, a male person, as PSA-III's for the Records Section in late 1972 and early 1973. They were considered appropriate candidates to learn how to do what Complainant was doing and eventually be promoted to manage the Records Section as the civilian replacement for the sergeant position then still heading the Section. Sgt. Eilert did so. At the time he was hired, Mr. Pope had no actual records training, having experience only in minor secretarial procedures. Mr. Robare had work experience which arguably bore some relationship to Records Section work. Six to ten months after he was hired as a PSA-II, Mr. Robare was promoted directly to the PSA-III classification. Complainant trained Messrs. Pope and Robare. As PSA-III's, Messrs. Pope and Robare were, like Complainant, shift supervisors, and this made them all peers in rank. There were attempts by Respondent's management to have Mr. Robare or Pope take over Complainant's duties, during 1973 or early 1974, but they failed.

17) In approximately December 1973, Captain Beesee left his position as commander of Respondent's Management Services Division, and Captain David L. Hunter was appointed to replace him. Sometime during the first three months of 1974, Chief Myers left his position and, on April 22, 1974, Roy Hollady was appointed to replace him. At this time, Sgt. Eilert resigned his employment with Respondent, and the "civilianization" of Records Section management took place. The sergeant position which Sgt. Eilert had occupied

was eliminated, and Complainant was promoted to fill the new civilian position of supervisor of the Records Section. Accordingly, effective on or about September 6, 1974, Complainant was promoted from the classification of PSA-III to that of office Supervisor, a classification which had not previously existed in the Records Section. She was placed at the step five rate of pay for this classification and paid $740.00 per month. The only evidence on the record concerning the rate of pay of the sergeant position which had headed the Records Section is that a sergeant at an unspecified step level, presumably the level at which Sgt. Eilert was paid at the time of his resignation, was paid $1,176.00 per month.

Complainant received this promotion because Chief Hollady, Captain Hunter, and Sgt. Eilert believed she was the most qualified applicant for it. The promotion of a female to this position, even Complainant, would not have occurred under Chief Myers. What had been a virtually absolute insistence upon male management under Chief Myers became at most a preference to appoint men to positions of authority under Chief Hollady. Complainant's promotion to Section management evidences the fact that any such preference was not absolute. Furthermore, sworn officers were replaced by civilians in two other positions heading Management Services Division sections, and eventually these two other positions were filled by women. There was, therefore, improvement in Respondent's attitude toward the employment and promotion of women under Chief Hollady. Less favorable treatment of female Records Section employees because of their sex, however, did persist after Chief Hollady was appointed. The record herein provides three examples of this fact. Soon after he was appointed, Chief Hollady met with Records Section staff and described his plans for better treatment of female employees, especially through in-service training for career development and consultation with clerical employees about divisional changes. These plans did not materialize. Chief Hollady and Captain Hunter often consulted with Mr. Robare, Complainant's subordinate and the only male permanent Records Section employee between 1976 and 1978, rather than Complainant about Records Section matters which were not limited to Mr. Robare's computer specialty. Finally, police officers often insisted upon getting information from Mr. Robare, even when the female Records Section employee who was serving such an officer explained that she could get the information.

18) As Office Supervisor of the Records Section, Complainant had the same duties as she had been delegated when she was Shift Supervisor, and her general work was substantially the same: she managed and worked in the Records Section.

An exhibit in the record is an accurate description of what Complainant initially did as Office Supervisor. She had virtually no additional duties that she had actually performed as Shift Supervisor, because almost all the work Sgt. Eilert and Sgt. Holden actually did between 1968 and 1974, including their work pertaining to units other than just the Records Section, was assigned to individuals other than

Complainant. During her first several months as Office Supervisor, Complainant did some report reviewing, because she had observed Sgts. Eilert and Holden doing it, but she then discontinued this work at Captain Hunter's direction.

Between 1974 and 1978, Complainant's administrative workload as Office Supervisor increased, as she started a manual with written procedures concerning the processing of each type of document (the Report Processing Procedures Manual); started and developed a manual detailing other types of procedures (the Records Section Procedural Manual); and devised a Daily Resume, a "diary" summarizing the work done on each shift, each day. She had more contact with attorneys, the management and staff of other public agencies, and towing companies, and delegated more training to shift supervisors than she had as Shift Supervisor. Complainant did remain a working supervisor, performing the work of a PSA-II or even PSA-I if she felt it appropriate. (From at least 1976 on, there were no PSA-III's assigned to Records Section.)

Between 1974 and 1978, Complainant's work also changed due to technological advances. For example, Complainant "had a great deal to do with organizing and implementing" Respondent's record microfilm system in 1976-77, including training staff concerning it. Her involvement in Respondent's growing participation in computerized law enforcement data systems continued until, from September 1976 onward, she played a focal role in the Record Section's conversion to the Regional Automated Information System (hereinafter RAIN).

Another exhibit is a detailed description of the work Complainant performed during the year before February 1978. As Office Supervisor, Complainant reported directly to Captain Hunter until February 1978. She formally briefed Captain Hunter, and was briefed by him, at least three times each week, and he was available to her fifteen minutes each morning. Complainant and Captain Hunter openly and frequently discussed Records Section operations.

Between 1974 and 1978, the size of the Records Section staff remained the same, with the exception of five temporary employees who worked on the microfilming project when it was getting underway. The Section's workload continued to grow, and turnover to Respondent's better-paying jobs and understaffing remained chronic problems. The changes to microfilm and computer systems inevitably disrupted and confused Records Section operations and, initially, added a great deal of work.

At all times during her tenure as Office Supervisor, Complainant was paid less than Sgt. Eilert or Sgt. Holden had been paid, as adjusted upward by annual pay increases since their tenures in the Records Section.

19) On March 17, 1976, Complainant received from Captain Hunter a formal performance evaluation for her March 1975 to March 1976 work. The format of this evaluation was identical to that of Complainant's 1973 evaluation described in Finding of Fact 14 above. Captain Hunter graded Complainant in twenty-six specific

performance areas, nine of which related just to supervisory employees. Complainant received no "Not Satisfactory" grades. She received "Some improvement Needed" grades in "Leadership," "Promotability," and "Supervisory Control." She received the grade of "Exceeds Standards" in six factors: "Volume of Acceptable Work," "Accepts Responsibility," "Accepts Direction," "Effectiveness Under Stress," "Scheduling and Coordinating," and "Operational Economy." The remaining seventeen factors were all graded "Meets Standards."

The evaluation's narrative section concerning "Job Strengths" stated:

> "Excellent at coping with volume of work. You are always able to assume new assignments within (sic) short notice. You accept responsibility for your section and work hard to accomplish the job. You accept direction and are not afraid to voice an opinion on issues with which you disagree without becoming argumentative. When decisions are made, you accept them without adverse reaction. You are able to cope with increased responsibilities and work loads and can maintain your sense of humor. You take action when you see the need without waiting for direction. You work toward improving service and quality of work and have submitted written documentation to support it. You have been able to adjust personnel schedules to provide significant personnel assignments to get the job done although we have had extreme absenteeism due to illness. You are aware of costs of material and manpower and utilize them both to an admirable degree. You are continuing towards self-improvement by attending courses to enhance your supervisory experience."

The evaluation's narrative section concerning work performance "Deficiencies" stated:

> "You must overcome certain feelings of inadequacy, distrust and favoritism which exists (sic) in the minds of some of your subordinates. Regardless of whether these are real or imagined, they do exist and must be overcome before you can become totally effective as a leader. Supervisory control can be enhanced by becoming more approachable. You have not yet gained the complete confidence of some of your subordinates."

Comments which Complainant and her subordinates had made to Captain Hunter had led him to conclude that Complainant had difficulty communicating with her subordinates. The primary example was Complainant's perceived favoritism, which was based on Complainant's working closely with each successive day shift supervisor. Whoever was the day shift supervisor at the time was perceived as Complainant's favorite. Although Captain Hunter had discussed this problem with Complainant, she had not been able to dispel this perception.

This evaluation suggests as a "goal" or "improvement program" that Complainant continue to attend courses in psychology and personnel management, which Complainant did.

This forum finds that overall this evaluation was favorable. Deficiencies were cited to help Complainant optimize her performance, not to indicate that her performance was unsatisfactory.

20) On or about May 17, 1976, a written union grievance was filed which had been signed by four Records Section employees. The grievances complained that Complainant's assignment of a particular Records Section employee to training classes had been discriminatory and unfair. On May 20, 1976, Complainant offered a lengthy written Step I response to this grievance, stating that Records Section training selections were and should continue to be based upon the need of the Section and the individual employees and should be left to the discretion of the management. Thereafter, discussion between the grievors and Chief Hollady expanded the complaint to also embrace the alleged lack of logic of Records Section shift rotations, failure to pay for training time, failure to permit PSA-I's to compete for a statistician position, and an alleged statement by Captain Hunter that he would be more likely to listen to a particular male employee than to any of the female employees under his supervision. All of these complaints except that last one related to activities which were the responsibility of Complainant and Captain Hunter.

On June 23, 1976, Chief Hollady made a lengthy written Step II response to the expanded grievance. His response stated that Complainant and Captain Hunter would develop and implement a formalized shift rotation program, organized more in terms of seniority, and promised notice to all staff of training assignment and their rationale, as well as scheduling of training assignments on an equitable basis. It also promised pay for attending specifically assigned training and the assignment to the statistician of other PSA-I duties. Chief Hollady also labeled the challenged "assignment practices" of Captain Hunter and Complainant "unacceptable".

Thereafter, this grievance was pursued no further. One of the employees who signed the grievance admitted at hearing that unfairness in shift scheduling (which had been the root of the complaint concerning scheduling) had been a perceived rather than actual problem. The same employee labeled Complainant as a "very competent" Office Supervisor.

21) There is evidence of five other union grievances filed by Records Section employees during Complainant's four years as Office Supervisor of that Section.

> 1. At the Step III level, Respondent's Personnel Director agreed in part with a September 16, 1975, grievance asking for work-out-of-class pay.
>
> 2 - 4. Three of the five grievances were filed by Lynette Baker, a PSA-I referred by some employees as a "cry-baby." One, dated May 2, 1976, complained about Respondent's break and lunch policy. There is no evidence that it was pursued after Complainant's Step I response denying its merit. Another was filed by Ms. Baker on the same day and asked for "work-out-of-class"

pay. It appears that Complainant's action was upheld. Ms. Baker's third grievance was filed in 1977. It complained about Respondent's promotion standards requiring 50 wpm typing speed of a PSA-II applicant. This grievance was apparently resolved at Step III by the City of Salem's Personnel Department agreeing to develop a new selection procedure without this requirement.

5. In response to the fifth grievance, dated December 22, 1977, Chief Hollady upheld Complainant's decision not to grant a shift assignment request.

Only one of these grievances resulted in any change in a challenged action for which Complainant was solely responsible. There is no evidence that Respondent felt that these grievances reflected negatively upon Complainant's work performance.

22) On April 22, 1977, Complainant received a formal performance evaluation of her work during the year ending April 1, 1977, from Captain Hunter. Because of a city-wide change, the format of this evaluation was completely different from that of Complainant's previous evaluation.

In this evaluation, Captain Hunter stated that Complainant performed satisfactorily in the key performance areas of planning and organizing the Section's work activities, determining staff training needs and developing programs to meet those needs, providing necessary equipment and supplies for the Section, and supervising staff performance and correcting deficiencies as needed. Captain Hunter added that Complainant's problems in scheduling personnel and determining work priorities had diminished and Complainant had improved in communicating with staff and getting them to communicate with each other. He qualified his remarks by stating that much more improvement was needed in the latter area.

In the evaluation section headed "performance problems," Captain Hunter wrote nothing. In the section headed "action for job-related employee development," Captain Hunter wrote that:

"Mrs. Penny has shown improvement in her administration of the Records Section this year, however, some deficiencies are still present. To assist her in overcoming these and to improve her own job performance, several goals have been identified for this coming year. Successful achievement of these goals will serve to measure her job performance this next year."

These goals were included in the evaluation because of a new requirement that all evaluations include a work plan and goals. The evaluation articulated "General Goals" in personnel administration, equipment and supplies, and planning. In addition, it established the following "Specific Goals:"

"1. Establish and develop a training program to train enough people in data coding to have five experienced data entry persons in the section.

"2. Train all but probationary personnel in data entry other than coding.

"3. Complete microfilming of department records through year 1976.

"4. Bring all data entry up to current time and keep it current.

"5. Improve job satisfaction of subordinates by improving communications between employees."

Complainant wrote on this evaluation that the evaluation and work plan had been discussed with her and that she found the goals "achievable."

This forum concludes that this evaluation was favorable overall and that Captain Hunter believed that Complainant was, at the least, a good and improving manager. There is no indication that he felt that the problems noted were serious, so this forum concludes that they were not.

23) On or about April 28, 1977, Captain Hunter informed Complainant by written memo that he had been informed that a Records Section shift supervisor had refused to accept an incident report and to perform a service concerning the report for Respondent's Command Center, because the report did not meet the criteria for an "incident." Captain Hunter criticized the shift supervisor for failing to effectively communicate with fellow employees and indicated that the occurrence showed a training deficiency. He directed Complainant to correct the problem. At hearing, Complainant explained, and this forum finds, that there were frequent problems in communication between Records Section shift supervisors and the Command Center sworn personnel involved in this incident, because of the latter's "surly and overbearing attitude to non-sworn personnel."

There is no indication that Captain Hunter felt that this incident evidenced that Complainant had a serious performance problem, so this forum concludes that it did not.

24) In May 1977, Complainant informed Captain Hunter, for the first time on the record, that she thought her salary was too low. At the time she was being paid at the highest (sixth) salary step for the Office Supervisor classification, but less than Sgt. Eilert or Holden had been paid (as adjusted upward by annual salary increases since their tenure in the Records Section). In response, Captain Hunter asked Complainant to complete a new Position Classification Questionnaire, describing how she spent her work time, which she did. Captain Hunter found Complainant's completed questionnaire to be an excellent delineation of her job and forwarded it with his signature to Chief Hollady. Captain Hunter supported Complainant's efforts to get a higher salary, but did not feel that she should be paid as much as a sergeant.

Thereafter, on May 18, 1977, Chief Hollady asked the Personnel Department of the City of Salem to conduct a reclassification study in order to ascertain the appropriate salary range for Complainant. In his written request, Chief Hollady indicated that he felt that because of changes in the number and variety of duties and responsibilities in Complainant's position, her job description and salary should be "altered." His request conformed with the

City of Salem's standard procedure for obtaining reclassification of a position.

25) George Gura, a personnel analyst for the City of Salem, performed the reclassification study which Chief Hollady requested. He was very experienced in doing such studies. After auditing all the duties and responsibilities delineated in Complainant's Questionnaire, Mr. Gura went to the labor marketplace to find comparable positions. He defined the marketplace as the Mid-Willamette Valley, because this was the area in which Respondent would have to recruit for Complainant's position. Most law enforcement agencies he contacted had a sworn officer in charge of both their records and communications units, doing work which was therefore greater in scope than Complainant's and entailing program responsibilities which Complainant did not have. Mr. Gura found only two other positions which were comparable to Complainant's, in that they involved management of high volume records retention clerical operations.

On June 13, 1977, Mr. Gura circulated his study of Complainant's position. It concluded, based upon "the admittedly limited . . . data," that the compensation rate for the Office Supervisor classification was about 10% below the prevailing maximum average salary in the labor marketplace. It recommended that that rate be adjusted upward from range 14B to range 15B, effective July 1, 1977, and stated that such adjustment would place the position in a "financially competitive" posture with the comparable positions Mr. Gura had found.

Mr. Gura's testimony established that in doing this study, he did not consider the Records Section one of Respondent's most important units, as this forum has found that it was.

26) Pursuant to Mr. Gura's recommendation, Respondent raised the range for its Office Supervisor classification from 14B to 15B, effective July 1, 1977. As before, Complainant was placed at the highest step of the Office Supervisor range, and her salary increased approximately five percent. Also effective July 1, 1977, Respondent raised the salaries paid all its ranges by 6.6 percent. On July 1, 1977, therefore, Complainant's salary was raised by a total of about 11.6 percent, from $1040.00 to $1161.00 per month. This was less than Sgt. Eilert or Sgt. Holden had been paid, as adjusted upward by annual raises since their tenure in the Records Section. Complainant did not receive any other raise in pay until April 1, 1978.

27) On July 1, 1977, Complainant responded to Mr. Gura's study with her own study. Complainant had no training in personnel or salary analysis. Citing data which she had compiled herself, Complainant argued that, even with her July 1, 1977, raises, she was receiving considerably less compensation for her work than her counterparts in comparable agencies. She also stated that she felt a salary increase would be appropriate in light of Respondent's emphasis on affirmative action. Complainant still felt that she should be paid according to the scale by which Respondent's sergeants were paid.

After reviewing Complainant's study, Mr. Gura advised Larry Wacker, the Personnel Director of the City of Salem, that he felt reservations about the correlation between Complainant's position and the positions Complainant had considered comparable to her own.

28) During the summer of 1977, Complainant repeatedly discussed her pay complaint with Sgt. Ronald Sonderman, who was in charge of Respondent's Personnel and Training Section. Sgt. Sonderman agreed that Complainant should be paid more and referred her to Jeannie Large, Affirmative Action Officer for the City of Salem. After speaking with Ms. Large, Complainant decided against pursuing her complaint through her.

29) On August 10, 1977, Mr. Wacker replied to Complainant's July 1, 1977, study. He opined that the salary range for Respondent's sergeants was too high for Respondent's Office Supervisors. He stated that Respondent was "going to review" some of the other "jobs in the City to see if the Office Supervisor classification" was "properly placed internally." Mr. Wacker promised to inform Complainant of the results of that review. He never did, and there is no evidence on the record that this review was ever done.

30) On August 11, 1977, Complainant told Sgt. Sonderman that it looked like she "wouldn't get anywhere (with her pay complaint) without filing (a complaint) with Affirmative Action or EEO." Sgt. Sonderman told Chief Hollady this. Sgt. Sonderman then told Complainant that the Chief asked that she not pursue filing such a complaint until Mr. Wacker's review was completed. Complainant said that she would wait until the survey could be completed.

31) During the Fall of 1977, in a meeting attended by Chief Hollady, Phil Robare, Captain Hunter, and others, Complainant stated that she was still paid less than her counterparts. Chief Hollady said he thought Complainant's pay should be higher, but not as high as that of a sergeant.

32) In November 1977, after Complainant had obtained the document necessary to file a civil rights complaint with the Bureau of Labor and Industries but before she had submitted them to that agency, Complainant told Chief Hollady directly that she was thinking of filing a civil rights complaint with an "EEO agency." Chief Hollady told Complainant that he could understand her feelings, that he thought she should have a raise in pay, and that he had no control over the time the City's Personnel Department was taking to complete its review.

33) On December 30, 1977, Complainant received a memo from Captain Hunter complaining that a Records Section shift supervisor had filed three weekly evaluations of a probationary employee which were inadequate because they did not either specify any action taken by the supervisor to correct areas needing improvement or indicate any improvement. Captain Hunter asked Complainant to make progress in correcting this problem by January 20, 1978.

34) On or about January 27, 1978, Respondent advised Lieutenant Lyle Gembala that he was being given a special temporary assignment to Respondent's Records Section. On or about February 2, 1978, Captain Hunter sent a memo to Records Section staff which stated that Lt. Gembala

would "conduct a study of the functions and duties performed by the" Section, "review and change assignments or schedules of personnel as necessary, and administer overall operation of the Section to improve efficiency and effectiveness within available resources." Lt. Gembala began working on his assignment on February 6, 1978.

When he began his assignment, Lt. Gembala had no more than a basic understanding of Records Section procedures and practices. He had considerable police department training in principles and management.

At the beginning of Lt. Gembala's month in the Records Section, he went over with Complainant the General and Specific Goals contained in her April 1977 evaluation, relative to her current performance. He concluded that the General Goals had not all been met, in that Complainant was not picking out and evaluating employees' deficiencies; she had put no scheduling information in writing except for the schedule itself and had no "shift requirements for a balance;" she had not fully achieved the training objectives because of a lack of time and resources; she had not developed a system to provide for adequate supplies; and she had no "written guidelines" or "systemized structure" for preventative maintenance of equipment. Lt. Gembala also stated that Complainant told him that not all of the Specific Goals had been or could be met.

Lt. Gembala worked in his assignment to the Records Section for about one month. During this time, Complainant was directed to, and did, report to him rather than Captain Hunter. Lt. Gembala reported to both Captain Hunter and Chief Hollady. During this month, Lt. Gembala had a desk in the Records Section; discussed the Section with Captain Hunter, Chief Hollady, Complainant, and other Section personnel; and had all incoming and outgoing Section correspondence routed through him. Lt. Gembala and Complainant did not look together at the whole Records Section operation the way Complainant felt they should have, in order to accomplish the stated purpose of Lt. Gembala's assignment. Lt. Gembala did not have Complainant do any analysis, nor did he convey to her any findings other than, one month after he left, his evaluation of Complainant described in Findings of Fact 37 and 38 below. He did not discuss any Records Section procedures, functions, or systems with Mr. Robare or speak with Mr. Robare at all in any detail, even though Mr. Robare was an important Records Section employee with considerable knowledge of the Section's procedures and priorities. Moreover, Lt. Gembala did not ask Mr. Robare about Complainant's performance, even though Mr. Robare was functioning more like her assistant than was any other person.

Upon completing his assignment to the Records Section, Lt. Gembala produced no written study of the "function" or "duties" of the Records Section, suggesting how procedures could be improved. In fact, he did not produce any written reorganization plan for the Section or any document to articulate this study of the Section to Chief Hollady.

At hearing, upon consulting notes, Lt. Gembala testified that during his

month in Records, he found the following problems and took the following actions to end them.

a) In the area of its printing system, the Section was messy and disorganized. Lt. Gembala directed the Section to clean up this area and keep it clean. He also determined that the printing system was grossly inefficient and in extremely poor state of repair, so he obtained another one. (Complainant had been well aware of the problems created by, and the state of repair of, the printing system, and she had made several attempts to obtain another machine or use of one of Respondent's less messy machines. Respondent had told her that it could not afford a better machine for the type of printing the Records Section did.)

b) Lt. Gembala concluded that there was no organization to the requisitioning of supplies, so he directed that a system with written guidelines be devised.

c) Lt. Gembala directed that filed "mug shots" which were not statutorily "records" be disposed of.

d) Lt. Gembala recommended minimum staffing by shift and automatic authorization to bring any shift up to those minimums.

e) Lt. Gembala directed Complainant to establish "some" priorities concerning "some" work assignments.

f) Lt. Gembala directed that a "systemized system" be established for records organization, because similar types of records were kept in totally different file cabinets. (Complainant explained at hearing that those records were organized in terms of the frequency with which they were used, rather than just by subject matter.)

g) Lt. Gembala directed that old traffic warnings and citations be expunged and written guidelines established concerning their retention and disposal.

h) Lt. Gembala directed that written guidelines be established concerning the retention of teletypes, because useless teletypes were being retained.

i) Lt. Gembala directed that Humane Society slips stacked in boxes go to the City Recorder as per a city ordinance.

j) Lt. Gembala discontinued some specific duplicative functions which Records Section staff were carrying out, by eliminating certain logs and files on types of reports.

k) Lt. Gembala directed that certain work backlogs be "prioritized" and "caught up."

35) During approximately the first week of March 1978, Lt. Gembala left the Records Section and began a project in the Property Control Section.

36) On March 20, 1978, Captain Hunter was demoted, at his request, to the rank of lieutenant and transferred to a management position in Respondent's Field Operations Division.

Captain Hunter had been overwhelmed by his very heavy workload since late 1976 and by some personal problems. His workload had included a great deal of planning and research for the microfilm system and RAIN; implementing a number of other new projects; a heavy Records Section workload and a very heavy workload concerning the Personnel and Training and Property Control Sections, and his

other assignments. Because of exhaustion, Captain Hunter had informed Chief Hollady in late 1977 that he was considering asking for a rank reduction. In February 1978, Captain Hunter had formally requested his demotion.

Captain Hunter was not present in the Management Services Division after the first part of March 1978. When his reassignment took effect, Captain John Newell was temporarily assigned to command the Division.

37) Sometime between March 20 and April 3, 1978, Captain Newell instructed Lt. Gembala to formulate the formal performance evaluation of Complainant due on April 1, 1978. Lt. Gembala was no longer Complainant's supervisor. The evaluation was to appraise Complainant's work during the twelve months preceding April 1, 1978. Lt. Gembala had observed Complainant during one of those twelve months.

It was the procedure of the City of Salem to have an employee evaluated by the person who was his or her supervisor at the time of the evaluation, in this case Captain Newell. This person usually consulted with any other person who had supervised the employee during the period to which the evaluation pertained. Respondent alleges that Captain Newell had Lt. Gembala evaluate Complainant because he was her most recent immediate supervisor. (Captain Newell had been Complainant's immediate supervisor for at most 11 days as of the date of the evaluation was due.) Lt. Gembala did not consult with Captain Hunter, who was Complainant's immediate supervisor for ten months of the twelve month evaluation period. When Lt. Gembala was first assigned to the Records Section in February 1978, he had briefly talked with Captain Hunter about Complainant's performance, and Captain Hunter had indicated that Complainant had a communication problem with subordinates and was reluctant or unable to delegate some work. However, Lt. Gembala did not subsequently talk with Captain Hunter about Complainant's job performance. Even though Captain Hunter was still working for Respondent when Lt. Gembala evaluated Complainant, Captain Hunter had "no direct input" on this evaluation; Lt. Gembala did not talk with him about it. Lt. Gembala asserts that he based his evaluation of Complainant upon his personal observations and discussions with Complainant during his month in the Records Section and his February 1978 discussion with Captain Hunter about Complainant.

38) Lt. Gembala stated on his evaluation that Complainant had performed satisfactorily in the key performance areas of knowledge of work, relationships with superiors, and budget preparation. Under the heading of "action for job related employee development," Lt. Gembala criticized Complainant for spending too much time performing staff duties; not insuring that staff clearly understood her scheduling and the rationale therefor; not having adequate written guidelines and not insuring that staff performed according to guidelines which did exist; not leading staff in a desirable manner during meetings; not achieving more than a "small percentage of last year's evaluation and work plan projects," approving and writing staff evaluations which did not accurately document

problem areas and plan work; and not having sufficiently developed written training material. Other than the above-stated mention of Complainant's last (April 1977) evaluation, Lt. Gembala did not specifically evaluate Complainant as to her accomplishment of that evaluation's General or Specific Goals. In the narrative portion of his evaluation, Lt. Gembala concluded:

> "My evaluation of your performance is deficient to the point that you must improve significantly in all areas of responsibility or face the possibility of removal from the position . . ."

As part of his evaluation, Lt. Gembala established a new five-page work plan for Complainant and indicated to her that the work plan's "evaluative criteria" would serve as the "factor(s)" in her next evaluation. Complainant helped formulate and agreed upon the time "goals" for achieving this work plan. Her estimates were based upon normal operations in the Section.

On a cover sheet for Complainant's evaluation, Lt. Gembala stated:

> "As a part of her work plan, ongoing evaluation and on-the-job training Office Supervisor Penny will be formally evaluated again in six months. Significant overall job improvement in Key Performance Areas is mandatory."

On April 3, 1978, Lt. Gembala conducted an interview with Complainant in which he went over her evaluation item by item. Captain Newell, who had already reviewed and approved the evaluation, attended. Lt. Gembala took notes during this interview. Complainant did not. Complainant left this interview firmly convinced, because of the tone of the interview and Lt. Gembala's clear intimation, that she would be demoted in six months. She made no objection or comment on this evaluation because she believed that it would be futile to do so.

This was the first time in Complainant's 19 years of service for Respondent that she had had an evaluation whose dominant tone and majority of comments were negative. For this reason, this forum finds that this was Complainant's first unfavorable evaluation during her employment by Respondent.

39) When Complainant received her April 1, 1978, evaluation, she believed, and this forum finds, that the Records Sections was operating relatively smoothly. Staff seemed more satisfied with their jobs and were staying long enough to become trained. There was less staff bickering and less desire to transfer out of the Section. The Section had no new problems. As recently as the Spring of 1978, another police department had looked to Respondent's Records Section as a very good model.

At hearing, Complainant testified, and this forum finds, that, as of April 1, 1978, four of the five Specific Goals contained in her April 1, 1977, evaluation had either been fully accomplished or there was justification for their not having been fully accomplished. (Complainant was not asked about the fifth Specific Goal.)

40) Because Lt. Gembala was number one on Respondent's civil service promotional list for captain, he was promoted to that rank, effective June 12, 1978, and assigned to

replace Captain Hunter as Commander of Respondent's Management Services Division. He thereby again became Complainant's immediate supervisor.

41)Captain Gembala testified at hearing that before June 12, 1978, he had "absolutely no idea" that Complainant had filed a civil rights complaint and that he did not recall having heard before then that she was dissatisfied with her pay. He stated that he learned of Complainant's civil rights complaint on June 12, 1978. This forum does not believe that Captain Gembala found out about Complainant's civil rights complaint the very same day he was promoted but did not discover at least her 1977 attempts to achieve higher pay during the one month he scrutinized Complainant in February 1978 or when he evaluated her in April 1978. It is inconceivable, given his alleged thoroughness, that Captain Gembala did not peruse Respondent's personnel file for Complainant during that month or when he evaluated Complainant, and that such file would not have contained, at the very least, the exhibits which directly concern Complainant's pay complaint and all of which were sent to Chief Hollady. Furthermore, since Lt. Gembala reported directly to Chief Hollady during his assignment to the Records Section, it is extremely unlikely that he did not discuss Complainant's work with Chief Hollady.

Such a discussion certainly would have included some mention of the civil rights complaint against Respondent which Complainant had recently filed. For all these reasons, this forum finds that Captain Gembala knew of, at least, Complainant's dissatisfaction with her pay before he was promoted to Captain.

42)After his assignment to the Records Section in June 1978, Captain Gembala again had a conference with Complainant about his last evaluation of her, in particular about the microfilm and evaluation goals on its work plan. Captain Gembala took notes at this conference, and Complainant did not. Complainant found this conference to be intimidating rather than constructive in tone.

During June and July 1978, Captain Gembala did not spend his time observing Records Section operations to evaluate and find ways to improve them, as he allegedly had done during February 1978. Captain Gembala was not nearly as accessible to Complainant as Captain Hunter had been and they did not have frequent discussions about Records Section operations.

43)During the Summer of 1978, the circumstances affecting the Records Section were far from normal. The physical area the section occupied was completely remodeled, to reduce the Section's space by about half and build new offices for RAIN and Respondent's management and computer. All Records Section equipment, furniture, records, reference materials, etc. were displaced and stored in boxes for periods of time. They eventually had to be unpacked and rearranged to fit into the smaller new space. Complainant had to pack all the books, files, and other materials in her office so they could be moved and piled in a corner. For at least two work days, she had no desk. She was without a telephone for a long period of time. Construction workers were constantly working in or near and walking through the Section's work space. For at least two months after Complainant moved out of her office, construction was not completed in the Section's work area. This construction was a time consuming distraction which significantly disrupted Records Section operations.

On June 15, 1978, the Records Section began staffing Respondent's Front Desk, assisting people who came into Respondent's station. The Section was given no additional personnel with which to accomplish this additional duty. The installation of a computer-retrieval system during the summer brought more work for the Section in the way of meetings, monitoring, and entry making.

Finally, from April through September 9, 1978, there were more homicide investigations than usual. Each was a priority and caused significant extra work for the Records Section. Four involved many leads, and the resulting increase in record checking occupied whole shifts of Records Section employees. The fact that the new commuter was not always working well at that point added to the work time involved.

In sum, during the Summer of 1978, the construction in the Records Section, the decrease in the Section's work space and the increase in its work load necessarily disrupted and impeded the functioning of the Section.

44)On July 1, 1978, Complainant and all other employees of the City of Salem received a routine raise in pay. Complainant's salary became $1256.00 per month.

45)During approximately the week before August 18, 1978, Captain Gembala held two conferences with Complainant about her job performance. When Complainant began taking notes at one of these two conferences, Captain Gembala stopped talking and told Complainant she was not taking the conference constructively, because (he said) she was taking notes for "some kind of future court action." Captain Gembala felt that Complainant's attempts to take such notes indicated that her relationship with him was no longer "healthy and open," that her overall attitude and degree of cooperation were no longer healthy, and that she was no longer working toward her goals optimistically. Captain Gembala did not resume this conference until Complainant stopped taking notes. He had referred to his files and taken notes during all his meetings with Complainant.

At his second August 1978 conference with Complainant, which took place approximately one day before Complainant began a month long vacation, Captain Gembala told Complainant that his recommendation would probably be that Complainant be demoted. He asked Complainant if she would consider requesting "reassignment" and told her that he would have to have any such request from her in writing the next day. Complainant did not request reassignment.

46)Between approximately August 18, 1978, and September 18, 1978, Complainant took her vacation. At some time no later than June 1978, she had scheduled this vacation according to the weather pattern of the place she was going to visit.

47) At hearing, Captain Gembala testified, and this forum finds, that he did not start formulating his written evaluation of Complainant, due October 1, 1978, until August 23, 1978. Before that date, he had just accumulated documents, without beginning to compile or assess them as a whole. On August 23, 1978, he started to assemble and evaluate "things" in a systematic fashion. Captain Gembala testified at hearing that during Complainant's vacation, because of his discussions with Complainant and problems which arose when she left on vacation, he started probing perceived problem areas and discussing then with the personnel involved. Captain Gembala maintains that each discussion revealed "disturbing" information and caused him to probe deeper. During Complainant's vacation, Captain Gembala came to the Records Section at all hours to interview Records Section staff individually in his office regarding Records Section problems and Complainant's competence. Captain Gembala did not talk with Mr. Robare, the Section's Records Specialist and the person still functioning, more than anyone else, as Complainant's assistant. The staff felt that Captain Gembala was "lurking" around the Section, and he made them feel apprehensive.

48) On September 18, 1978, upon her return to work after her vacation, Complainant was told by at least two of Respondent's police officers that while she was on vacation, Respondent had told them in a briefing that she was to be replaced by Sergeant Ficklin.

On the same day, Complainant received a memo from Captain Gembala which summarized his opinion of her work performance. It concluded that Complainant's

> ". . . job performance is deficient to the point that it constitutes 'improper conduct' as defined in the City Personnel Rules.
>
> "Improper conduct if substantiated, is of sufficient severity to warrant demotion."

The memo also informed Complainant that she had until September 20, 1978, to respond in writing, that she could make verbal statements to Captain Gembala at 3 p.m. on September 21, 1978, and that Captain Gembala's performance appraisal of Complainant could be finalized and Respondent's decision concerning her demotion would be made and communicated to her by 3 p.m. on September 22, 1978.

49) In a memo to Captain Gembala dated September 20, 1978, Complainant denied all the assertions concerning her work performance contained in Captain Gembala's September 18, 1978, memo.

50) At 1:30 p.m. on September 21, 1978, Complainant received Captain Gembala's voluminous documentation of the assertions in his September 18, 1978, memo (now an exhibit herein). The cover memo reiterated the September 22, 1978, 3:00 p.m. deadline for finalization of Complainant's performance appraisal and communication of Respondent's decision concerning her demotion.

51) In response to her September 21, 1978, receipt of Captain Gembala's documents, Complainant asked him for more time to review them and respond to specific allegations. Although Complainant had seen at least some

of the documents dated before August 18 as they were generated, this was the first time she had seen any of them within the context of her performance appraisal and the conclusions Captain Gembala had drawn from them. Complainant's request was denied by Captain Gembala.

52) During the several days between approximately September 18 and September 22, 1978, and definitely on September 22, 1978, Captain Gembala was Respondent's acting Chief of Police, due to the absence of other higher-ranking officers. He had received Chief Hollady's informal approval of his recommendation to demote Complainant before that time.

53) Complainant received her actual performance appraisal on September 22, 1978. The first part of this massive document consists of introductory pages (pp. 1-11) and summary pages (pp. 12-19). Essentially, Captain Gembala states therein that while Complainant had performed satisfactorily in the key performance areas of appearance, understanding the pertinent union contract, and employee safety, her job performance constituted "Improper Employee Conduct" in violation of Section 8.2 of the City of Salem's Personnel Rules, because of her "Inefficiency" and "incompetence" (Section 8.2d) and her "willful violation of rules or regulations prescribed by a department head." (Section 8.2k).

Thereafter, the performance appraisal includes seven sections, each of which concerns one type of deficiency. Each section has a cover narrative page(s) written by Captain Gembala, followed by exemplary documents. The seven sections are titled "Failure to Follow Orders" (pp. 20-27), "You have failed to comply with department written directives" (pp. 28-30), "You do not exercise adequate supervisory control" (pp. 31-38), "Your planning is inadequate . . ." (pp. 55-58), "You have not conducted proper review and evaluation . . ." (pp. 59-74), and "You have failed to carry out your supervisory and administrative duties as an Office Supervisor in charge of the Records Section in a satisfactory manner" (pp. 75-81).

Page 82 of this performance appraisal consists of Captain Gembala's "Summary," "Determination," and "Recommendation," followed by six pages of documents. Finally, pages 90-166 consist of evaluations of Records Section employees.

54) The specific criticisms which Captain Gembala made in his Performance Appraisal, and Complainant's responses thereto, were:

a) Complainant's Failure to Cause All Evaluations to Be Timely

On June 23, 1978, Captain Gembala had told Complainant that employee performance evaluations had to be submitted to him early enough to allow him to review and submit them by their effective date. He had explained that timely evaluations gave the evaluatees timely feedback and raises in compensation, where such raises were attached to the completion of the evaluation. Although Complainant told Captain Gembala that evaluations would be on time, eleven evaluations of four different employees were submitted late after June 23, 1978.

1. Two were annual evaluations formulated by

Complainant which were submitted at least one month after their July 1, 1978, due dates.

2. Eight were evaluations of one probationary employee, and they included one weekly evaluation, one mid-probation evaluation, and six bi-weekly evaluations. Complainant had taken no corrective or disciplinary action against the evaluator, other than to have her do the late evaluations and to assign two of the evaluations due during the evaluator's vacation to another employee. However, the employees to whom Complainant had assigned the evaluations had not observed the subject for evaluation purposes or used the appropriate form before, and Complainant had assigned her the evaluations two days after one was due.

3. One mid-probation evaluation, due July 1, 1978, was turned in nearly two months late.

None of these evaluations involved a raise in compensation.

Although Complainant was responsible for seeing that all Section evaluations were done on time, she personally completed evaluations on just the shift supervisors. New employees were to be evaluated once each week for their first three months; once every two weeks for the next month; and once each month for the final two months of their probation. In addition, they received a mid-probation evaluation after three months. No one liked to do evaluations. The weekly evaluations were due too often to serve any purpose, because in just one week there was rarely any perceptible change in the subject's assignment or work product. In addition, the evaluator did not necessarily get to observe the subject often enough during just one week to evaluate his or her work. Weekly evaluations were at best repetitious. Historically, the weekly and biweekly evaluations of Records Section probationary employees had always been late. Complainant repeatedly chastised and exhorted her staff verbally to elicit on-time evaluations, but that did not solve the problem. Complainant did not issue any written reprimands for late evaluations. Complainant did not recommend to Captain Gembala that the frequency of probationary evaluations be changed.

Captain Gembala told Complainant that he could accept tardiness if he were given advance notice that it would occur, along with a good explanation. Complainant did not give Captain Gembala such notice.

Although late evaluations had continued throughout Complainant's tenure as Office Supervisor, Respondent had not previously indicated to Complainant that they rendered her an unsatisfactory employee. Captain Gembala had not mentioned late evaluations in his April 1978 appraisal of Complainant. However, the attention given late evaluations in Captain Gembala's performance appraisal makes it clear that this problem constituted at least a substantial part of the reasons he gave for recommending her demotion in September 1978.

b) Complainant's Continuing To Do Staff Duties, Helping Subordinates Do Their Jobs While Her Supervisory and Administrative Duties Went Undone

Captain Gembala told Complainant that he wanted her to be a managing supervisor, not a working supervisor. Despite this directive, for 1 1/2 days during the Summer of 1978, Complainant purged and shredded files; for 3/4 of an hour on July 21, 1978, she numbered envelopes; and did some of her own typing.

Complainant did the above-noted purging and shredding because she could do it faster and better than her staff and the construction described in Finding of Fact 43 above prevented her from performing her other duties. Complainant maintained that she did no shredding after Captain Gembala told her not to.

Complainant numbered envelopes during the brief time cited because her staff was so busy.

Complainant did some of her typing because she could type faster than dictate, the only other option.

Until Captain Gembala began running the Records Section, Respondent wanted Complainant to be more of a working than managerial supervisor. For example, Captain Hunter had not protested when, in May 1977, Complainant noted that she spent 5.8 percent of her time doing staff rather than managerial work. Captain Gembala wanted an absolute reversal of this emphasis, with Complainant doing nothing but supervision and management, but no additional personnel were added to do the work which Complainant had done.

c) Complainant's Implementing Procedures Without Written Guidelines, Discontinuing or Changing Procedures Without Proper Notice to All Staff, and Having Conflicting Written Directives

Because of rapid changes in law enforcement activities generating records and in record-keeping systems, the procedures of the Records Section had to and did change all the time. This made it impossible to incarnate procedures in writings which were clear, concise, and complete, and to keep them in a neat, perfectly organized and indexed, and complete manual. Nevertheless, during her tenure as office Supervisor, Complainant developed at least two systems for the written articulation of procedures and one to apprise Complainant and her staff of what was actually occurring in the Section. In 1978, as procedures changed, a new procedure was written in memo form. One copy of each memo was sent to each Records Section employee, one copy was inserted in the Procedures Manual kept in the staff area for staff reference, and one copy went to Complainant. Most actions which the Records Section took were covered by a written procedure.

Captain Gembala appears to have expected a procedures manual which clearly dictated the appropriate staff action for every conceivable situation. He gave only one example of a procedure for which there was, apparently, no written guideline: because the staff did not know the location and existence of one file, he inferred that no written procedure existed concerning

that file. He did not give Complainant a reasonable opportunity, before he recommended her demotion, to respond to his inference. Given the above-described circumstances, Complainant's success in having "most" procedures written constitutes substantial and reasonable compliance with Captain Gembala's expectation.

To support his allegation that Complainant discontinued or changed procedures without proper notice to all staff, Captain Gembala cited two examples of instances in which employees were not aware of such changes, plus the fact that eight employees had not received copies of their union contract as of September 5, 1978. However, a memo of at least one of the above-mentioned changes had been sent to all employees.

Captain Gembala cites three instances in which the Records Section Procedural Manual contained conflicting directives. This was true of Complainant's copy of that manual, which was kept in her office and was just for her own use; but it was not true of the copy of the manual kept in the staff work area for staff reference. Complainant deliberately kept memos of old procedures beside her memo of the current procedure on the subject, in order to aid her in locating records which had been processed when the old procedures were in effect. Captain Gembala had ordered Complainant to keep what he called the "master" copy of the manual in her office and to have it up-to-date and containing originals. Complainant did: "up-to-date" for her reasonably meant that it contained copies of all procedures which she might need to know.

Captain Gembala also faulted Complainant's failure to tell the staff what to do during her vacation if a particular person came to pick up certain records.

Finally, Captain Gembala criticized Complainant for not consulting with or notifying her superiors before answering a question from the staff of the State Archivist about a proposed change in Respondent's Record Retention Schedule and for failing to inform Captain Gembala or Chief Hollady in writing when the State Archivist subsequently made the change. Respondent had had Complainant formulate its recommendation for the change, and it is not clear that Complainant understood the query from the Archivist as anything more than a question about her recommendation. Once the State Archivist actually made the change, pursuant to its new authority to do so, Complainant did so inform the person responsible for Respondent's records retention.

d) Complainant's Failure to See that Her Staff was Adequately Trained

Complainant trained shift supervisors (PSA-II's) to do her job and oversaw the training of the PSA-I's by examining their training manuals and reviewing the daily resume of what each employee had done each shift, to ensure that each PSA-I was trained in each area. Complainant assigned one PSA-II to be responsible for the training and evaluation of each PSA-I. PSA-I's could ask their PSA-II or Complainant for more training in an area. Complainant would get someone other than the assigned PSA-II to do it or do it herself. There was not enough time and money for the most desirable training

program. It took three to four years to become really knowledgeable about the Records Section.

Captain Gembala alleged that Complainant failed to train anyone adequately to do her job. He stated that Complainant left a person in charge of the Section during her 1978 vacation, with the responsibility of doing Complainant's job, who did not feel she knew what Complainant's duties were and did not have a key to Complainant's locked desk. This person said she had little training or knowledge of how to do Complainant's job. She could not fill out the time sheets properly and did not know how scheduling was done. Complainant had told Captain Gembala that this person was capable of doing Complainant's job.

Usually, the day shift supervisor replaced Complainant when she was absent. Complainant prepared her replacement by trying to work with her three days a week, especially before a vacation. Complainant did so train the person who replaced her during her 1978 vacation. Normally, there was nothing in Complainant's desk which would be needed in her absence. Complainant trained her employees on filling out time sheets and had an example posted. The person who replaced Complainant during her 1978 vacation had been acting Office Supervisor two times before. Captain Gembala did not take into consideration the possibility that this person was blaming Complainant for her own shortcomings.

Captain Gembala also criticized Complainant because the PSA-II's did not know how to do the PSA-I duties concerning the performance of which they were evaluating the PSA-I's. Complainant was responsible for seeing that subordinates received training as time and personnel constraints allowed, and this was a type of training limited by both those constraints.

In her April 1978 evaluation, Complainant had not been criticized specifically for the above-described two training shortcomings, nor had she been directed specifically to correct them in that evaluation's work plan.

e) Complainant's Failure to Have Subordinates Comply with Written Directives

One example Captain Gembala provided of this alleged deficiency was Complainant's failure to have PSA Snitch comply with the standard operating procedure dictating that the Section send a certified letter to the owner of any abandoned vehicle within a given time. Complainant explained that conforming with this time line was a "middling" priority and that procedure concerning abandoned or towed autos changes continually. During the Summer of 1978, the Records Section was experimenting with waiting 24 hours before sending the above-cited letters, because most owners claimed their vehicles during that time. Staff occasionally forgot to send the letters after the 24 hour wait.

Captain Gembala also cited Complainant for failing to have a new employee comply with Complainant's directive (made one week before this person was hired) that all personnel wear badges and name tags. He also stated that Complainant had failed to observe this employee's non-compliance because Complainant had not adequately conducted continuing

informal inspections of personnel as required by Respondent's Informational Bulletin. Captain Gembala also explained that "some" personnel were not following written procedures concerning the routing of amended citations and on microfilm preparation of reports. Complainant had detected and corrected the latter shortcomings.

Captain Gembala criticized Complainant's failure to fill out, or to have her staff fill out, time sheets per the applicable code. Complainant explained that the PSA-II's, not she, completed these sheets. She had posted an example and told employees to come to her with any questions. Captain Gembala faulted her for referring the employees to herself rather than to the applicable written directive.

f) Complainant's Failure to Report Violations of Directives in Writing Through Respondent's Chain of Command

Captain Gembala faulted Complainant for not having reported personnel who were late for a meeting in June 1978, and for not having reported the employee who was chronically late with evaluations. In fact, Complainant does not recall initiating any kind of formal discipline against any subordinate for improper or inadequate work performance, because she did not feel it was necessary. Her subordinates usually performed professionally. She did not feel that Respondent could apply the quasi-military, strict standards of discipline which were formulated for its police officers to its civilian office personnel. In related criticism, Captain Gembala faulted Complainant for not having followed his directive to contact Respondent's Internal Affairs Officer to find out what types of incidents were generally considered disciplinary in nature and what was a generally accepted recommendation for disciplinary action. Complainant did not recall this directive.

g) Complainant's Failure to Forward Any Suggestions by Staff to Captain Gembala for Evaluation as Required by Respondent's Standard Overrating Procedure

Complainant had a mechanism for staff input which her staff did not utilize often. She did not discuss staff suggestions with her superior. There is not substantial evidence that her staff made any suggestions during the material part of Captain Gembala's tenure.

h) Complainant's Not Being Aware That Traffic Citations Were Not Purged Per Her Directions

This task has never been a high priority. To the date of hearing, no one has ever been designated to do it, and it is done if someone remembers to do it. Later in his evaluation, Captain Gembala construes this shortcoming not as Complainant's failure to be aware, but as her lying to him about the fact that citation purgings were not up-to-date. These constructions are inconsistent, so this forum disregards them.

i) Complainant's Making Misleading, Deceptive or Lying Responses to Captain Gembala

One example which Captain Gembala gave of this has been discounted in section h above. Another example was that Complainant told Captain Gembala on June 23, 1978, that no other evaluations than those of employee Ingram were late when,

according to Captain Gembala, two were then late. It is not clear which two evaluations these were, but elsewhere in his appraisal, Captain Gembala cites Complainant for not having known, on June 23, 1978, that one of these evaluations had not been submitted. There is certainly no evidence that Complainant knew on June 23, 1978, that these evaluations were late.

Captain Gembala's final example of Complainant's alleged deception is her having told him that she had two directives on Humane Society slips because there were two different kind of Humane Society slips. When Complainant later admitted to him that she had been mistaken, Captain Gembala construed this as evidence that she had lied to him.

Captain Gembala stated in his evaluation that because Complainant lied to or deceived him, he could not trust her to complete any duties of a supervisory or administrative nature. This is a gross over reaction to the above-described two instances of statements which were by no means obviously deceptive or untruthful.

j) Complainant's Scheduling, and Not Being Aware that She had Done So, an Employee to Work 16 Hours Straight

The documentation of this alleged error shows that this employee was scheduled to work an eight hour shift, followed by five hours of overtime work, totaling 13, not 16, straight hours of work. There is no evidence that Captain Gembala would have considered 13 hours excessive. In addition, this work was to occur when shift assignments rotated, a time when employees must sometimes work irregular hours in order to accomplish the rotation from one shift to another. There is no evidence that the employee involved did not volunteer to work the extra five hours, and overtime work was usually assigned to volunteers. Complainant asked Captain Gembala why he had not caught this scheduling flaw. This must be excused by the fact that it was said after Complainant's return from vacation, at a time when she had just been told she would be demoted and was under a great deal of stress. It was made after Captain Gembala had decided to recommend Complainant's demotion, so it could not have been part of his reason for making that decision.

Captain Gembala testified that this alleged error made him feel he would have to go over all of Complainant's work, line by line, to determine its accuracy. This is a gross over reaction to this particular incident, which appears not to have been Complainant's error at all.

Finally, Captain Gembala wrote in his evaluation that Complainant had failed to follow proper procedure for joint preparation of work plans with employees; that she was not able to recall when she told a subordinate to have an evaluation done; that she had not completed work plan projects as he had directed; that she had not ensured that subordinates had a clear understanding of expected behavior and performance standards; and that she had failed to obey Captain Gembala's order to properly perform her duties and conform to work standards. Because Captain Gembala gave no specific examples or explanations of these alleged deficiencies, this forum

disregards them as redundant or unsupported.

55) In the appropriate place on her September 22, 1978, Performance Appraisal, Complainant stated that she did not agree with it.

56) On September 22, 1978, Captain Gembala issued to Complainant and, at the same time, to all Records Section personnel memos stating that Complainant was demoted, effective September 25, 1978, to the classification of PSA-I and that PSA-II Elaine McMellon (a female person) would act in the capacity of Office Supervisor as of that date. On September 25, 1978, Chief Hollady gave written approval of Captain Gembala's recommendation that Complainant be demoted.

57) At the time of Complainant's demotion, Respondent's PSA-I's made entries into the computer, processed reports, numbered envelopes and shredded documents. They had no supervisory duties unless they were acting as a shift supervisor. They trained one person at the report-processing desk. Complainant was demoted to this entry level classification rather than to the higher classification of PSA-II because Captain Gembala did not consider her "capable of carrying out the acting office supervisory responsibilities sometimes thrust on a PSA-II."

58) Under Complainant's supervision and management because of her skills and efforts, the Records Section had become a well-run and dependable unit. It speedily provided accurate information to the individuals who utilized its services, thereby fulfilling its purpose.

At the time Complainant was demoted, the Records Section staff who testified at hearing considered her to be a very good, very competent supervisor. They felt that, under Complainant, "we had a real good Records Section." They characterized Complainant as very approachable, a good listener, and a good problem solver who went out of her way to make things run smoothly and effectively. At the time Complainant was demoted, no personnel wanted to transfer out of the Section or resign, and most had progressed beyond probation and were therefore fully trained.

Law enforcement agencies interacting with Respondent thought that Respondent had a very good Records Section. Many Oregon law enforcement agencies visited the Section, seeking advice and records models to follow, and adopted its procedures, forms, systems, etc.

Records Section staff had received very favorable comments on how the Section was run. For example, during Complainant's tenure, Chief Hollady himself had told the Records Section staff that it was "one of the best Records Sections he had ever seen."

The State Archivist's staff person who worked with Complainant on updating Respondent's records retention times in late 1977-1978 was impressed favorably by Respondent's Records Section, compared with the many others he had seen and worked with in Oregon.

Complainant worked excellently with police officers and detectives.

For all of the above reasons, this forum finds that at the time of her demotion, Complainant was at least a competent Office Supervisor of the Records Section.

59) After Complainant's demotion, PSA-II McMellon acted as Office Supervisor of the Records Section until Sgt. Ficklin, a male person, returned from vacation on about October 5, 1978. At that time, Sgt. Ficklin assumed responsibility for administering the Records Section, coordinating the October 1978 physical move of RAIN into Respondent's facility, and developing procedures and guidelines for the consolidation of the records and dispatching functions of the Marion County Sheriff's Office into Respondent's Records Section and Command Center, which was then scheduled for January 1979.

When he began running the Records Section, Sgt. Ficklin had not worked before in the Section and was not knowledgeable about records. He consulted Complainant often about Records Section procedures. He instituted nothing to solve the problems for which Complainant had been demoted.

60) After Complainant was demoted, Captain Gembala spent less time examining the internal operations of the Records Section. He was willing to rely on Sgt. Ficklin to apprise him of any problems. During Sgt. Ficklin's tenure, Captain Gembala did not check, for example, on the abandoned auto letter problem, on whether annual evaluations included a work plan, on whether time sheets were properly filled out, or on whether purging was done on time. In fact, Records Section staff was not aware of Captain Gembala monitoring Sgt. Ficklin at all. Captain Gembala stopped approaching the Section's staff about Records Section problems. This forum concludes that Captain Gembala was no longer concerned with the continuing (*see* Finding of Fact 63 below) problems of the Records Section.

Captain Gembala did not devise any work plan for Sgt. Ficklin. He provided Sgt. Ficklin with Complainant's April 1, 1978, work plan and the narrative part of her September 22, 1978, evaluation, so that Sgt. Ficklin could "recognize the magnitude of the Records Section problems" and "formulate a mental work plan."

61) On February 6, 1979, Respondent transferred Jon Grim, a male person, to Complainant's former position of Office Supervisor of Respondent's Records Section. Up to that time, Mr. Grim had been the Police Records and Communications Supervisor for the Marion County Sheriff's office. He was appointed to the Office Supervisor position pursuant to the above-mentioned consolidation. Mr. Grim was a sworn deputy and knew a great deal about Records.

Mr. Grim's beginning salary as Office Supervisor was $256.00 per month more than Complainant's had been at the time of her demotion. Respondent had set Mr. Grim's salary at or near what Marion County had paid him, as required by an agreement protecting Marion County employees. Mr. Grim's salary remained frozen at that level until the salary range of Respondent's Office Supervisor classification reached that level.

Mr. Grim reported to Sgt. Ficklin, who supervised Mr. Grim and

continued to coordinate the consolidation through at least August 1979.

The consolidation added work and three permanent ex-Marion County staff (other than Mr. Grim) to the Records Section.

At the time he demoted Complainant, Captain Gembala had not known that Mr. Grim might be transferred to the Records Section.

62) There is no evidence at all as to whether Complainant would have continued to be Records Section Office Supervisor after February 5, 1979, had she still occupied that position on that date. There is evidence that she might not have. As of February 6, 1979, Respondent would have had two employees qualified to be Records Section Office Supervisor and only one position. This forum must infer therefore that on or about February 6, 1979, either Complainant or Mr. Grim would have been demoted, transferred, or laid off. Although, as noted above, the record shows that Respondent would have had to pay Mr. Grim at least as much as it did no matter what position he worked, there is no comparable evidence about Complainant. For all these reasons, this forum cannot conclude that, but for her demotion, Complainant would have continued to be Records Section Office Supervisor or continued to earn at least $1256.00 per month in Respondent's employ after February 5, 1979.

63) Most of the problems cited in Complainant's September 22, 1978, Performance Appraisal remained unsolved after Complainant's demotion (and many continued as of the date of hearing), and her April 1978 work plan goals are no more met today than when Complainant was demoted. Staff morale worsened after her demotion. Misfiling has continued. Letters on abandoned cars are still sent late. There have not been regular uniform inspections. All evaluations have not been submitted on time, and Captain Gembala has taken no disciplinary action in response because he hasn't "considered it a problem." Purging of traffic citations was not up-to-date at the time of hearing. Microfilming and RAIN entry backlogs still occurred. Mr. Grim's management style, like Complainant's, has been to rely on oral exhortation rather than written discipline. There has been no noticeable increase in written procedures. The procedures manual is merely supplemented when procedure changes.

Captain Gembala testified that after October 1978 nothing directly attributable to the supervision of the Records Section which was in Complainant's April 1978 work plan was not accomplished which required his affirmative action in response. Given the non-accomplishment of all that work plan's goals, this forum construes this bulky statement to mean that Captain Gembala did not attribute that failure to the Section's supervisor, or if he did, he did not feel he had to take affirmative action in response. This is a drastic difference from the way he felt in September 1978, when he demoted Complainant.

After Complainant's demotion, Captain Gembala considered changing procedures as a solution to problems rather than stripping any one person of his or her power. For example, he decided that weekly evaluations of probationary employees were

unworkable and unproductive, and they are no longer required.

64) Captain Gembala claims that the reason all problems noted in Complainant's September 1978 evaluation have not been resolved is that he has identified more significant problems and "re-prioritized" all work projects. The more significant problems (goals?) were allegedly training staff in computer entry and accomplishing the added duty of monitoring RAIN computers, training PSA-II's to do the work of the Office Supervisor and PSA-I's, and developing a procedure to identify staff who misfiled a report. Captain Gembala stated that the PSA-II training has been accomplished over "a long period of time" (and yet he faulted Complainant for not having accomplished it in a few months). Captain Gembala did not mention how or if the other goals he cited above have been accomplished. Captain Gembala did purport that additional policies and procedures have been developed and ambiguity and lack of clarity in existing policies has been eliminated. However, he gave no examples of the latter two accomplishments, and this forum concludes that they must have constituted rather minute changes, since the clear testimony of Records Section staff is that there has been no noticeable increase in written procedures and the procedural changes continue to be articulated as they were under Complainant. This forum is not convinced that the problems for which Complainant was allegedly demoted have remained unsolved because Captain Gembala identified more significant problems and made different priorities or that, if he did, those problems have been solved and priorities met. This forum attributes the continuation of most of the problems for which Complainant was demoted to either unimproved Records Section management or to the inevitability or insignificance of these problems.

65) Because she was demoted, Complainant's salary dropped from $1256.00 per month to $5.285 per hour, where it remained until November 1979. Complainant earned $930.16 during October and November 1978; $903.88 in December 1978; and $1010.00 in January 1979; and $885.54 in February 1979. Had she not been demoted, she would have earned $1256.00 per month during this time. Therefore, from September 25, 1978, to February 6, 1979, Complainant earned approximately $3907.03. Had she continued being Office Supervisor, she would have earned $5212.40, or $1305.37 more.

The measure of Complainant's compensation loss due to her demotion is the difference between the salary she received from September 25, 1978, to February 6, 1979, and the salary she would have received as Office Supervisor during that time.

66) At the time of hearing, Complainant still worked for Respondent as a PSA-I working with records. What was the Records Section was combined at some point with the Communications Unit to form the Information Section of Respondent's Management Services Division. There is no evidence on the record as to whether the records function of the Information Section is still managed by an Office Supervisor or any one position, or if the Office Supervisor position which

managed the Records Section now manages the Information Section. In sum, there is no evidence on the record as to what has become of what used to be Complainant's Office Supervisor position.

67) On September 9, 1979, Mr. Grim notified one of the Records Section PSA-II's that Complainant could be assigned to be an acting PSA-II if Complainant wanted to take that responsibility. This meant that Complainant could work in a non-permanent status as a PSA-II (shift supervisor).

68) Complainant has suffered continuous mental distress since her September 25, 1978, demotion. She was stunned to be demoted all the way down to the lowest position in the Records Section. There was an immediate drastic change in the way Records Section staff treated her. Respondent had told the Section's staff that Complainant was incapable of, and was not to, train or instruct anyone or act in any supervisory capacity. For several weeks after this, Complainant was shunned by her fellow employees, who did not even speak to her because they feared the consequences of being associated with her by Respondent. Complainant was treated "like the plague" by her coworkers, and she suffered deep, continual humiliation and shame as a result. She had interviewed, hired, and trained virtually all the people who worked in the Section at the time of her demotion. Since that demotion, Complainant has been embarrassed and frustrated by the fact that almost all of those people have been considered her superior. Although not as severe as during the first weeks after her demotion, Complainant's acute loss of confidence, embarrassment, and shame continued as of the date of hearing. Since her demotion, and at least in part because of that demotion, Complainant has suffered more frequent illness than she had experienced before.

For all the above reasons, it has been very emotionally and physically difficult for Complainant to continue working for Respondent since her demotion. She has done so because she needed employment and she did not want to forfeit the considerable pension for which she will soon be eligible.

69) As stated in the Ultimate Findings of Fact below, this forum has determined that Complainant was not demoted by Respondent because she was incompetent. In making this finding, this forum has implicitly also found that Captain Gembala's testimony that Complainant was demoted because she was incompetent is not accurate. This fact necessarily and deeply impeaches Captain Gembala's credibility on all points herein. The fact that close scrutiny of Captain Gembala's testimony reveals him to have been, in matters which are material herein, ruthless, inconsistent, incredibly picayune, and able to slant and even twist his interpretation of actions and events to get what he wanted, as well as needlessly evasive in his testimony, certainly does nothing to rehabilitate his credibility. Accordingly, although this forum has carefully considered all of Captain Gembala's testimony, it has given less relative weight to it where it differs seriously from that of another witness who was in a position to, and did, attest to the same subject matter.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was a law enforcement agency whose Records Section collected, analyzed, retained, updated and accessed its police information, and generated and distributed statistical data and reports concerning this information. The Records Section was one of Respondent's most important units.

2) Complainant is a female person who has worked continuously in Respondent's Records Section between July 1, 1959, and the date of hearing.

3) From at least 1968 to the date of hearing, the Records Section has been a very busy unit whose operation has been hampered by chronic staff shortages and the ever-increasing amount and complexity of its workload. Because of these problems, some human error and delay in the functioning of the Section has been inevitable.

4) From 1968 to September 1974, Complainant was classified as a Police Service Aid (PSA) III and titled Shift Supervisor. During this time, her supervisors, Sergeant Eilert (1968-1970 and 1972-1974) and Sergeant Holden (1970-1972), who had managerial responsibility for the Records Section, delegated to Complainant front-line supervisory responsibilities for the day-to-day operation of the entire Records Section. Complainant ran the Section, even though her title gave her supervisory responsibility for just one of the three daily Records Section work shifts. During this time, overall Records Section operations were improved and upgraded.

5) Until March 1974, Respondent's personnel decisions were governed by Chief Myers, who felt that the place of Respondent's female employees was to serve its male employees and not to be managers or administrators.

6) In September 1974, Complainant was promoted to the classification of Office Supervisor, which was new to the Records Section, and formally placed in charge of the Section. The sergeant position which Sgts. Holden and Eilert had occupied was eliminated. Virtually all the duties of that position which Sgt. Eilert and Holden had not previously delegated to Complainant were assigned to other people.

Initially, Complainant's work as Office Supervisor was for the most part the same as her work as a PSA-III had been. Her appointment was not a promotion to the job duties which Sgt. Eilert or Holden had performed, but was instead recognition of the work Complainant had actually been performing as a PSA-III. As time passed, Complainant's administrative workload increased and was altered by technological change.

7) At no time while Complainant was office Supervisor of the Records Section was her work equal to the work which either Sgt. Eilert or Sgt. Holden had performed between 1968 and 1974, in that the performance of Complainant's work did not require skill, effort, and responsibility which were equal or substantially equal to the skill, effort and responsibility which had been required to perform the work of Sgt. Holden or Sgt. Eilert.

Because they had been able to delegate supervision of the Records

Section to Complainant, Sgts. Eilert and Holden had both been able to concentrate upon responsibilities which were almost completely different from those of Complainant. For example, whereas Sgts. Eilert and Holden had substantial responsibilities and activities beyond the Records Section (supervising some of Respondent's other units and working at a Department rather than Section level) and were clearly at most the administrative overseers of the Records Section, Complainant's activities and responsibilities, with minor exception, were limited to the Records Section, and she was a working supervisor of that Section. Although the on-paper duties of the positions which Sgts. Holden and Eilert had held may have been similar to Complainant's actual work, there was little similarity between much of what Sgts. Holden and Eilert had done from 1968 to 1974, on the one hand, and, on the other hand, what Complainant actually did between 1974 and 1978.

8) Throughout her tenure as Office Supervisor, Complainant received a salary which was lower than what Sergeant Eilert or Holden had received when managing the Records Section, as adjusted upward by the salary increases since those times. This was because she performed different work than either Sgt. Eilert or Sgt. Holden had performed between 1968 and 1974.

9) While Complainant was Office Supervisor, she believed that her salary was too low and that she should be paid what Sergeant Eilert or Holden would have been earning. She first expressed this complaint to Respondent during May 1977. Chief Hollady, her supervisor Captain Hunter, and the officer in charge of Respondent's Personnel and Training Section supported her request for higher pay, but Chief Hollady and Captain Hunter did not believe that she should earn as much as Respondent's sergeants did. In response to Complainant's pay complaint, Respondent conducted a reclassification study which led it to raise Complainant's salary by five per cent, but to a level which was still less than a sergeant's pay. Complainant was not satisfied: she conducted and submitted to Respondent her own salary study, arguing that she was still paid less than her counterparts. She also mentioned Respondent's affirmative action responsibilities. Despite some flaws in Complainant's study, the Personnel Division of the City of Salem told Complainant that it would conduct an internal review to see if the Office Supervisor positions were paid enough. It promised to apprise Complainant of the result of that review. The next day, Complainant made to Respondent her first direct on-the-record reference to the possibility of her filing a civil rights complaint. This comment was transmitted to Chief Hollady, who asked Complainant to await the results of the Personnel Department's review before proceeding.

During the Fall of 1977, Complainant continued complaining about her salary to her superiors. Finally, in November of 1977, Complainant told Chief Hollady directly that she was contemplating filing a civil rights complaint, because the Personnel Department still had not responded as promised to her request for higher pay.

10) Respondent gave Complainant the following written feedback, before February 6, 1978, concerning her job performance as Office Supervisor:

a) Complainant received annual performance appraisals in March 1976 and April 1977. Both of these evaluations were favorable overall, with no serious problems noted. Complainant was regarded by the evaluator, Captain Hunter, as a good and improving manager. The last evaluation noted that Complainant had improved in problem areas, but more improvement was needed in communications with and between staff. The problems noted by no means made Complainant an unacceptable manager.

b) In June 1976, in response to a union grievance, Chief Hollady had directed the modification of the assignment practices of Complainant and Captain Hunter, which he deemed "unacceptable." There is evidence of five other grievances during Complainant's tenure as Office Supervisor, and only one resulted in Respondent or the City of Salem reversing or changing an action for which Complainant was solely responsible.

c) In April 1977, Captain Hunter sent Complainant a memo asking her to correct her shift supervisor's communication problem with fellow employees, based upon one incident. On December 30, 1977, he sent Complainant a memo asking her to correct a shift supervisor's problems in formulating weekly evaluations. There is no evidence of any other written communication from Respondent to Complainant between September 1974 and February 6, 1978, which could be construed as negative or indicative of deficiencies in Complainant's job performance.

11) Although Respondent's treatment of its female employees improved under Chief Hollady, whose tenure started in April 1974 and continued as of the date of hearing, Respondent still treated its female Records Section employees, including Complainant, less favorably because of their sex.

12) On or about January 27, 1978, Respondent gave Lieutenant Lyle Gembala a special assignment in the Records Section, effective February 6, 1978. His stated directive was to administer and study the Section. However, he stayed only one month and, during that time, developed and minutely documented criticism of Complainant's work. In so doing, he made some changes in the operation of the Section, many of which consisted of his directing Complainant to perform, or establish written guidelines for, a process. He also made an improvement which Respondent had denied Complainant permission to make. He determined that Complainant had not yet met all of the goals in her April 1977 work plan. He took piecemeal actions and made piecemeal complaints, but did not work with Complainant or her assistant to examine the operations of the Complainant's Section as a whole. He did not produce a written study of the Section, or any document suggesting changes, for Complainant or Chief Hollady. He made no criticism of the service the Records Section was providing to those who utilized it. He left the Section during approximately the first week of March 1978.

13)After the first part of March 1978, Captain Hunter also was not present in the Records Section. Due to exhaustion because of his workload and some personal problems, Captain Hunter requested and received a voluntary demotion and reassignment, effective March 20, 1978.

14) Captain Hunter's temporary replacement asked Lt. Gembala, who by then had been assigned to another section in Management Services Division, to do Complainant's April 1, 1978, performance evaluation. Lt. Gembala did so, even though he was not Complainant's supervisor at the time and had/or observed her during only one month of the twelve to which the evaluation was to pertain. Apart from a brief conversation be had with Captain Hunter about Complainant in early February 1978, Lt. Gembala sought and received no input from Captain Hunter, who had been Complainant's immediate Supervisor for ten of those twelve months. This contravened Respondent's practice. In doing Complainant's April 1978 evaluation, Lt. Gembala did not specifically evaluate Complainant as to her accomplishment of the general and specific goals contained in her most recent evaluation, as the latter evaluation had said her next evaluation would do. Lt. Gembala's evaluation of Complainant was negative overall and concluded that unless Complainant improved significantly in all areas of responsibility within six months (when he directed that she would be evaluated again), she might be removed from her position. This was Complainant's first unfavorable evaluation in her nineteen years of service with Respondent and a drastic departure from her previous evaluations.

As a required part of Complainant's evaluation, Lt. Gembala formulated a work plan for Complainant. Complainant's agreement to time goals for each part thereof was predicated on the assumption that the Records Section would function normally during the next six months.

15)In fact, as of April 1, 1978, the Records Section was operating relatively smoothly, with improved staff morale. It had no new problems, and other law enforcement agencies continued using it as a model records unit. Four of the five specific goals in Complainant's April 1, 1977, evaluation had either been accomplished or there was justification for their not having been accomplished.

16)Lt. Gembala was promoted to Captain and assigned to command Respondent's Management Services Division effective June 12, 1978. This made him Complainant's immediate supervisor.

17)During June and July 1978, Captain Gembala did not observe the Records Section in the way he had during February 1978, and did not frequently discuss its operations with Complainant.

18)During the Summer of 1978, the Records Section was subjected to very unusual circumstances, and its workload increased with no increase in personnel. Summer long construction, which resulted in the drastic reduction of Section workspace, was a time consuming distraction which significantly disrupted Records Section operations and Complainant's functioning. At the same time, the Section assumed the responsibility of staffing the Front Desk of Respondent's Station. Finally, there was significant extra work checking records for homicide investigations, each a priority over all other Section work. The disruption, the increase in workload with no additional staff, and the decrease in workspace impeded Records Section functioning far more than normal circumstances would have.

19)Just before August 18, 1978, Captain Gembala's perception of Complainant changed drastically. Because she started to take notes during a conference with him for, he perceived, her civil rights action against Respondent, Captain Gembala decided that Complainant no longer had a constructive attitude. Soon thereafter and immediately before Complainant left on a month long vacation, Captain Gembala told Complainant that he would probably recommend her demotion and gave her just one day to request reassignment. Complainant did not so request.

20)While Complainant was on vacation, Captain Gembala started formulating his written evaluation of Complainant for the period between April 1, 1978, and October 1, 1978. He had observed Complainant for two months of that six month period. He individually interviewed the Section's staff, again excepting Complainant's "assistant," about section problems and Complainant's competence. The Section's staff found his actions confusing and intimidating. Before Complainant returned to work, Captain Gembala had decided to recommend, and received informal approval of, Complainant's demotion.

21)Immediately upon Complainant's return from vacation, Captain Gembala notified her of her impending demotion on the basis of "improper conduct," and gave her two days to respond in writing and three days until she could make an oral response. She was also notified that her evaluation would be finalized and Respondent's decision concerning demotion given to her within five days. Two days later, Complainant denied all Captain Gembala's assertions against her. The next day, she was given his voluminous documentation of her "deficiencies" and told again that Respondent's decision about her demotion would be given to her within 24 1/2 hours. Captain Gembala denied Complainant's request for more time to review the documentation and respond. The next day, Complainant received her evaluation and notice of demotion, even though the absent Chief Hollady had not yet signed the evaluation. The evaluation was finalized and submitted to Complainant eight days before the completion of the period to which it was to have pertained. At the same time Complainant received her notice of demotion, Captain Gembala notified all Records Section staff of her demotion, effective September 25, 1978. The demotion was effective five days before the end of her evaluation period.

22)Respondent demoted Complainant to the classification and position of PSA-I, the lowest position in the Records Section.

23)Captain Gembala's September 22, 1978, evaluation of complainant is

166 pages long. With a minor exception on one page, it is completely negative; its unrelentingly scathing tone renders it incredible. Most of it consists of documents which were included to show exactly what Complainant did wrong. Close examination of this evaluation reveals it to be redundant, poorly organized, and very difficult to analyze or respond to. Essentially, it criticizes Complainant for not causing all employee evaluations to be timely; for continuing to do staff work rather than administrative duties; for having insufficient or inadequate written policies and procedures and inadequate staff training; for not having her subordinates comply with all written directives and not reporting their violations of such; for not having passed staff suggestions on to Captain Gembala; for having lied to or misled Captain Gembala; and for having committed a scheduling error.

There were late evaluations during the Summer of 1978, and this was at least a substantial part of the reasons given for Complainant's demotion. However, previous similar problems in the Records Section during Complainant's tenure had not been mentioned in her April 1978 evaluation. Furthermore, one of the two reasons for requiring timely evaluations did not apply to the evaluations which were late during Summer 1978.

The evidence of Complainant's performing staff duties shows only inconsequential or justified performance by Complainant of what Captain Gembala labeled staff rather than administrative work. As recently as May 1977, Respondent had made no objection to Complainant's notice that she did work when personnel shortages made it necessary. Suddenly, under Captain Gembala, doing any staff work at all under any circumstances was intolerable, even though no additional personnel were added to do the staff work Complainant had done up to that time.

Complainant pioneered the written articulation and compilation of policy and procedure in the Records Section, but her substantial and reasonable compliance with Captain Gembala's unworkable expectation that there would be one clear written directive for every possible situation was deeded deficient performance. Captain Gembala's examples of unwritten procedures, changes in procedure without sufficient notice to staff and conflicting written directives are few, and they illustrate Captain Gembala's ability and propensity herein to extrapolate the worst conclusion from the picayune or unsubstantiated flaw. They also illustrate how his failure to seek or allow Complainant's response to his allegations led to, or allowed, his misconstruction of fact.

Complainant's April 1978 evaluation did not specifically criticize her for the training shortcomings highlighted in her September 1978 evaluation, nor did it direct her to correct them. In faulting Complainant totally for perceived shortcomings in training, Captain Gembala did not take into consideration the constraints of time and resources. Yet he admitted that after Complainant's demotion, it took "a long time" to accomplish even one of the training goals which he had faulted Complainant for not accomplishing.

Two of the cited areas in which Complainant allegedly failed to have

staff comply with written directives concern isolated incidents in areas which did not have a high priority, and one area in which Complainant had reasonably instructed her staff to comply and how. The other two areas Complainant detected and corrected. They illustrate how Complainant's very efforts to detect non-compliance with policy and practice, through her development and use of the daily resume, were used against her by Captain Gembala, who utilized her detection device to ascertain her flaws and ignored her subsequent correction of the problems she had detected.

Captain Gembala faulted Complainant for not reporting her subordinates in writing for their "violations" of directives. With the possible exception of late evaluations, there is no evidence that anything beyond the verbal admonishment and exhortation Complainant used was necessary to correct these infractions. Complainant did not report her employees for late weekly or biweekly evaluations because, as a manager, she knew how unproductive evaluations done this frequently were.

There is no substantial evidence that there were staff suggestions to pass on to Captain Gembala.

Complainant's statements which Captain Gembala construed as deceptive or untruthful boil down to two instances of statements which were not necessarily either. Again, Captain Gembala leapt to the worst possible construction of Complainant's actions and remarks.

There is no substantial evidence that Complainant made a scheduling error. Captain Gembala's construction of both the perceived error and Complainant's response to it illustrate his propensity to grossly overreact in his evaluation of Complainant.

24)In fact, at the time of her demotion, Complainant was at least a competent Records Section manager under whose leadership the Section had, during a time fraught with challenge in the forms of problems and change, retained and even improved its good reputation and the quality of the service it existed to provide. It was, a well-run, dependable, and well-organized unit.

25)The exhaustive analysis of Captain Gembala's 166 page evaluation and his testimony reflected in the Findings of Fact above revealed that Captain Gembala sought out evidence of deficient performance by Complainant and construed what he found in the worst possible light. He blamed Complainant for every flaw in Records Section functioning and held her to a standard of perfection.

26)After Complainant's demotion, Captain Gembala's attention to the Records Section diminished, and he did not apply the same performance standards to Complainant's successor. He no longer seemed concerned about the problems he had deemed sufficiently serious to necessitate Complainant's immediate and total removal from Records Section management. Most of those problems remained unsolved, either because of unimproved management or the inevitability or insignificance of the problems. Captain Gembala no longer blamed all Section problems on its management.

27)The fact that Lt. Gembala's original assignment to the Records Section was made within about two

months of Complainant's second, and most direct, threat to Respondent to file a civil rights complaint and began just after she did so file; Captain Gembala's consistently seeking negative information about Complainant; his refusal to entertain any conclusion but the most negative about Complainant (despite his relatively limited observation of her at work); his drastic and precipitous step against her in September 1978; the many above-noted flaws in his evaluation which supposedly lead to (and supported) that step; Complainant's competence; and Captain Gembala's incredibly diminished concern about and tolerance of the continuation of many of the very problems which had allegedly been serious enough to necessitate Complainant's demotion all lead this forum to conclude, which it does, that Respondent did not demote Complainant for the stated reason of incompetence.

28) Complainant continued to work for Respondent as a PSA-I from the effective date of her demotion to the date of hearing. This forum cannot conclude that, had Complainant not been demoted on September 25, 1978, she would have continued to be Office Supervisor of Respondent's Records Section after February 5, 1979, when leadership of the records functions of the Marion County Sheriff's office and Respondent were consolidated. As a PSA-I between September 25, 1978, and February 6, 1979, Complainant earned $1305.37 less in salary than she would have earned had she been an Office Supervisor.

29) Because of Respondent's demotion of Complainant on September 25, 1978, Complainant suffered deep, severe, and constant humiliation and other mental anguish for several weeks and the same continual emotions, in diminishing but substantial severity, since that time.

30) Unless Complainant has ceased working for the Records Section since the date of hearing, she is qualified to be a PSA-II assigned to that Section.

31) The actions described herein of Chiefs Myers and Hollady, Captains Hunter and Gembala, and Sergeants Eilert and Holden were within the scope, and occurred during the course, of their employment by Respondent.

CONCLUSIONS OF LAW

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

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

3) The actions, and motivations for those actions, of Chiefs Myers and Hollady, Captains Hunter and Gembala, and Sergeants Eilert and Holden, which were described herein, are properly imputed to Respondent.

4) Respondent did not commit an unlawful employment practice in violation of ORS 659.030(1)(a) because Respondent did not discriminate against Complainant in compensation by not paying her at the Sergeant's level as charged.

5) The agency has established a prima facie case that Respondent demoted Complainant because she filed a complaint under ORS 659.010 to 659.110. The Agency has also proved that the one reason Respondent articulated for demoting Complainant, her alleged incompetence, was not the real reason and was therefore pretextual. Therefore, Respondent demoted Complainant because she filed the above-mentioned complaint. This constitutes an unlawful employment practice in violation of ORS 659.030(1)(d).

6) The Commissioner of the Bureau of Labor and Industries has the authority to award monetary damages to, and order appointment of, the complainant herein under the facts and circumstances of this record, and the sum of money awarded (including interest thereon) and the appointment ordered below are appropriate.

RULING ON REQUEST

Respondent requested that the Commissioner or her designee hear oral argument on the exceptions filed, because this matter is "of such financial and precedential significance to Respondent." This forum sees no reason to hear oral argument on the exceptions. Neither party sought to introduce new evidence therein, and Respondent has amply set forth its position in the 32 pages of exceptions it has filed. This forum's consideration of the entire record, the exceptions filed and the Proposed Order before formulating this Order is certainly adequate and fair. This matter does not involve extraordinary circumstances that necessitate other than normal procedure. Respondent's request is denied.

OPINION

1. Hearing Officer Bias

Respondent claims it was denied its right to an impartial tribunal, by virtue of the fact that the hearing officer is a former employee of the Civil Rights Division of the Bureau of Labor and Industries. This assertion is without merit. The party asserting such a claim must make a substantial showing of actual bias or prejudice. *Boughan v. Board of Engineering Examiners,* 46 Or App 287, 611 P2d 670 (1980). Nothing in the proceedings indicates improper influence on the hearing officer's decision.

The inherent differences between judicial and administrative adjudication have long been recognized. It is

> "...well established that due process does not require a formal separation of the investigative functions from the adjudicative or decision making functions of an administrative agency, nor does it preclude those who perform the latter from participating in the investigative phase." (Citations omitted) *Fritz v. Oregon State Penitentiary,* 30 Or App 1117, 1121, 569 P2d 654 (1977).

In this matter, the hearing officer did not participate in the investigation leading to the contested case. Even if he had, it would not necessarily be reason for disqualification. (*Boughan*, at 291). It is the evidence presented at hearing which forms the basis of the decision, and the evidence here amply supports the hearing officer's ultimate conclusions.

Respondent chose to waive its objection at the hearing. There is no

authority for Respondent's proposition that concern about "strategic disadvantage" supersedes the long-standing rule that an objection must be preserved on the record or is waived.

There was no basis for disqualification of the hearing officer at the time of hearing, nor is there any reason for this forum not to have considered his Proposed Order. A fair and impartial hearing was conducted.

2. Retaliation

There is substantial evidence on the record that Respondent demoted Complainant to the classification of PSA-I in retaliation for Complainant's filing her first complaint with the Civil Rights Division.

Complainant had been instrumental in the development of Respondent's Records Section. She had worked her way up, over nineteen years, from an entry level clerical position to the management of the Section. She had assumed the responsibility of running the Section before she received the title or compensation commensurate with that responsibility. There was no substantial evidence that under Complainant's direction the Records Section was inefficient or ineffective overall; instead, the record showed that the Records Section provided very good service while Complainant supervised it, despite substantial increases in workload, change in technology, and chronic staff shortages. For nineteen years, Complainant's performance evaluations were favorable. She was considered, and was, a valuable, competent employee and manager.

Then Complainant began complaining to Respondent that she was underpaid because of her sex and that she should be paid more. Complainant felt she should be paid as much as Respondent's sergeants. Even after she received a five percent raise in response to her complaints, she was not satisfied, because she did not receive as much pay as a sergeant or her other perceived counterparts.

Within two months of Complainant's November 1977 conversation with Chief Hollady where she told him directly, and for the second time, that she was contemplating filing a civil rights complaint because of the inequity of her pay, Respondent began to single Complainant out for observation and criticism. On January 27, 1978, Respondent assigned Lt. Gembala to "study" and administer the Records Section for one month. His study focused on Complainant. Although he produced no written study of the Section, Lt. Gembala did direct Complainant to correct the many deficiencies which he had uncovered and attributed to her.

After Complainant's supervisor transferred to another Division, Respondent had Lt. Gembala formulate Complainant's next formal evaluation in April 1978. Although he was not Complainant's supervisor, Lt. Gembala did so on the basis of his one month of observing Complainant in February and without any direct input on that evaluation sought or received from the person who had supervised Complainant ten of the twelve months to which it pertained. This contravened Respondent's practice. The evaluation was very unfavorable and raised the specter of demotion. It was a startling departure from any appraisal

Complainant had received during her employment by Respondent.

Two months later, Respondent named Lt. Gembala Complainant's direct supervisor. Three months later, after he had supervised Complainant during two months of work without frequent intercourse with her as to the Section's operation, and after Complainant had declined to let Captain Gembala push her into requesting reassignment, Captain Gembala stripped Complainant of every vestige of actual and potential supervisory authority and placed her in an entry level position, without first taking the intermediate step of giving her a workable probationary period, a merit decrease in salary, or demoting her to an intermediate classification. Captain Gembala demoted Complainant before he had given her any reasonable opportunity to respond to the voluminous written appraisal upon which he allegedly based the demotion, in the absence of his superiors and before his ultimate superior had even signed Complainant's evaluation, and before the six month evaluation period to which the appraisal had pertained was even finished. He sent Records Section staff the notice of Complainant's demotion on the same day he sent Complainant her evaluation and notice of demotion. He must have been extremely anxious to take the most drastic action against Complainant which he could as fast as he could. Captain Gembala had not seemed to feel this haste until he had decided that Complainant didn't have a good attitude (because she had tried to take notes at a meeting with Captain Gembala for use, he thought, in her civil rights action). Shortly thereafter, he formulated, in Complainant's absence, a frequently erroneous, hyperbolic, petty, redundant evaluation of Complainant, which faulted her for any failure by herself or her staff to attain his rigid unworkable standards, and did not credit Complainant for her accomplishments or those of the Records Section. Some of the characteristics of Complainant's work which he criticized had been noted in evaluations of Complainant done by her previous supervisor, but they had not made her an unacceptable Office Supervisor before. Captain Gembala did not consider the effects of the extraordinary and disruptive obstacles to smooth performance which the Section had endured during the time period upon which the evaluation was based. Much of his criticism was based upon incidents which occurred or which he uncovered during Complainant's absence, yet he did not talk with Complainant at all about any such incidents before construing them in the way which supported his vilification of her. The evaluation was written and constructed to support Complainant's demotion. It is obvious to this forum that Captain Gembala was unwilling to entertain any conclusion other than that any flaw in the smooth running of the Records Section was Complainant's fault. It is equally obvious that Complainant had not, in her four-and-three-quarter months of work since Lt. Gembala had first criticized her, suddenly become so grossly unfit that she had to be subjected to precipitous and ignominious demotion to the lowest classification and job.

The artifice in Captain Gembala's alleged reason for demoting

Complainant is further evidenced by his failure to replace her with a person who was knowledgeable about records, his failure to impose upon this person or his successor the same or similar work standards, his failure to continue to scrutinize Records Section operations or otherwise follow through to see that the problems he had deemed serious enough to necessitate Complainant's demotion were cured, and his failure to blame the Section's continuing problems on the Section's management (including himself). In fact, many of the problems or shortcomings for which Complainant was supposedly demoted were not cured even as of the time of hearing.

For all the above reasons, this forum has concluded that the one reason Respondent has articulated for demoting Complainant, her incompetence ("improper employee conduct"), was pretextual. Since the Agency has established a prima facie case that Respondent demoted Complainant because she had filed a civil rights complaint, and Respondent has offered no legitimate, non-discriminatory reason for demoting Complainant which has not been found pretextual, this forum concludes, as a matter of law, that Respondent did, in fact, demote Complainant because she filed a civil rights complaint.

3. Damage Limitation

Because this forum cannot conclude that Complainant would have been Records Section Office Supervisor after February 5, 1979, had she not been demoted, pay damages reflecting her continuation as Office Supervisor cannot accrue after February 5, 1979, when a merger required office reorganization.

4. Reinstatement and Appointment

The Specific Charges ask that Complainant be reinstated to the position of Office Supervisor if this forum finds, as it has, that Respondent's removal of Complainant from that position was an unlawful employment practice. This forum cannot grant that plea because, as explained above, there is no reason to conclude that, absent Respondent's unlawful employment practice, Complainant would have occupied the position of Office Supervisor after February 5, 1979.

At the time of Complainant's demotion, PSA-II's in the Records Section worked as its shift supervisors, a position and classification above Complainant's current position and classification and below that of Office Supervisor. Because Respondent acknowledged, on September 9, 1979, that Complainant was qualified to be assigned to work as an acting PSA-II, because Complainant has had approximately twelve years of experience either working as a shift supervisor or supervising and working with shift supervisors, and because she has continued to work in the Records Section since her demotion, this forum has concluded that Complainant is qualified to work as a shift supervisor and to be assigned the classification as PSA-II, unless she has ceased working for the Records Section since the date of hearing. There is absolutely no indication that, had Complainant not continued to work as Office Supervisor because of consolidation on February 6, 1979, she would not have worked as a PSA-II shift supervisor, the closest position in rank to Office Supervisor. For all these reasons, this forum has determined that ordering Complainant's appointment to the next available shift supervisor position or its equivalent, at the rank of PSA-II or its equivalent, is an appropriate part of this forum's remedy for Respondent's unlawful employment practice found herein. Concomitantly, ordering that Complainant be paid the step 6 salary of the PSA-II classification or its equivalent until such appointment is an appropriate and necessary part of such remedy.

AMENDED ORDER

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

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Eunice Penny in the amount of ELEVEN THOUSAND EIGHT-HUNDRED-DOLLARS AND FORTY-CENTS (11,800.40). This amount represents $1,305.37 damages for wages Complainant lost because of Respondent's unlawful employment practices set out above, interest thereon in the amount of $495.03, computed and compounded annually, starting February 1, 1979, at the annual rate of six percent until July 25, 1976, and then at the rate of nine percent computed to December 15, 1982, to continue to accrue until the date upon which Respondent complies with this paragraph, and $10,000.00, which represents damages for the mental anguish Complainant suffered because of those unlawful employment practices.

2) Appoint Eunice Penny to the next available position of Records Section Shift Supervisor or its equivalent, and the classification of PSA-II or its equivalent, at the salary described in paragraph 3 below.

3) As of November 30, 1982, begin compensating Eunice Penny at the salary step 6 for its PSA-II classification, or its equivalent.

4) Cease and desist from discriminating against any employee because that employee has filed a complaint under ORS 659.010 to 659.110.

In the matter of
WEST COAST
GROCERY COMPANY,
Respondent.

Case Number 01-82
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 14, 1983.

SYNOPSIS

Where Complainant's education and work experience revealed no discernible business or financial skills in evaluating commodities and markets, and where Complainant had not demonstrated an ability to get along well

with a variety of people at work, the Commissioner found that Complainant did not possess the minimum qualifications for the position of grocery buyer, and that the position was not suitable for Complainant's reemployment after a compensable injury disabled him from his regular warehouse position with Respondent. Finding that the denial of the position was not in retaliation for Complainant's workers' compensation filings, the Commissioner held that Respondent committed no unlawful employment practice and dismissed the complaint. ORS 659.060(3); 659.410; 659.420.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on September 29, 1982, in Conference Room A of the Executive Department, 155 Cottage Street N.E., Salem, Oregon and on October 8, 1982, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Betty Smith, Assistant Attorney General. West Coast Grocery Company (hereinafter the Respondent) was represented by Ruth J. Hooper, Attorney at Law. Eugene Fewx (hereinafter the Complainant) was present on September 29, 1982.

The Agency called as witnesses the Complainant; Scott Udey and Richard Barker, Respondent's employees; Terry Alley, Complainant's Workers' Compensation Department counselor during times material; Carole Nielsen Fewx, Complainant's wife; and Toni Chandler, investigator for the Civil Rights Division of the Agency during times material. Respondent called Roger Cochell, Respondent's Human Resources Manager; Rebecca Reppeto, Respondent's Human Resources Technician; and Kenneth Gregson, Respondent's Merchandise Manager during times material.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about June 9, 1980, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that Respondent, Complainant's employer, had not reemployed Complainant, who was disabled from his former regular employment, in available and suitable work for which Complainant had applied.

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

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

4) Before the commencement of the hearing in this matter, Complainant received from this forum a copy of "Contested Case Rights and Responsibilities" and stated that he had no questions about it. Before the commencement of the hearing, Respondent received from this forum a copy of "Contested Case Rights and Responsibilities" and stated, through its counsel, that it had no questions about it.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a Washington corporation in good standing in Oregon. It was doing business in Oregon as an independent grocery wholesaler, buying grocery products from manufacturers and selling them to retailers. In that business, during all times material, Respondent employed between 270 and 345 people in Oregon.

2) On or about July 3, 1978, Roger Cochell, Human Resources Manager of Respondent's Oregon Division, hired Complainant as a selector. This entry-level job consisted of doing the manual labor which was necessary to fill orders from Respondent's customers. A selector accomplished this by taking a sequential list of items which a retailer had ordered from Respondent, locating those items in Respondent's sequentially-organized Salem, Oregon warehouse, stacking them on a mechanized transporter, and taking them to an outbound door.

3) When Respondent hired Complainant as a selector, Complainant had a Bachelor of Science degree in General Studies (with a major in social science corrections and a minor in psychology), which he had obtained in December 1972. After receiving that degree, he had gained the following work experience:

a) From March 1973 until July 1974, Complainant had worked at a Towmotor-Caterpillar, Inc. plant which manufactured lift trucks. After six weeks stocking parts in the warehouse, Complainant had been promoted to inventory planner. In that position, he had kept a running total of the piece parts on hand, by making a monthly deduction of the parts used. He also had kept a minimum number of parts on hand, by ordering or coordinating the in-house manufacture of parts needed for future production.

b) During July 1975, Complainant had worked on a crew building grain elevators.

c) From August to October 1975, Complainant had driven a fork lift and worked on the sanitation crew at Agri-Pac Cannery.

d) From October 1975 to July 1978, Complainant had worked at Fairview Hospital and Training Center. For the first six months he had been a Psychiatric Aide I, caring for and training 16 to 21 retarded patients. Thereafter, he had been promoted to Psychiatric Aide II and had supervised a staff of eight people who did all the basic care of sixty patients. In the latter position, he had trained, supervised, and evaluated his staff; done a lot of administrative paperwork; and received six commendations. He had attended the American Management Association's Supervisory Management Course in 1976, the State of Oregon's Supervisory Management Course I and II, and Performance Appraisal and On-the-Job Training Coach classes.

4) When Mr. Cochell hired Complainant in July 1978, he knew that Complainant had suffered an on-the-

job injury in 1971 which had resulted in the amputation of two of Complainant's fingertips. He also knew that Complainant had applied for workers' compensation benefits for this injury. This knowledge did not influence in any way Mr. Cochell's hiring decision with respect to Complainant.

Before beginning work for Respondent, Complainant passed the required physical examination.

5) On September 1, 1978, February 15, 1979, March 19, 1979, and June 10, 1979, Complainant suffered injuries while working as a selector for Respondent. Three of these injuries caused Complainant to lose time from work, and he applied for workers' compensation benefits for these three injuries.

6) Complainant returned to his selector position after each of the injuries described in Finding of Fact 5 above. He noticed no change in Respondent's treatment of or attitude toward him as a result of these injuries or the workers' compensation claims he had filed because of them.

7) From the time Respondent hired him until June 25, 1979, Complainant was a "casual" rather than "regular" employee of Respondent. This meant that he worked only when Respondent called him, replacing "regular" selectors who were absent. After Complainant had incurred the injuries and filed the workers' compensation claims described in Finding of Fact 5 above, Respondent awarded Complainant "regular" employee status. Respondent could have declined to do this.

8) Complainant worked as a selector for Respondent from July 1978 until December 30, 1979. His level of productivity was good, and his record of errors was average. These were the main performance criteria for selectors.

9) At all times material herein, Respondent had a policy that, in each case, an employee of Respondent who applied for another job with Respondent would be interviewed for that job. A non-employee applying for a job with Respondent was interviewed for that job only if his or her resume reflected possible qualification for the job. This was the only way in which Respondent treated employee and non-employee applicants differently.

10) In November 1979, Respondent had an opening for a grocery buyer.

11) At all times material herein, Ken Gregson, Merchandise Manager of Respondent's Oregon Division, was the direct supervisor of the grocery buyers in that Division. He was the best person to determine what were the qualifications for the job of grocery buyer and whether a particular applicant possessed those qualifications. As a former grocery buyer for Respondent and the chief personnel officer of Respondent's Oregon Division at all times material, Mr. Cochell was qualified to contribute to such a determination.

12) Mr. Gregson (with Mr. Cochell) offered the following description of the job of grocery buyer, which this forum finds accurate for the time period at issue. Respondent's grocery buyer position is a fairly high level, technical position within Respondent's management. Each of Respondent's grocery buyers evaluates opportunities to purchase new items in the 1600 to 2000 commodities assigned to him or her; plays the key role in deciding whether to purchase those items and participates in such decisions on commodities which are not assigned to him or her; purchases assigned commodities; and controls a commodity inventory worth $2,000,000 to $3,000,000.

Respondent's grocery buyer position is very important because Respondent is dependent for its survival upon the purchasing decisions of its grocery buyers. Much of Respondent's net profit consists of "speculative profit," the profit Respondent makes when its grocery buyers purchase commodities when the market for them is about to rise. The decision as to whether to buy a new item is basically a group decision made by the five or six buyers in Respondent's Oregon Division, but the individual buyer responsible for the item can override the group's decision not to buy. Once a decision is made to buy an item, the buyer to whom the item is assigned is responsible for the purchase from the time he or she places the order until the purchase has left Respondent's warehouse enroute to one of Respondent's customers.

Each of Respondent's grocery buyers must be familiar with all the commodities assigned to him or her. Each must make timely and correct assessment of the relative marketability of items in his or her assigned commodities which are newly available for purchase, and present that assessment to fellow buyers. This involves evaluating the item's sales potential by assessing the item itself, its historic sales pattern, the record of its sales representatives, the pertinent commodity markets and trends therein, the merchandising and media support for the item, and forecasting the response of Respondent's retailers to the item; and, finally, comparing this evaluation to a similar evaluation of competing items. Respondent's grocery buyers go through the same process in assessing purchasing deals available for items which it already carries. Each buyer must skillfully interview and negotiate with Respondent's suppliers regarding prices and service. Each must have good relationships with the wide variety of people with whom he or she deals, including retailers, suppliers' sales representatives, and Respondent's other departments.

Respondent's grocery buyer position does not involve physical labor.

13) Mr. Gregson testified that Respondent's grocery buyer hires must have the following qualifications: "some good business background in areas such as financing; marketing type experience; a lot of people experience; leadership qualities;" the ability to "communicate with retailers, sales representatives, etc." He specified that the most essential two qualifications for grocery buyer hires are "a good business-type background in the area of people and of financing." He elaborated that the former phrase means "people type skills, the ability to get along with and knowledge and expertise to evaluate outside sales representatives, retailers, and all of Respondent's departments, and 'the degree of a problem' involved in 'dealing with them'" and financial skills. He stated that "financial skills" means

"basically, good business sense and some kind of a background dealing with financial type things, evaluating commodities and speculative profit opportunities." All this testimony applies to times material, as well as the present.

14) Mr. Gregson testified that, at times material, Respondent could not train a grocery buyer hiree on-the-job to gain the qualifications described in Finding of Fact 13 above. A hiree had to have the right type of personality and background to deal effectively with people and financial/business skills in evaluating markets, commodities, etc. when he or she became a buyer.

15) The notice which Respondent posted of its November 1979 grocery buyer opening was the same as the exhibit in the record which offers basic general information about this job, but does not delve into the technical aspects of the job or the degree of skills and abilities necessary to do it. For example, it uses extremely broad phrases such as "supervisory, leadership and management ability" in describing the qualifications which the person selected "should possess." It states that "sales aptitude and ability" are "helpful," and "retail grocery or buying experience" are "helpful, but not necessary." It also names a starting salary range of $16,000 to $20,000 per year. Mr. Cochell wrote this notice.

16) In May 1980, Respondent placed newspaper advertisements for another grocery buyer opening which stated that a grocery buyer hiree "should possess" "buying experience," the "ability to plan, organize and coordinate and effectively control inventory" and other specified qualifications and that "retail groceries and/or marketing background or education" was "preferred." When this advertisement was placed, the qualifications for the grocery buyer position were the same as they had been in November 1979.

17) The written "Question Outline" Respondent used in interviewing applicants for the November 1979 grocery buyer opening asked about the "extent of" the candidate's "marketing" background, and, under that question, specifically asked about "grocery" and "buying" experience. It also asked about "leadership" and "supervisory" experience. These were the only questions which specifically addressed these topics.

Under its introduction headed "Job Concept," this outline said that grocery buyer responsibilities included "purchasing assigned commodities, evaluation for purchasing deals and controlling inventory, interviewing and negotiating with suppliers regarding price and service (sic)" and "customer relations responsibilities." It also said that the job was "pressure packed."

18) The person Respondent hired to fill its November 1979 grocery buyer opening was an employee who had recently gained a college degree in business administration with a major in marketing, which Respondent viewed as a "tremendous marketing background." "Marketing" by definition is the process of purchasing and selling commodities in a market and thereby, includes evaluating commodities and markets. This hiree had worked satisfactorily for Respondent for about nine months, first as a selector and then dealing with Respondent's retailers (as a part of Respondent's customer service department).

19) The person Respondent hired to fill its next grocery buyer opening, in May 1980, had graduated from a four-year undergraduate university program in three years, while captaining the university debate team and serving as president of the university student body. He had gained "a lot of experience" dealing with financial institutions and working on money matters when he spent the two years preceding his grocery buyer application evaluating commodities (residential and commercial property) for the City of Salem Assessor's Office.

20) On or about November 14, 1979, Complainant applied for Respondent's grocery buyer opening.

21) At all times material herein, Complainant did not like working with people who were not formally educated. He had a hard time becoming familiar with "illiterate" people. However, he had most often worked with people who were less formally educated than he was and, in his opinion, had "gotten along fine with them." No one had complained to Complainant about his relationship with his coworkers. One of the commendations he had received while working at Fairview was for "maintaining good communications" with the staff he supervised. His work at Townotor had involved communicating with other departments, plants, and vendors.

At the time Complainant applied for the November 1979 grocery buyer opening, Mr. Cochell and Mr. Gregson knew that Complainant did not like working with people who were not formally educated and that he related to educated people best. At least one of Complainant's supervisors had told Mr. Cochell that there was a "rapport problem" between Complainant and his coworkers, because Complainant felt he was better than they. From this knowledge and information, Respondent concluded that Complainant had not demonstrated an ability to get along with a variety of people.

22) In his own words and by his own admission, Complainant did not have, at tines material herein, a "strong business background." He had no marketing, retail, or sales experience and no financial background or work experience with a financial institution.

23) During a tour of Respondent's office when he was hired as a selector, Complainant had asked Mr. Cochell which of Respondent's positions would be most similar to Complainant's inventory planner work at Townotor. Mr. Cochell had told him that the grocery buyer position would be. There is no evidence as to what Mr. Cochell knew about the inventory planner position when he answered that question.

25) There were about fifteen applicants for Respondent's November 1979 grocery buyer opening. Mr. Cochell interviewed all of them and decided that Complainant and three other applicants each would be offered a second interview, with himself and Mr. Gregson. Two of these applicants were Respondent's employees, and two were not. Complainant knew this. Complainant assumed that the fact that he was offered a second interview meant that he was a finalist. In fact, Mr. Cochell offered Complainant a second interview because he wanted Mr. Gregson's participation and input, in

order to prevent Mr. Cochell's friendship with Complainant and his knowledge that Complainant wanted this job very much to influence Respondent's decision regarding Complainant. The fact that Mr. Cochell offered Complainant a second interview did not mean that Mr. Cochell considered Complainant qualified for the job.

26) After Mr. Cochell and Mr. Gregson interviewed Complainant, Mr. Gregson felt that Complainant clearly was not qualified for the job of grocery buyer. Mr. Cochell agreed. Accordingly, Respondent did not hire Complainant for this job.

27) Messrs. Gregson and Cochell deemed Complainant unqualified for the grocery buyer position in November 1979 because they felt that Complainant did not have experience "at the business level," "experience dealing with highly technical people trying to sell Respondent merchandise," "retail experience," or any "financial type dealings with outside people." They dismissed Complainant's experience at Towmotor as "re-order clerk work," lacking the degree of importance and the technical commodity decision making responsibilities of grocery buyer work. They characterized Complainant's background as in supervision and doing physical labor. They felt that Complainant's average error record as a selector was not good enough, because there was so little margin for error as a grocery buyer. They felt that Complainant's attitude towards less educated people and his rapport problem with co-workers indicated a problem in his ability to get along with a variety of people. They believed, in effect, that Complainant had not demonstrated an ability to get along with a variety of people and that he had not obtained financial/business skills in evaluating commodities and markets. They also believed that Respondent could not train Complainant on-the-job to gain the qualifications they felt he lacked.

28) Because Mr. Gregson and Mr. Cochell found Complainant unqualified for the position of grocery buyer, they would not have hired him for Respondent's November 1979 grocery buyer opening even if he had been the only applicant. Despite his lack of qualification, Complainant "came in second" for this grocery buyer opening. By "came in second," however, Mr. Cochell (who originated the phrase) meant, and therefore this forum means, just that Complainant "did not come in first." There is no evidence in the record as to why the two other finalists were not selected.

29) On November 20, 1979, Mr. Cochell notified Complainant by telephone that he had not been selected for the grocery buyer opening. He also told Complainant that he had come in second. He did not tell Complainant that he was qualified for the job. In fact, Mr. Cochell advised Complainant to seek work in the area of supervision to which Complainant's background related.

30) On December 30, 1979, Complainant suffered an on-the-job injury to his back while working as a selector for Respondent. As a result of this injury, Complainant missed work. He applied for workers' compensation benefits on December 31, 1979, and received them thereafter. At the time of this injury, Complainant was earning $10.455 per hour for his selector work.

31) As of January 21, 1980, Complainant's physician released him to return to work, with the restriction that he not lift more than twenty-five pounds. On January 30, 1980, Complainant returned to light duty selector work which Respondent had devised and made available to him. This work was within the above-cited lifting restriction, but it did involve bending, reaching for, and lifting items weighing less than twenty-five pounds.

On February 5, 1980, Complainant informed Respondent that he no longer could perform his light duty work because it had aggravated his back injury.

32) February 5, 1980, was the last day on which Complainant actually performed work as a selector for Respondent.

33) During his one week of light duty selector work, Complainant noticed no difference in Respondent's attitude toward him from what that attitude had been before his injury. However, when it became clear that he might not ever be able to return to his selectors job, Complainant felt Mr. Cochell's attitude toward him changed. Before that time, he had a very good relationship with Mr. Cochell. Thereafter, Mr. Cochell became quite cold to him.

34) Between February 6, 1980, and March 11, 1980, there was no work available with Respondent which was suitable for Complainant.

35) On March 11, 1980, Complainant telephoned Mr. Cochell about returning to his work as a selector. Mr. Cochell made what amounts to a brief written summary of their conversation soon thereafter; Complainant did not. During pertinent testimony, Complainant described the conversation in more detail than did Mr. Cochell.

36) Complainant testified that, during the above-described conversation, after Mr. Cochell asked Complainant how he was doing, Complainant reported that he was not doing too well and that his doctors had told him that any more injuries to his lower back could be quite serious. Complainant testified that Mr. Cochell then asked if Respondent could expect Complainant to come back to work, adding that Respondent needed someone to do the (selector) job. Complainant testified that he hesitated, because he really needed the job, then told Mr. Cochell he couldn't do that kind of work anymore. Complainant testified that Mr. Cochell asked if he could take this as Complainant's unofficial resignation. Since the conversation had focused on Complainant's ability to do his selector work and upon the particular demands of that job, Complainant believed that Mr. Cochell's question concerned just the selector's job. Based upon that belief, Complainant testified, he answered, "Yes." Based upon his experience with a prior employer, Complainant thought Respondent could not fill Complainant's job with a regular employee until Complainant vacated it. Complainant vacated his position so Respondent could fill it. Complainant maintains emphatically that he did not intend to completely resign his employment with Respondent. First of all, he believed that his resignation would not become official unless

he formalized it by writing or signing some documents. Secondly, he believed he was resigning only from the selector job he could no longer perform. Complainant did not ask Mr. Cochell what an "unofficial" resignation was.

37)Mr. Cochell's version of his March 11, 1980, conversation with Complainant is quite different from Complainant's. The notes Mr. Cochell took about that conversation say simply,

> "Gene called today and informed me both his doctors are advising him not to do this type of work and he is officially quitting. He is seeking employment elsewhere."

Mr. Cochell maintains that he did not ask Complainant if he could return to work or request his resignation. He insists that "officially quitting" was Complainant's phrase; that Complainant used it and Mr. Cochell did not. Mr. Cochell states that these words were not the "nomenclature" Respondent used. Although Mr. Cochell did not state specifically that he did not ask Complainant, with any language, whether he could take Complainant's statement as a resignation, this forum construes the above-cited testimony as Mr. Cochell's assertion that he did not.

Mr. Cochell states that he understood the purpose of Complainant's March 11, 1980, call to be to "voluntarily quit" and that it was absolutely clear that Complainant felt he was totally and completely resigning from Respondent's employ. Mr. Cochell states that he took Complainants statement that he was seeking employment elsewhere to mean outside Respondent. Mr. Cochell insists that it did not occur to him that Complainant might be quitting just this position, because he had never had anyone quit a position without quitting "the company."

38)On March 11, 1980, Complainant had no intention of completely severing his employment relationship with Respondent. He wanted to continue working for Respondent. He felt the food industry held many opportunities for interesting work and that Respondent was a progressive part of that industry. His goal was to hold a professional job with Respondent within five years.

39)Complainant never submitted to Respondent, or signed, a written resignation from his selector job. (It was not Respondent's practice to have its terminating employees sign a resignation.) Whatever statement Complainant made to Mr. Cochell on March 11, 1980, was his only indication to Respondent that he was changing his employment relationship with Respondent at all.

41) Mr. Cochell had Becky Reppeto, Respondent's Human Resources Technician, process Complainant's termination papers on March 11, 1980, according to Respondent's standard operating procedures. As of March 11, 1980, Respondent no longer considered Complainant its employee, in any sense of that word.

42)The disability of which Complainant informed Mr. Cochell on March 11, 1980, was Complainant's first disability from an on-the-job injury which permanently prevented him from returning to his pre-injury work.

43)On March 12, 1980, Complainant had an interview for the position of Store Development Assistant with Respondent. Complainant had applied for this position before March 11, 1980. Mr. Cochell was not involved in this interview but was aware of it both before and after it occurred.

During the interview, Complainant withdrew his application for this job when it became obvious to him that his fingertip amputations would prevent him from adequately performing the position's typing duties. This was the only job with Respondent for which Complainant applied or was interviewed between the time of his injury and April 28, 1980.

44)On March 24, 1980, Complainant's physician declared him medically stationary, and on April 30, 1980, gave Complainant a total release for non-physical work. Complainant did not present any medical release to Respondent after January 1980 nor did Respondent ask Complainant for one before July of 1980.

45)Complainant successfully filed for unemployment compensation on March 26, 1980, with the Employment Division of the State of Oregon's Department of Human Resources. Thereafter, he was required to seek at least three jobs per week to remain qualified for unemployment compensation. His job search included contacting Respondent, responding to newspaper advertisements, and applying for positions with the State of Oregon. He received assistance in locating employment from his Workers' Compensation Department counselor, Terry Alley, between April 7, 1980, and September 8, 1980.

46)In late April 1980 Respondent had another opening for a grocery buyer. The position was identical to the position which had been open in November 1979.

47)In May 1980 Complainant applied for Respondent's grocery buyer opening. Complainant had not acquired any additional qualifications for this position since November 1979.

48)Based upon their November 1979 evaluation of Complainant, Mr. Gregson and Mr. Cochell jointly decided not to interview Complainant for Respondent's April/May 1980 grocery buyer opening, because he was not considered Respondent's employee and they believed that he was not qualified for the job. They continued to believe that Respondent could not train Complainant on-the-job to gain the qualifications they felt he lacked for grocery buyer. They would not have hired Complainant in May 1980 even if he had been the only applicant for the position or even had they considered him Respondent's employee.

49)The April/May 1980 grocery buyer opening was the last opening Respondent had for that position up to the time of hearing. There is no evidence or allegation that Respondent had any work available which was suitable for Complainant, other than this grocery buyer opening, between March 11, 1980, and September 3, 1980.

50)On May 8, 1980, before Complainant discovered that Respondent had not (or would not) hire him for its grocery buyer opening, Complainant mentioned that opening to Mr. Alley. He told Mr. Alley that he had interviewed for that position before and

come in second. On the basis of Complainant's statement, Mr. Alley felt that the position might be suitable for Complainant. He had no actual knowledge as to whether Complainant was qualified for the position or it was suitable for him.

51) On May 9, 1980, Mr. Alley telephoned Ms. Reppeto about Complainant's application for grocery buyer. She told him that Respondent had Complainant's resume and that Respondent would consider Complainant for it. She added that it was not an on-the-job training position; that Respondent wanted someone with "the product knowledge coupled with (possibly) some marketing skills." Mr. Alley then briefly explained his interest in Complainant being considered for the job as an employee who had suffered an on-the-job injury.

52) About one week after he had applied for the April/May 1980 grocery buyer opening, Complainant asked Ms. Reppeto when he would be interviewed for it. She informed him that the interviews were over and the selection made. On May 20, 1980, Complainant notified Mr. Alley of Ms. Reppeto's statement.

53) On May 22, 1980, Mr. Alley called Mr. Cochell and was told that Complainant had not been considered an employee ("in-house") candidate by Respondent, because Complainant had resigned on March 11, 1980.

On the same day, Mr. Alley relayed this information to Complainant, who told him that he had meant only to relinquish his selector employment, not his entire employment with Respondent. On May 22, 1980, Mr. Alley conveyed this message to Mr. Cochell, telling him that it sounded as if there were a misunderstanding as to the scope of Complainant's resignation.

54) Mr. Alley contacted Mr. Cochell once again on May 22, 1980, and Mr. Cochell said he had talked to Respondent's lawyer and was adamant that Complainant had quit on his own volition. Mr. Cochell said Respondent felt it had sufficient cause to consider Complainant terminated and its responsibility to re-employ him ended.

55) The grocery buyer Respondent hired in May 1980 earned $7.70 per hour until July 6, 1980, and $8.00 per hour from that date to October 6, 1980.

56) After discovering Respondent had not hired him as a grocery buyer in May 1980, Complainant continued to search for work with Respondent and elsewhere, in the manner described in Finding of Fact 45 above.

57) At no time since March 11, 1980, has Respondent acknowledged any obligation to re-employ Complainant at available and suitable work.

58) In August 1980, Complainant applied and was interviewed for a position as "Night Shift Meat Clerk" with Respondent. On Mr. Cochell's recommendation, Respondent hired Complainant for this position. Complainant started working this job on September 3, 1980, at a salary of $5.25 per hour.

59) Complainant worked for Respondent as Night Shift Meat Clerk until September 23, 1981, when he returned to school full-time.

60) There is no allegation or evidence that Respondent did not re-employ Complainant in available work which was suitable for him at any time between September 3, 1980, and September 23, 1981.

61) As explained in the Opinion below, this forum disbelieves the testimony of Mr. Cochell on one key point in this matter. Accordingly, this forum has accorded less weight to Mr. Cochell's testimony in general, where it differs from the Agency's evidence.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was a grocery wholesaler employing more than six persons in the State of Oregon.

2) From July 1978 until December 30, 1979, Complainant worked for Respondent as a selector. In that job, he performed physical labor to fill orders in one of Respondent's warehouses.

3) In November 1979, Complainant applied for an opening Respondent had for a grocery buyer. This technical position within Respondent's management was very important. Respondent's grocery buyers decided what items Respondent would purchase and negotiated and managed such purchases. Each buyer was responsible for 1600 to 2000 commodities and $2,000,000 to $3,000,000 in inventory. Respondent's survival depended largely upon the results of the complex buying decisions which its grocery buyers made.

4) Respondent did not hire Complainant for its November 1979 grocery buyer opening. Respondent's employee Ken Gregson believed that Complainant was not qualified, and could not be trained on-the-job to become qualified, for the position. Respondent's employee Roger Cochell, who made the selection decision with Mr. Gregson, concurred.

5) Mr. Gregson was the best person to determine whether Complainant was qualified for the job of grocery buyer, and Mr. Cochell was an appropriate person to assist him in doing so.

6) Before December 30, 1979, Complainant suffered four on-the-job injuries while working for Respondent and one on-the-job injury before working for Respondent. Complainant filed claims for workers' compensation benefits as a result of three of these injuries. Respondent knew this. Respondent did not discriminate against Complainant in any way because of these filings.

Although three of the on-the-job injuries suffered while working for Respondent caused Complainant to miss some work, he was able to return to his former regular job eventually after each injury.

7) While working for Respondent, Complainant sustained a compensable injury on December 30, 1979, and was disabled from working until January 21, 1980. As result of this injury, Complainant filed a claim for workers' compensation benefits on December 31, 1979.

8) Pursuant to his physician's release and with Respondent's full cooperation, Complainant returned to a light-duty version of his former work as selector on January 30, 1980.

9) By February 5, 1980, Complainant's light duty work had aggravated his injury, and Complainant became disabled from both his former and regular employment and its light-duty version. After February 5, 1980,

Complainant never again worked as a selector for Respondent.

10) On March 11, 1980, Complainant reported to Mr. Cochell that he simply could not do selector work anymore; that is, for the first time while in Respondent's employ, Complainant was disabled permanently from performing the duties of his former regular work. During the ensuing conversation, Complainant resigned from his selector position. The Agency alleges that by his resignation, Complainant did not intend to sever his entire employment relationship with Respondent. The Agency also contends that Respondent introduced the subject of resignation and solicited the limited resignation Complainant made. In any case, Respondent did not consider Complainant its employee between March 11, 1980, and September 3, 1980.

11) In April 1980 Respondent had another opening for a grocery buyer. Although he had acquired no additional qualifications for that job since November 1979, Complainant applied for this opening. Respondent treated Complainant as a non-employee applicant, which meant that it would not automatically interview him for this opening.

12) Respondent did not interview or select Complainant for its April/May 1980 grocery buyer opening because, based upon their November 1979 evaluation of Complainant, Mr. Gregson and Mr. Cochell believed that Complainant was not qualified, and could not be trained on-the-job to become qualified, for the position. For that reason, they would not have hired Complainant even if they had treated him as an employee applicant.

13) The minimum qualifications for the grocery buyer positions available with Respondent in November 1979 and April/May 1980 were the same: a demonstrated ability to get along with a variety of people and financial/ business skills in evaluating commodities and markets.

14) In November 1979 and April/ May 1980, Complainant had never worked as a grocery buyer. His job as a selector was completely different from a grocery buyer's job.

15) In November 1979 and April/ May 1980, Complainant was physically capable of performing grocery buyer work.

16) In November 1979 and April/ May 1980, Complainant had a general liberal arts education. Through his various jobs since graduating from college, he had gained general and supervisory skills, but no technical skills qualifying him for grocery buyer work. He had no business education. His only experience in business was his fourteen months of work as an inventory planner for a lift truck manufacturer five and a half years before his November 1979 application. That work did not involve evaluating any commodities or markets. Complainant had no financial background at all.

Accordingly, in November 1979 and April/May 1980, Complainant did not have financial/business skills in evaluating commodities and markets.

17) In neither November 1979 nor April/May 1980 had Complainant demonstrated to Respondent an ability to get along with a variety of people. Whatever such ability he had was tainted by his negative attitude toward working with people who were less educated than he was.

18) In neither November 1979 nor April/May 1980 did Complainant possess the minimum qualifications for Respondent's position of grocery buyer. He could not have gained the qualifications which he lacked (noted in Findings of Fact 16 and 17 above) without, at the least, substantial training. For those reasons, Complainant could not have performed the work of a grocery buyer in a satisfactory manner without, at the least, substantial training. Accordingly, the grocery buyer positions available with Respondent in November 1979 and April/May 1980 were not suitable for Complainant.

19) The people Respondent hired for its November 1979 and April/May 1980 grocery buyer openings both possessed the minimum qualifications for the position.

20) On May 22, 1980, Respondent was directly informed that at no time since his December 30, 1979, injury had Complainant intended to sever his entire employment relationship with Respondent.

21) Respondent did not reinstate its employment relationship with Complainant in any way between March 11, 1980, and September 3, 1980.

22) If Respondent refused or failed to reinstate Complainant's employment, solicited Complainant's changing the status on March 11, 1980, or discriminated against Complainant in his employment in any way, there is no evidence that Respondent did so because Complainant had applied for workers' compensation benefits on December 31, 1979. Furthermore, there is evidence that any such failure, solicitation, or discrimination was because Complainant had become disabled permanently from performing the duties of his former regular work.

23) There was not work available with Respondent between February 6, 1980, and September 3, 1980, which was suitable for Complainant.

24) On September 3, 1980, Complainant began working as a Night Shift Meat Clerk for Respondent. His salary was almost one-half of his former selector's salary.

25) Thereafter, Complainant worked in this job until September 23, 1981, when he resigned to become a full-time student.

26) There is no evidence or allegation that after September 3, 1980, Respondent failed to re-employ Complainant in any available and suitable work.

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) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing Respondent and Complainant of the matters described in ORS 183.413(2)(a) through (i).

4) The actions, and motivations for those actions, of Respondent's employees Roger Cochell, Kenneth Gregson, and Rebecca Reppeto described

herein are properly imputed to Respondent.

5) Respondent did not engage in an unlawful employment practice in violation of ORS 659.410 as charged, because Respondent did not discriminate against Complainant with respect to his employment tenure because Complainant had applied for benefits provided for in ORS 656.001 to 656.794 and ORS 656.820 to 656.824.

6) Respondent did not engage in an unlawful employment practice in violation of ORS 659.420 as charged, because Respondent did not fail or refuse to re-employ Complainant at available employment which was suitable for Complainant.

RULINGS

1. Respondent's Affirmative Defenses and Counterclaim

In its answer to the Amended Specific Charges, Respondent raised nine affirmative defenses. All but the eighth affirmative defense are rendered moot by this forum's conclusion that Respondent has not engaged in the unlawful employment practices charged. In its eighth affirmative defense, also labeled a counterclaim, Respondent alleged that it is entitled to its reasonable attorney fees if it is found to be the prevailing party herein. This forum cannot consider this counterclaim, because this forum is not empowered to make attorney fee awards to prevailing parties. ORS 659.060(3) gives this forum only the power to issue an Order dismissing the Specific Charges and Complaint, should the respondent prevail.

2. Admission of Investigator Affidavit

The Presiding Officer provisionally admitted an affidavit of Toni Chandler attached to Ms. Chandler's Narrative or Summary and written record of her April 23, 1981, interview of Roger Cochell.

Respondent attacked the admissibility of the exhibit, arguing that Ms. Chandler did not understand or accurately record in it Mr. Cochell's answers to her questions, or draw accurate conclusions in her Narrative or Summary. This forum does not agree with Respondent's allegations concerning Ms. Chandler's comprehension or recording of Mr. Cochell's answers. Ms. Chandler planned to make a verbatim recording of her interview of Mr. Cochell by tape recording it, but did not because Respondent's counsel would not permit it. Given Respondent's refusal, Ms. Chandler recorded her questions and Mr. Cochell's answers as accurately as possible. Respondent should not profit from its refusal to allow a verbatim record of the interview to be created.

When she interviewed Mr. Cochell, Ms. Chandler was an experienced investigator of employment related claims, who had conducted many witness interviews as a part of her investigations. She had received no complaint similar to Respondent's about her work. At the time of hearing, she had a clear current recollection, independent of the exhibit, that she had asked what is marked on the exhibit as question 23 and that Mr. Cochell has given the one word answer noted. His answer to question 24 repeats his answer to question 23, in pertinent part. The answer to question 25 is too unclear to be considered by itself. The cited portions of questions and answers 23 and 24 therefore are the parts of the exhibit most relevant to Respondent's objection to that exhibit, because they contain the only statements in that exhibit which could have caused or helped cause this forum to rule against Respondent on the issue of position suitability, the only key issue this forum has resolved in this Order.

For all the above reasons, this forum finds that the exhibit is evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs and therefore, under OAR 839-04-090(1), admissible. Accordingly, the Presiding Officer's provisional admission of the affidavit is affirmed.

However, this forum will not consider the Narrative or Summary contained in the exhibit, which consists of conclusions which Ms. Chandler drew from her written record of her interview with Mr. Cochell. It is this forum's responsibility to examine the record and come to its own conclusions.

OPINION

1. The Allegation That Respondent Violated ORS 659.410

At the end of the first day of hearing, when all testimony but that of Ms. Chandler had been presented, Respondent moved for a "directed verdict" that Respondent had rot violated ORS 659.410 as charged, on the ground that there was no evidence that Respondent terminated Complainant because he had filed a claim for workers' compensation benefits. The Presiding Officer reserved ruling on this motion.

The motion is denied, because it is not proper in administrative proceedings, where there is no jury.

The latter ruling notwithstanding, this forum has concluded that Respondent is correct in arguing that there is no evidence of an element crucial to the ORS 659.410 violation charged. Although there is evidence that Respondent in effect discriminated against Complainant in the tenure of his employment by soliciting his resignation on March 11, 1980, and/or by viewing his resignation as a complete severance of his employment relationship with Respondent even after Respondent had been notified that such was not Complainant's intention, there is no evidence linking such discrimination to Complainant's December 31, 1979, filing for workers' compensation benefits. Instead, there is evidence that Respondent had a history of not discriminating against Complainant after he had filed for workers' compensation benefits. The Agency attempted to distinguish Complainant's December 31, 1979, filing because it involved an injury which eventually permanently disabled Complainant from returning to his former regular job. Complainant admitted that Respondent's attitude toward him did not deteriorate until it became clear that he might not ever return to his former job. Both facts support this forum's conclusion that if Respondent's above-cited "discrimination" can be linked to any cause, it is to Complainant's March 11, 1980, notice to Respondent of his indefinite disability, not to his having filed a workers' compensation claim two-and-one-half months before. Consequently, the evidence herein points to a possible

violation of ORS 659.420, not ORS 659.410. Accordingly, this forum has dismissed the Specific Charge that Respondent violated ORS 659.410.

2. The Allegation That Respondent Violated ORS 659.420

Two key factual questions are raised by the evidence which concerns the Agency's allegation that Respondent violated ORS 659.420:

A) Did Complainant voluntarily sever his entire employment relationship with Respondent on March 11, 1980?

B) Was the grocery buyer position which was available with Respondent in April/May 1980 suitable for Complainant?

Because Respondent's duty under ORS 659.420 arose only if Respondent had available work which was suitable for Complainant during times material, this forum examines Question B above first.

Oregon case law includes the following construction of what is "suitable" work under ORS 659.420:

> "The question of what constitutes suitable work is a question of fact which depends on the circumstances of each case. Certain factors, however, will be relevant in determining suitability in all cases. These include the employee's educational background and work experience, his prior salary and level of responsibility, the nature and severity of his disability, and his record with the employer, as well as the employer's size, diversity and hiring needs.
>
> ". . . a position which the injured worker could not perform without substantial training or rehabilitation is not 'suitable' within the meaning of ORS 659.420(1).
>
> "A suitable position is one that plaintiff probably could, without substantial rehabilitation or retraining, perform in a satisfactory manner." *Carney v. Guard Publishing Company,* 48 Or App 147, 154-155, 616 P2d 548 (1980).

At 48 Or App 927, 630 P2d 867 (1980), the Court of Appeals withdrew the above-quoted passages and all of the *Carney* opinion which addressed the question of suitability, because it determined that question had not been properly before it in *Carney*. Nevertheless, the forum regards the court's above-quoted statements as advisory and therefore useful as guidance herein.

The *Carney* language on suitability advises this forum that a job is not suitable for a worker unless that worker is qualified to perform it or could become qualified to do so without substantial training, i.e., unless that worker is minimally qualified for the job. Whether Complainant Fewx was minimally qualified for the grocery buyer position depends upon his qualifications and what Respondent needed in a grocery buyer hire, i.e., the minimal qualifications for the position.*

* On January 26, 1983, the Agency promulgated OAR 839-06-145, concerning "suitability" under ORS 659.420. In its subparagraphs (1)(a) through (d), this rule describes what "qualified" means. Although OAR 839-06-145 does not apply herein because it went into effect long after the instant complaint was filed, this forum notes that the "minimally qualified" test used in this Order substantially conforms with the description of "qualified" contained in OAR 839-06-145.

A. Minimal Qualifications for Grocery Buyer

Because, as far as this record is concerned, Respondent had no precise, written delineation of the minimum qualifications for grocery buyer during times material, this forum had to compose one. To do so, this forum first formulated a description of what a grocery buyer does, contained in Finding of Fact 12 above, based upon the testimony of Ken Gregson, the person whom even Complainant acknowledged as the best source of this information, as complemented by the testimony of Mr. Cochell. Having carefully analyzed Finding of Fact 12 and the evidence described in Findings of Fact 13 through 19 as to what Respondent believed it needed in a grocery buyer hire, and having given greatest weight to the Gregson/Cochell statements on the latter topic, this forum arrived at Ultimate Finding of Fact 13's statement about the minimum qualifications for the job of grocery buyer at times material herein: a demonstrated ability to get along with a variety of people and financial/business skills in evaluating commodities and markets. To paraphrase what this forum has said above, by minimum qualifications, this forum means those qualifications which a person had to possess to be able to do the job of grocery buyer satisfactorily, without substantial training.

Both of the people Respondent hired during times material as grocery buyer possessed these minimum qualifications. One had recent business education in evaluating commodities and markets plus recent experience dealing with Respondent's retailers in a service capacity. The other had clearly demonstrated outstanding ability to deal with a variety of people by being elected and serving as president of a university student body and captaining the university debate team, while completing a four-year degree program in three years. He had recent financial experience evaluating commodities within a market framework.

The only evidence mitigating against the above statement of minimum qualifications is the notice Respondent posted to solicit applications for the pertinent grocery buyer openings. This notice contains a list of the qualifications a grocery buyer "should possess" which does not specify business or financial skills in evaluating markets or commodities. However, this notice was meant to describe the qualifications for grocery buyer broadly and used such expansive, nebulous terms as "supervisory, leadership and management ability" in describing key qualifications. It obviously was not intended to be a specific, inclusive description of the type and degree of technical skills necessary to become a grocery buyer. Given the purpose and nature of the notice, this forum's findings as to the nature of the grocery buyer position, and Respondent's other evidence as to the qualifications for this position, this forum cannot conclude that any person with experience or education which could be said to fall within each category of the notice's general description of qualifications is

minimally qualified to be a grocery buyer for Respondent.

B. Complainant's Qualifications

Close examination of Complainant's educational background and work experience reveals that Complainant had no discernible business or financial skills in evaluating commodities and markets. In addition, he had not demonstrated to Respondent an ability to get along with a variety of people. If he had the ability to do so, it was tarnished by his negative attitude toward working with people less educated than he.

There is no evidence that with anything less than substantial training, Complainant could have gained the qualifications for grocery buyer which he lacked. In fact, Respondent did not believe that it could have trained Complainant to gain those qualifications, period. That is why it would not have hired Complainant as grocery buyer either time he applied, even if he had been the only applicant.

In arguing that Complainant was qualified to be a grocery buyer, the Agency pointed to the evidence that Complainant had come in second for a grocery buyer opening with Respondent five months before the April/May 1980 opening. Complainant testified that Mr. Cochell told him this on November 20, 1979. Complainant's wife testified that, as soon as Complainant finished his November 20, 1979, conversation with Mr. Cochell, Complainant told her that Mr. Cochell had said that he came in second. Mr. Barker, who had no interest in this case except preserving his current employment with Respondent, testified that Complainant told his co-workers soon after November 20, 1979, that he was runner-up or number two for the November 1979 grocery buyer opening. Mr. Alley, a disinterested witness, testified that Complainant told him in May 1980 that he had been number two for the November 1980 (sic) vacancy. Mr. Alley made a note of that statement at the time. Toni Chandler, who investigated this case for the Agency, testified that Mr. Cochell himself told her during an April 28, 1981, interview that it was true that Complainant came in second.

At hearing, Mr. Cochell absolutely denied that he told Complainant that he had come in number two, or that Complainant in fact had come in number two, in November 1979.

Based upon the consistent testimony of the above-cited five witnesses, this forum believes that Mr. Cochell did tell Complainant that he came in second. Based upon that fact and Mr. Cochell's statement to Ms. Chandler, this forum believes that Complainant did come in second in the limited sense in which Mr. Cochell used that phrase. As Mr. Cochell pointed out to Ms. Chandler, that did not mean that Complainant was qualified to be a grocery buyer. Mr. Cochell insisted that there was a big difference between the person who came in first and Complainant, and that Complainant was not qualified for the job.

The result of this forum disbelieving Mr. Cochell's testimony as to whether Complainant came in second and whether Mr. Cochell told Complainant that he had come in second is that this forum has accorded less weight to Mr. Cochell's testimony than to the Agency's evidence, where Mr. Cochell's testimony contradicts the Agency's evidence. However, this forum must agree that Complainant's "coming in second" for the grocery buyer job does not mean that he was minimally qualified for that job.

The other evidence which the Agency pointed to as an indication that Complainant was qualified for the grocery buyer job was Mr. Cochell's undisputed statement to Complainant, one-and-one-third years before November 1979, that the position in Respondent's Oregon Division most similar to Complainant's inventory planner job at Towmotor was that of grocery buyer. Especially since there is no evidence as to what Mr. Cochell knew about Complainant's inventory planner job when he made that statement, this does not constitute evidence that Complainant was minimally qualified for the job of grocery buyer.

After painstakingly examining all the evidence on point, this forum concludes that it does not indicate, by a preponderance, that Complainant was minimally qualified for the job of grocery buyer at times material. For that reason, this forum must conclude that Respondent's grocery buyer work was not suitable for Complainant at times material.

The grocery buyer opening which Respondent had in April/May 1980 was the only work Respondent had available during times material which the Agency asserts was suitable for Complainant, this forum concludes that Respondent had no available and suitable work for Complainant during times material. For that reason Respondent could not have failed or refused to re-employ Complainant in available and suitable work. Consequently, Respondent did not violate ORS 659.420 as charged.

This conclusion renders moot the other factual question cited at the beginning of this discussion. For that reason, this forum need not and does not determine whether Complainant severed enough of his employment relationship with Respondent on March 11, 1980, to extinguish his reemployment rights under ORS 659.420 and, if so, whether he did so voluntarily, or resolve the many tangential issues relating to these questions which the parties raised and about which they presented a great deal of evidence.

ORDER

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

In the Matter of
KENNETH CLINE,
dba K. C. Logging, Respondent.

Case Number 11-82
Final Order of the Commissioner
Mary Wendy Roberts
Issued August 30, 1983.

SYNOPSIS

Wage claimant worked for Respondent cutting timber on another's land with the expectation of being paid $5.00 per 1,000 board feet cut. Evidence did not support Respondent's claims that the agreement was for board feet hauled out, that Respondent was unable to haul out all that was cut, and that Claimant should have imposed a lien on the land-owner. The Commissioner ruled that Respondent's duty to pay his employee was absolute, and awarded Claimant $589 in unpaid wages based upon Claimant's expert opinion of the amount cut. Respondent failed to prove his defense of inability to pay, where at the time the wages became due he had over $6,000 worth of equipment and continued making payments on a non-residential land purchase. The Commissioner awarded Claimant $2,727 in penalty wages, together with interest on both amounts. ORS 652.130; 652.140; 652.150.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on March 8, 1983, in Room 156 of the Josephine County Courthouse, N.W. Sixth and C Streets, Grants Pass, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Employer Kenneth Cline, doing business as K. C. Logging, was represented by Michael J. Bird, Attorney at Law. Claimant Terry C. Brown was present throughout the hearing.

The Agency called as witnesses Claimant and George Akin, Claimant's coworker during times material herein. The employer called himself as his only 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, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On June 1, 1981, Terry C. Brown (hereinafter the Claimant) signed a wage claim which alleged that Kenneth Cline, doing business as K. C. Logging, was his former employer and that Mr. Cline (hereinafter the Employer) had failed to pay wages due to the Claimant. On June 4, 1981, the Claimant filed this claim with the Wage and Hour Division of the Bureau of Labor and Industries.

2) On June 1, 1981, the Claimant assigned all wages due him under the above-described claim to the Commissioner of the Bureau of Labor and Industries in trust for the Claimant.

3) On November 5, 1981, the Administrator of the Wage and Hour Division issued an Order of Determination which found that the Employer and Beulah Cline, operating K. C. Logging as a partnership, owed the Claimant $589.40 in unpaid wages for timber the Claimant had cut, plus interest on that sum. In addition, the Order of Determination found that the Employer and Beulah Cline owed the Claimant $2727.30 in penalty wages plus interest thereon.

4) The Order of Determination was served upon the Claimant on November 19, 1981.

5) The Wage and Hour Division attempted to serve the Order of Determination on the Employer and Beulah Cline, separately, by transmitting it by certified mail to the last known residential address of each of them. On or about November 23, 1981, the U.S. Postal Service returned both transmissions to the Wage and Hour Division, marked "unable to deliver because unclaimed." On January 25, 1982, the Order of Determination was served on the Employer by the Office of the Josephine County Sheriff. On January 25, 1982, that office also attempted to serve the Order of Determination on Ms. Cline but, after diligent search and inquiry, could not find her within Josephine County. The record herein contains no indication of any further effort to serve the Order of Determination to Ms. Cline, so this forum finds that she was not served with it. Ms. Cline did not appear at hearing.

6) Thereafter, the Employer filed with the Wage and Hour Division a request for hearing in this matter and an answer to the Order of Determination denying the wage claim and affirmatively alleging that:

a) the Claimant was the employee of George Akin during times material;

b) the Claimant's rate of pay was "specifically agreed to be on the basis of 'logs hauled out' of certain property...";

c) the "rate of pay due" the Claimant had been reduced by the Employer's inability to haul the logs from the property; and

d) the Employer was financially unable to pay any claimed balances due to the Claimant.

7) The Bureau of Labor and Industries duly served the Employer and the Claimant with the Notice of Time and Place of the hearing.

8) Before the commencement of hearing, the Claimant received from this forum and read a copy of "Contested Case Rights and Responsibilities" and stated that he had no questions about those documents. Before the commencement of the hearing, the Employer received from this forum and read a copy of the same exhibits and stated that he had no questions about them.

9) At the commencement of the hearing, the Agency moved that the Order of Determination be amended by handwritten interlineation. The Employer had no objection to this motion, and the Presiding Officer granted it.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, the Employer operated a logging business called K. C. Logging. The Employer's wife, Beulah Cline, was K. C. Logging's bookkeeper. Although Ms. Cline apparently was inadvertently listed as a partner in this business on a state hauling permit, she was not in fact a

partner. The Employer viewed himself as, and was, the sole proprietor of K.C. Logging.

2) On or before December 1, 1980, the Employer hired George Akin to cut timber on property owned by a person named Pat O'Brien. This property was located within the State of Oregon.

3) Because it was illegal to log alone, the Employer directed Mr. Akin to find someone to cut timber with Mr. Akin on the O'Brien job. The Employer told Mr. Akin that if Mr. Akin did not find a helper, the Employer would do so. Mr. Akin told Employer that he would find someone himself.

4) It was to be the job of Mr. Akin and his helper to fall timber on the O'Brien property, and the Employer's responsibility to haul the cut timber off the property to the mill.

5) The Employer agreed to pay Mr. Akin and his helper a total of $10.00 for every 1000 board feet of timber. The Employer did not specify, nor did Mr. Akin understand, that this rate applied to the quantity of logs which the Employer removed from the O'Brien property rather than to the quantity of logs which Mr. Akin and his helper cut. The Employer did not specify, nor did Mr. Akin understand, that the logs which Mr. Akin and his helper would cut would have to be removed before the Employer would pay them for those logs.

6) The Employer believed that Mr. Akin understood, when he agreed to do the O'Brien job, that: 1) the Employer had no money, so the O'Brien job would have to pay for itself through sale of the O'Brien timber; and 2) because of winter weather, the cutting and removing of the timber would be "spasmodic." The Employer argues that Mr. Akin (must have) understood this, and that Mr. Akin was willing to work on these terms, because neither the Employer nor Mr. Akin had any other income. However, because there is no evidence on the record that Mr. Akin had specific knowledge of whether or not the Employer had any other income, this forum finds that Mr. Akin did not. The Employer apparently assumed that because of the depression afflicting Oregon's logging industry, Mr. Akin would know that the Employer had no other income.

7) Mr. Akin asked the Claimant, a timber faller, to work with him on the O'Brien job. Mr. Akin told Claimant that they would "get $10.00 per 1000, split two ways." The Claimant agreed to do the job at this rate of pay.

8) After showing the Claimant the cutting site, and before or just after the Claimant and Mr. Akin began work, Mr. Akin introduced the Claimant to the Employer, explaining that the Claimant would work with him on the O'Brien job. The Employer told Mr. Akin and the Claimant to go to work and had the Claimant complete a federal tax withholding Form W-2 for employees. It was the Claimant's understanding that he was the Employer's employee.

9) While working on the O'Brien job, the Claimant was covered by the Employer's workers' compensation insurance. At hearing, the Employer declined to testify that the Claimant was not his employee on the O'Brien project and admitted that the Claimant "in actuality had to be considered" his employee. The Employer admitted that Mr. Akin was his employee.

10) On December 1, 1980, Mr. Akin and the Claimant began to cut timber on the O'Brien property. They performed this work together for eleven days, through December 17, 1980. By agreement of the Claimant, Mr. Akin and the Employer, the employment of Mr. Akin and the Claimant on the O'Brien job ended when they finished the work on December 17, 1980, apparently because they had finished the work they had agreed to do.

11) After their employment on the O'Brien project ended, Mr. Akin and the Claimant told the Employer that they figured they had cut about 200,000 board feet of timber on that job.

12) When the Claimant and Mr. Akin had almost finished their work on the O'Brien job, the Employer began hauling the logs they had cut off the property. He was severely hampered by soft, very steep and slick terrain, as well as bad weather. Unable to build a road to the cut timber for his log truck, the Employer had to bunch the felled trees together and pull them a distance of up to one mile to a loading site. It was slow and dangerous work. Just after the beginning of 1981, the Employer stopped his hauling efforts because of the adverse conditions and because he was losing money on the project.

13) Sometime between December 17, 1980, and the end of 1980, Mr. Akin asked the Employer for a draw on the wages the Employer owed him and the Claimant for their O'Brien work. The Claimant was present. The Employer said that he did not want to write two checks and wrote Mr. Akin one check, for $500.00. Mr. Akin gave the Claimant $250.00 of this amount. This was the only money the Claimant received during December 1980 for his O'Brien work.

14) Because the Claimant did not believe that the $250.00 he had received compensated him for all the timber he had cut on the O'Brien job, the Claimant asked the Employer for the remainder of his wages for that work. The Employer, through Ms. Cline, told the Claimant that the Employer, and consequently the Claimant, would get paid for the logs the Claimant cut when the Employer had removed those logs from the O'Brien property. This was the point at which the Claimant first realized that the Employer did not consider the Claimant's wages due until the timber he cut had been removed from the property. The Employer told Mr. Akin the same thing in response to Mr. Akin's many requests for the remainder of his wages for the O'Brien job.

15) The Employer also informed the Claimant and Mr. Akin that because some timber had been illegally cut and removed from property adjoining the O'Brien property, there was an allegation that, and an investigation as to whether, the Employer had committed a timber trespass. The Employer told Mr. Akin and the Claimant that this was one reason the Employer could not remove, at that time, the logs which the Claimant and Mr. Akin had cut.

16) Soon after January 1, 1981, Mr. O'Brien was found to have been responsible for the above-mentioned trespass, and the Employer was cleared of suspicion. Soon thereafter,

Mr. O'Brien canceled the Employer's contract to log his property. Because of this cancellation, the Employer believed that he could not legally haul the rest of the timber Mr. Akin and the Claimant had cut off the O'Brien property. The Employer did not take legal action against Mr. O'Brien for this cancellation.

17) On or about February 20, 1981, the Employer paid the Claimant gross earnings of $160.60. Written across the top of the stub attached to the check paying this amount was "32,120" at 5.00." "32,120"' plus four loads of poles was the amount of the timber cut by Mr. Akin and the Claimant which the Employer had removed from the O'Brien property. This notation was the first indication the Employer furnished the Claimant of the quantity of logs the Employer removed from the O'Brien property.

18) In a note which the Employer sent to the Claimant with the above-mentioned paycheck, Ms. Cline stated that the check paid the Claimant "Jan 1 thru Feb. 15, 1981, except for 4 loads of poles." Ms. Cline promised to send the Claimant his pay for these poles as soon as she "got hold of the mill" to determine how many board feet they equaled.

19) The $250.00 paid in December 1980 and the above-mentioned $160.60 are the only sums the Employer has paid the Claimant for the Claimant's work for the Employer on the O'Brien property.

20) After receiving the February 20, 1981, check, the Claimant believed he was entitled to additional pay. As he had done at the end of 1980, he asked the Employer for a formal breakdown of the quantity of logs he had cut. The Employer never furnished him with any statement of this quantity.

21) Although the Employer testified on one hand that he does not know how much timber Mr. Akin and the Claimant cut on the O'Brien property, he insisted on the other hand that he removed less than half of what they cut from the property. Mr. Akin has no idea how much of the timber he and the Claimant cut was removed. According to Claimant, approximately one-half of the total timber the Claimant and Mr. Akin cut was removed.

22) An exhibit is the Claimant's estimate of the quantity of timber he and Mr. Akin cut for the Employer on the O'Brien job. The Claimant and Mr. Akin prepared this estimate at the request of the Agency shortly after the Claimant filed the instant wage claim. To prepare it, they estimated the average amount of timber they cut per 6 to 6 ½ hour work day by evaluating the number of days they worked, the number of hours they worked each day, and the amount of fuel their saws burned each day. They also took into consideration the size of the timber they cut. The poor weather, mud and steepness of the terrain did not affect the quantity of their cut.

As of the time of the hearing, Mr. Akin had been a logger for about 32 years, the Claimant for about 12 years. When they prepared the exhibit, they were qualified to estimate the amount of timber they had cut on the O'Brien job. Their 200,000 board feet estimate includes the four loads of poles Ms. Cline had mentioned.

The Claimant believes that the exhibit's estimate is a very reasonable, conservative representation, made to the best of his ability, of the amount of timber he and Mr. Akin cut on the O'Brien job. Mr. Akin believes that it is a low estimate and that they felled "a lot more than" 200,000 board feet. The Employer testified that he could not honestly say whether he agrees or not with this estimate, because he did not view all of their cut. The Employer concluded that he does not "quarrel" with their estimate. Other than the identical estimate mentioned in Finding of Fact 11 above, this is the only estimate, or record of any kind, of the quantity of timber Mr. Akin and the Claimant cut for the Employer on the O'Brien project.

23) In approximately March of 1981, the Claimant and Mr. Akin again worked for the Employer as loggers. For this job, the Claimant agreed to be paid as the logs he cut were hauled from the cut site. Although the Employer did not provide him with documentation of the quantity of timber removed, the owner of the property apprised the Claimant of all timber removed and made sure the Employer paid the Claimant therefor. When he performed this work, the Claimant felt that the Employer would probably still pay him for all his work on the O'Brien property.

24) In the Claimant's twelve years of logging, the March 1981 job was the only time (other than, per the Employer, the O'Brien project) the Claimant worked under an arrangement by which his pay was contingent upon the timber which he cut being removed from the site.

25) The O'Brien job and the March 1981 job are the only times the Employer has employed the Claimant.

26) Immediately before the Claimant filed the instant claim, the Employer told the Claimant that because Mr. O'Brien had canceled the Employer's contract, the Employer would not (ever) be able to haul any more of the timber the Claimant and Mr. Akin had cut off the O'Brien property. The Employer told the Claimant that for that reason he was not going to pay the Claimant or Mr. Akin any more money for their work on the O'Brien property. This was Claimant's first notice of these (alleged) facts.

27) Within one week or so after filing the instant claim, the Claimant informed the Employer of his filing. The Employer suggested that the Claimant file a logger's lien upon cut logs. The Employer believed that since he was unable to remove the rest of the cut timber, it was the Claimant's responsibility to take action to get his wages through the lien process.

The Employer testified that the Claimant and Mr. Akin should have been paid for all the timber they had cut for him on the O'Brien project. However, the Employer believes that Mr. O'Brien, not the Employer, should have paid the Claimant and Mr. Akin the remaining wages due them. The Employer also believes that since the Claimant did not file a lien against Mr. O'Brien, the Claimant did not do all he should have done to get paid. For these reasons, and because the Employer believes that the amounts he has paid the Claimant for the O'Brien job compensate him at more than the agreed-upon rate for the cut timber

which the Employer removed from the property, the Employer does not feel that he owes any further wages to the Claimant.

28) The Employer has never removed all the timber the Claimant and Mr. Akin cut from the O'Brien property. He has not paid the Claimant or Mr. Akin for all the timber they cut on that property.

29) The Employer testified that without getting the O'Brien logs hauled and sold to the mill, he was absolutely not financially able to pay the Claimant the wages the Claimant seeks herein. The Employer stated that he would not have tried to remove the logs under such abhorrent conditions in December 1980 if he had any other way to pay the Claimant and Mr. Akin. The Employer testified that in December 1980 his liabilities exceeded his assets and he did not have enough cash to cover all his financial obligations.

30) In December 1980 the Employer owned the following major equipment, which he used in K. C. Logging:

a) One 1975 Mack truck and trailer, which cost almost $60,000.00 new, and 1971 pickup truck. The Employer was able to make sufficient monthly payments on this equipment to keep it until approximately early 1982.

b) Two different types of caterpillar vehicles in working condition, each worth at least several thousand dollars.

c) Two to three chain saws worth $100 to $300 each.

In December 1980 the Employer also owned KenCo Timber Company, an entity which he used as a means for holding timber. It had no assets at that time.

In December 1980 the Employer had an interest in real property located in the State of Oregon which was not his place of residence, on which he was making payments of approximately $150.00 per month. In addition, he had an interest and was making payments on another piece of real property upon which his home stood.

31) Mr. Akin, the Claimant, and the Employer all impressed the Presiding Officer as honest and sincere witnesses. However, the Employer's testimony on points at issue was often less clear than that of the Claimant, and the Employer's testimony contradicted itself on several points at issue. Unlike the Claimant's testimony, the Employer's testimony points at issue was not corroborated by any other witness or any documentary evidence. For these reasons, the forum found the Employer less credible than the Claimant, where their testimony differed. Accordingly, the forum has given less weight to the Employer's testimony than to that of the Claimant, where they differ. In addition, where the Employer's testimony contradicts itself or is very unclear, this forum has regarded the version or interpretation of that testimony least favorable to the Employer as his testimony.

ULTIMATE FINDINGS OF FACT

1) Through the Employer's agent George Akin, the Employer, a person, engaged in the personal services of the Claimant, an individual. Through Mr. Akin, the Employer and the Claimant agreed that the Claimant would cut timber with Mr. Akin for the Employer on Pat O'Brien's property, located in the State of Oregon. They further agreed that, as consideration for these services, the Employer would pay Mr. Akin and the Claimant at the fixed quantity-produced rate of $10.00 per 1000 board feet of timber, to be split equally between Mr. Akin and the Claimant. By this arrangement, the Claimant became the Employer's employee for the first time.

2) For eleven days between December 1 and December 17, 1980, the Claimant and Mr. Akin rendered the agreed-upon services to the Employer. After they finished working on December 17, 1980, their employment with the Employer ended by mutual agreement.

3) At the time of this termination, Mr. Akin and the Claimant had cut at least 200,000 board feet of timber for the Employer on the O'Brien property.

4) The Employer was responsible for hauling the timber Mr. Akin and the Claimant cut off the O'Brien property to the mill. The Employer was not able to haul from the property more than 32,120 board feet, plus four pole loads, of that timber. Consequently, the Employer could not sell or realize any remuneration from the rest of the timber Mr. Akin and the Claimant cut.

5) Neither the Claimant nor Mr. Akin had explicitly agreed to be paid, or understood that they would be paid, on a "logs hauled out" (rather than a "logs cut") basis, or explicitly agreed or understood that the Employer would not pay them for timber they cut which the Employer never hauled off the O'Brien property. Furthermore, there is no evidence of any course of previous dealings between Mr. Akin and the Employer or between the Claimant and the Employer, or anything occurring during the Claimant's performance of the O'Brien work, or of any custom in the logging industry, which established a common understanding that the Claimant and Mr. Akin would be paid on a "logs hauled out" basis or not paid for logs never hauled off the O'Brien property. In fact, apparently neither the Employer, the Claimant, nor Mr. Akin contemplated the possibility, when they made their work agreement or when the work was being performed, that the Employer never would be able to haul all the cut timber off the O'Brien property.

6) Sometime between December 17 and 31, 1980, the Employer paid the Claimant, through Mr. Akin and at Mr. Akin's request, $250.00 for the Claimant's work on the O'Brien project. On or about February 20, 1981, the Employer paid the Claimant directly an additional $160.60 for his O'Brien work. Despite the Claimant's requests for the remaining compensation he believes the Employer owes him, the Employer has made no other wage payments to the Claimant, directly or through Mr. Akin, for the Claimant's work on the O'Brien job.

7) Despite the Claimant's request that he do so, the Employer did not furnish the Claimant with any statement of the quantity of logs the Claimant (or the Claimant and Mr. Akin) cut on the O'Brien property. The Employer did not even furnish the Claimant with any indication of the amount of those cut logs which the Employer had removed from the property until approximately February 20, 1981.

8) If the Claimant's wage is to be determined by the quantity of logs he

and Mr. Akin cut on the O'Brien property, the Claimant earned $1000.00 for his work on the O'Brien job. As he earned this sum in eleven work days, his average daily rate of pay was $90.91.

9) If the Claimant earned $1000.00 on the O'Brien job, the Employer still owes him $589.40 in wages for his work. In December 1980, when these wages accrued, the Employer held business equipment worth at least $6300.00. He also was making monthly payments of approximately $150.00 on real property which was not his place of residence, and was keeping up payments on the business equipment for which he had not yet fully paid. In effect, therefore, the Employer chose to keep his business equipment and to pay other debts rather than to pay the Claimant's wages. Given the evidence which leads to these findings, the Employer has not shown that he was financially unable to pay the Claimant $589.40 in December 1980.

CONCLUSIONS OF LAW

1) At all times material herein, the Employer was an employer, and the 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 of the State of Oregon has jurisdiction over the subject matter and the persons herein, with the exception of Beulah Cline.

3) The actions, and motivations for those actions, of the Employer's agent Beulah Cline which are described herein are properly imputed to the Employer.

4) The Claimant did not work for the Employer on the O'Brien project on a "logs hauled out" wage basis or agree to condition payment of his wages for that project upon the Employer's hauling the logs he cut off the O'Brien property. Instead, the Claimant worked at a rate of pay calculated according to the quantity of logs the Claimant and Mr. Akin produced by performing the services they agreed to render to the Employer; i.e., he worked at a rate of pay calculated according to the quantity of logs he and Mr. Akin cut on the O'Brien job. Consequently, the Claimant earned one-half of $10.00 for every 1000 board feet of timber he and Mr. Akin cut, or $1000.00.

5) The Employer's failure to pay the Claimant $589.40 of the $1000.00 the Claimant had earned at the time his employment was terminated (by agreement of the Claimant and the Employer) constitutes a violation of ORS 652.140.

6) Even if the Claimant could have attempted to recover the $589.40 the Employer owed him from a third party, the fact that the Claimant did not does not extinguish or diminish the Employer's liability for his above-cited violation of ORS 652.140. It is the Employer's absolute responsibility, and his responsibility alone, to pay the Claimant the wages the Claimant earned in his employ.

7) In accordance with the mandate of ORS 652.150, because the Employer willfully failed to pay $589.40 in wages to the Claimant, as provided in ORS 652.140, and because the Employer has not shown that he was financially unable to pay those wages at the time they accrued, the Claimant's wages continued at the average daily rate of $90.91 from the date of the Claimant's termination for thirty days, as a penalty for the Employer's nonpayment of the $589.40.

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 and must order the Employer to pay the Claimant $589.40 in earned and unpaid wages and $2727.30 in penalty wages, plus interest on both sums.

OPINION

1. Was K. C. Logging a Sole Proprietorship or a Partnership?

At all times material herein, both Kenneth Cline and his wife Beulah Cline participated in K. C. Logging. He operated this business, and she was its bookkeeper.

Mr. Cline viewed himself at all times material as the sole proprietor of K. C. Logging. There is no evidence that his view was inaccurate, other than his own cursory reference in testimony to having listed Ms. Cline as his partner on a hauling permit. Mr. Cline asserts that this listing was inadvertent and that Ms. Cline was never his partner in K. C. Logging. Absent any cognizable evidence to the contrary, this forum has concluded that during all times material herein, Kenneth Cline was the sole proprietor of K. C. Logging. Accordingly, Mr. Cline alone is named as the Employer in this matter.

2. Was the Claimant the Employer's Employee?

The Claimant asserts that he was the Employer's employee on the O'Brien job. In his answer to the Order of Determination, the Employer asserted that the Claimant was Mr. Akin's, rather than the Employer's, employee on that job. However, the Employer admitted at hearing that he treated the Claimant as his employee and that the Claimant had to be considered, and was legally, his employee. The only reason for the Employer's original assertion which is even alluded to on the record is the fact that the Employer did not personally select the Claimant for employment. The Employer admitted, however, that Mr. Akin selected the Claimant because the Employer directed him to do so for the Employer. The Employer also admitted that he approved Mr. Akin's selection. No evidence on the record, therefore, refutes the Employer's own admission, and the other evidence, that the Claimant was the Employer's employee on the O'Brien job. Accordingly, this forum has found that the Claimant was the Employer's employee on that project.

3. What Wages Did the Claimant Earn in the Employer's Employ?

ORS 652.140 provides that where employment is terminated as it was herein by mutual agreement of the employer and the employee, all wages earned and unpaid at the time become due and payable immediately. The chief issue in this matter is what amount of wages had the Claimant earned when his employment with the Employer ended.

A. The Claimant's Rate of Pay

Mr. Akin and the Employer agreed that Mr. Akin and a helper would cut timber for the Employer on the O'Brien property. They agreed that as consideration of the performance of this work, the Employer would pay Mr. Akin and his helper $10.00 per thousand board feet of timber. The Claimant agreed to work as Mr. Akin's helper for one-half of this quantity wage. Mr. Akin and the Claimant were to cut the timber, and the Employer was to haul it off the O'Brien property to the mill.

Mr. Akin, the Claimant, and the Employer disagree as to whether the above-cited rate of pay was to apply to all logs the Claimant cut on the O'Brien property or whether it was to apply just to logs they cut which the Employer subsequently hauled from the property. The Claimant and Mr. Akin assert the former interpretation, citing the fact that they were hired to cut logs and denying that they agreed to be paid on the basis of logs hauled out rather than cut.

The Employer asserted in his answer that they specifically agreed to be paid on a logs hauled out basis. (It is unclear whether the Employer meant that the rate of pay was to be calculated in terms of logs hauled out or that the Claimant's pay for logs cut would not become due until those logs were hauled out. For this forum's purposes, it makes no difference.) The Employer further maintained that since, due to circumstances beyond his control, he was not able to ever remove all the logs Mr. Akin and the Claimant cut, he should have to pay them only for those logs he removed.

At hearing, neither the Employer, the Claimant, nor Mr. Akin maintained that they agreed explicitly that the Claimant and/or Mr. Akin would not be paid for logs which the Claimant and Mr. Akin cut, but which the Employer did not subsequently remove from the O'Brien property. The Employer maintained, however, that Mr. Akin understood when he took the O'Brien job that since the Employer had no money, the job would have to pay for itself through the sale of the logs to a mill. There is no evidence, beyond the Employer's assumption, that the Claimant or Mr. Akin understood or actually agreed to work on those terms. Mr. Akin and the Claimant both deny doing so. The Employer did not make explicit that which he assumed was understood. The fact that the Claimant did wait, during the winter and spring months of 1981, for full payment from the Employer, which as far as he knew would be forthcoming, does not mean that the Claimant agreed to forego payment completely if the Employer never removed the logs from the O'Brien property. In fact, the Claimant filed the instant claim shortly after the Employer finally informed him that he would never be able to haul all the cut logs off the property. The Employer's allegation that the Claimant and Mr. Akin agreed to be paid according to the convenient measure, the quantity of logs measured at a scaling bureau, even if true, would not indicate that they agreed not to be paid at all for timber the Employer never hauled off the property to a scaling bureau. The Employer, Mr. Akin, and the Claimant may have realized, since it was winter, that the weather might prevent the Employer from removing the cut logs as rapidly as he could during drier months. However, there is no evidence that, when Mr. Akin, the Employer, and the Claimant made their work agreement or when the Claimant performed his work under that agreement, any of them contemplated the possibility that the Employer might not ever be able to remove the logs (or the possibility of any other circumstance which would render the Employer unable to realize any earnings from some of the logs cut).

Based upon the foregoing, this forum finds no explicit agreement between the Employer and the Claimant, before or during the performance of the Claimant's work for the Employer on the O'Brien property, that the Employer would pay the Claimant only for timber the Claimant cut which the Employer subsequently hauled off the O'Brien property. Furthermore, there is no evidence on the record of any course of previous dealings between the Claimant or Mr. Akin and the Employer, or of anything which occurred in the course of the Claimant's performance of the O'Brien job, which established a common understanding that the Employer would pay the Claimant only for timber hauled off the property. Finally, there is no evidence that such a wage basis was so usual in the logging industry that the Employer, Mr. Akin, and the Claimant should have expected that it would govern this situation. (The only pertinent evidence supports the opposite conclusion.) Furthermore, the Employer admitted in his testimony that the Claimant and Mr. Akin should be paid for all timber they cut.

This forum will not impute unreasonable terms to a work agreement. Absent any indication through an explicit agreement, any previous course of dealings between the Employer and the Claimant or Mr. Akin, the course of the Claimant's and Mr. Akin's performance of this work, or custom in the logging industry, that the Employer and the Claimant understood, or should have understood, or otherwise agreed that the Employer would pay the Claimant only for logs the Employer hauled off the O'Brien property, and given the Employer's admission that the Claimant should be paid for all the logs he cut, this forum has concluded that the specified rate of pay applies to the logs the Claimant and Mr. Akin cut. For the same reasons, this forum has also concluded that there was no agreement to condition payment of this compensation, in effect, upon removal of the logs from the property, delivery or sale of them to a mill, or any other act which the Employer was responsible for performing after the Claimant finished performing what he had agreed to do.

The Employer's inability to haul the timber off the O'Brien property may have modified the means by which the quantity of timber cut could be determined, but it did not extinguish the Employer's responsibility to compensate the Claimant for his performance of the work he agreed to do. To rule otherwise, and find that despite the absence of any explicit agreement or substantial indication to that effect, the Claimant and Mr. Akin agreed to work at a rate of pay which would be determined not by the services they rendered, but by subsequent acts of the Employer over

which they had no control, would not be reasonable.

B. Quantity of Logs Cut

ORS 652.130 requires the Employer at least once a month to furnish every employee working on a quantity wage basis with a statement of scale or quantity produced by the employee or his or her credit. The Employer herein did not do this. The first indication of any quantity measure he furnished the Claimant was a notation on a check stub given more than two months after the Claimant ceased working for the Employer. This notation indicated that amount of timber the Employer had taken to the mill. The Employer never gave the Claimant a statement of the amount of timber he cut.

Given the Employer's failure to comply with this statute, this forum must rely upon the Claimant's estimate that he and Mr. Akin cut 200,000 board feet of timber for the Employer. Because of the unrefuted testimony that the Claimant's estimate is the only existing estimate and the best estimate of two loggers qualified to make such estimates, that it was made within six months of the logging work at issue, that it took into account several relevant factors, and that it was conservative, and given the fact that the Employer testified that he had no quarrel with this estimate, this forum has used it as the measure of the timber the Claimant and Mr. Akin cut for the Employer on the O'Brien property.

4. Who Must Pay the Claimant His Wages Due?

The Employer admitted at hearing that the Claimant should be paid for the timber he cut on the O'Brien property, but maintained that Mr. O'Brien should pay the Claimant, because Mr. O'Brien allegedly put the Employer in the position of not being able to pay the Claimant.

The Employer himself has taken no legal action against Mr. O'Brien to recover what the Employer lost when Mr. O'Brien terminated his contract with the Employer for the logging of the O'Brien property. The Employer has not sought to make Mr. O'Brien part of this proceeding. The Employer asserts that it was the Claimant's responsibility to take action to recover his wages from Mr. O'Brien by filing a lien against Mr. O'Brien's property. This forum need not consider whether the Claimant might have done this, for it is not the Claimant's responsibility to seek his wages from anyone but the Employer. The Employer's responsibility to pay the Claimant did not become Mr. O'Brien's responsibility when Mr. O'Brien allegedly prevented the Employer from having the funds to pay the Claimant.

As Judge Gillette noted in concurring with the decision in *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 503 658 P2d 1164 (1983),

> "The duty of an employer to pay is absolute. That is the message of ORS 652.140 . . ."

Regardless of the fact that the Employer or the Claimant may have had (or may have) legal recourse against Mr. O'Brien for whatever actions Mr. O'Brien took concerning the timber the Claimant cut, it is the Employer's responsibility to pay the Claimant what the Claimant earned in his employ. That responsibility is not diminished by the Claimant's not having recovered those wages from a third party. It is the Employer's duty, and his duty alone, to pay the Claimant.

5. Penalty Wages Due Under ORS 652.150

ORS 652.150 provides that if an employer willfully fails to pay any wages of any discharged employee, as provided in ORS 652.140, then, as a penalty for such non-payment, the wages of such employee shall continue from the due date thereof for up to thirty days. This statute further provides that the employer may avoid liability for the penalty by showing his or her financial inability to pay the wages at the time they accrued.

The Employer herein asserts that he is not liable for penalty wages under ORS 652.150 because, if he owed the Claimant any wages, he was financially unable to pay them. The Employer maintains that he was dependent on revenue from the sale of the logs the Claimant cut to pay the Claimant's wages, because he had no other resources with which to pay those wages. The Employer argues that when he could not sell some of the logs the Claimant cut, he could not pay the Claimant wages for cutting those logs.

The Employer's assertions are not persuasive. ORS 652.150 focuses upon the time the wages accrued, which herein was December of 1980. At that time and for some time thereafter, the Employer had the financial ability to make $150.00 monthly payments on a piece of property which was not his residence, and to make payments upon a pickup truck and a logging truck and trailer of substantial value. At that time, he had other business equipment (caterpillars and chain saws) worth $6300.00 at a minimum. The amount of these payments plus the value of these assets totaled, at a minimum, more than ten times what the Employer owed the Claimant in wages.

The meaning of ORS 652.150 is obvious: the only way an employer who has willfully failed to pay termination wages when due can avoid paying a penalty for that failure is to show that the employer could not have paid the employee the wages when they were due. There are no exceptions or qualifications to the phrase "financially unable." It is a very strict standard designed to impress upon employers the absoluteness of the duty to pay wages which ORS 652.140 imposes upon them. If an employer has chosen to apply his or her resources elsewhere than to an employee's wages, that the employer cannot escape penalty wage liability. Herein, the Employer chose to make payments on other debts and to retain all his business assets rather than to pay the Claimant. This choosing, or setting of priorities, falls within the umbra of unwillingness, not inability, to pay.

Accordingly, this forum has found that the Employer has not met the burden ORS 652.150 gives him of showing that he was financially unable to pay the Claimant the wages he owed the Claimant at the time they accrued. The Employer is liable for penalty wages under ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Kenneth

Cline to pay to the Bureau of Labor and Industries in trust for Terry C. Brown, the sum of FOUR THOUSAND ONE HUNDRED SIXTY NINE DOLLARS AND SIXTY-SEVEN CENTS ($4,169.67, representing $589.40 in unpaid and earned wages and $2,727.30 in penalty wages) plus interest compounded, at the rate of nine per cent per year for the period of December 18, 1980, until paid on $589.40, and at the rate of nine per cent per year for the period of January 17, 1981, until paid on $2,727.30. This payment must be delivered to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 SW 5th Avenue, Portland, Oregon, 97201.

In the Matter of

PORTLAND ELECTRIC

& PLUMBING CO.,

an Oregon corporation, and Warehouseman's Employers Trust Local 206, and Warehouseman's Local 206, Respondents.

Case Number 110-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued September 22, 1983.

SYNOPSIS

Respondent employer and Respondent union had a collective bargaining agreement providing limited health benefits for the pregnancy of an employee's spouse, while providing full benefits for other dependent's health needs. The Commissioner held that Respondent employer's failure to provide medical benefits to the spouses of male employees equal to the benefits provided to the spouses of female employees constituted discrimination against male Complainant in the "compensation, terms and conditions" of his employment because of his sex, in violation of ORS 659.030(1)(b). The Commissioner held that Respondent union's failure to reopen a collective bargaining agreement to obtain pregnancy benefits for the spouses of male employees constituted discrimination, in violation of former ORS 659.030(1)(f). Respondent trust did not "aid, abet, incite, compel or coerce" the doing of any of the acts of discrimination committed by the employer or the union, and therefore did not violate former ORS 659.030(1)(f). The National Labor Relations Act did not preempt Oregon discrimination law. The Agency was not estopped by recognizing that the law does not mandate benefits, or by an apparent reliance on EEOC guidelines previously rejected by the Ninth Circuit Court of Appeals. The Commissioner ruled that an insurance plan that has the purpose of discriminatory treatment cannot be a *bona fide* plan. The Commissioner awarded Complainant $3,923 plus interest for expenses from the birth of his first child against both the employer and the union, and $611 plus interest for expenses from the birth of his second child against the employer alone. ORS 659.020(1); 659.028; 659.029; 659.030(1)(a), (b), and (f).

The above entitled contested case came on regularly for hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 21, 1982, in Room 311, State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Robert D. Bulkley, Jr., Assistant Attorney General. Respondent Portland Electric & Plumbing Co. (hereinafter referred to as Respondent employer), was represented by Steven W. Seymour; Respondent Warehousemen's Local 206 (hereinafter referred to as Respondent union) was represented by Stephen H. Buckley; and Respondent Warehousemen's Employers Trust Local 206 (hereinafter referred to as Respondent trust), was represented by Richard H. Muller. Complainant John Peak was not present.

The Agency called as witnesses Louis A. Cate, Chief Executive Officer for Respondent Portland Electric & Plumbing Co.; Bruce Wilson, Secretary/ Treasurer of Respondent Warehousemen's Local 206; and Phyllis Spencer, Senior Claims Representative for United of Omaha Insurance Co. None of the Respondents called any witnesses.

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

RULINGS UPON MOTIONS

At the beginning of the hearing, the Agency moved to amend the Amended Specific Charges dated November 19, 1980, to add the language "pursuant to a collective bargaining agreement between Portland Electric and Plumbing Co. and Respondent Warehousemen's Local 206." There was no objection to this amendment and it was allowed.

The Agency further moved to delete the word "Respondent's" and after the word 'benefits" to insert "provided to spouses of employees of Portland Electric and Plumbing Co. who are in the bargaining unit". There was no objection to this language and the amendment was allowed.

The Agency then moved to strike the whole of the Affirmative Defense in Respondent employer's answer. The motion was denied.

RULING UPON ADMISSIBILITY OF EVIDENCE

During the course of testimony Respondent trust offered into evidence legislative history on Senate Bill 714 from the 1977 legislative session. The Agency objected, and a ruling on the admissibility of this evidence was reserved for this Final Order. I now admit this evidence on the grounds that it is relevant to the intent of the 1977 Legislature in adopting SB 714, now codified as ORS 659.029, since all Respondents here are charged with unlawful employment practices under both ORS 659.030 and 659.029.

FINDINGS OF FACT – PROCEDURAL

1) On June 9, 1980, John Peak filed a verified complaint with the Civil

Rights Division of the Bureau of Labor and Industries. His complaint alleged that Respondent employer and Respondent trust had discriminated against him and continued to discriminate against him because of his sex.

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

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts. It subsequently added the union as a party respondent pursuant to ORS 659.050.

4) The Bureau and the Respondents stipulated that the second pregnancy may be treated for all purposes in this proceeding as if Complainant had timely filed a formal complaint with the Bureau against the Respondents based on discrimination because of his sex, the Bureau had followed all appropriate procedural steps, including a determination of substantial evidence of discrimination, and the case had been consolidated with this case for all purposes.

FINDINGS OF FACT – THE MERITS

1) All times material herein, Respondent Portland Electric and Plumbing Co. was an Oregon corporation and engaged the personal services of one or more employees in Oregon.

2) At all times material herein Respondent Warehousemen's Local Union 206 was a labor organization as defined in ORS 659.010(9).

3) At all times material herein, Respondent Warehousemen's Employers Trust Local 206 was a Taft-Hartly Trust set up under 29 USC Section 186(c)(5) and was administered by four trustees, two of whom represented Respondent employer and two of whom represented Respondent union.

4) The Complainant is a male and has been employed in Respondent employer's warehouse since March 16, 1979. He is a member of and represented by Respondent union and is covered by its collective bargaining agreement with Respondent employer. His only employment-related medical benefits are those which the Respondent trust provides. Respondent employer employs at least one female worker who is represented by Respondent union.

5) On March 12, 1980, Complainant's wife, a covered dependent, delivered a baby. The insurance carrier paid the full amount for which it was liable toward the costs of the pregnancy and delivery.

6) On September 17, 1981, Complainant's wife, a covered dependent, delivered a second baby.

7) During the spring of 1978, Respondent employer negotiated a new collective bargaining agreement with Respondent union covering its union employees. This new contract covered the period from August 1, 1978, until July 31, 1981.

8) Although Respondent employer retained the services of an outside negotiator, Louis Cate, Chief Executive officer for Respondent employer at the time, directed the general course of the contract negotiations with Respondent union. Mr. Cate was a member of Respondent employer's Board of Directors and advised the board on policy issues involved in the negotiations.

9) The labor contract in existence between Respondent employer and Respondent union prior to the August 1, 1978, contract had provided equal pregnancy benefits to female employees and spouses of male employees by providing a flat fee amount for pregnancy related medical costs. No other medical condition under this earlier contract was covered on a flat fee basis. This was the only plan for pregnancy coverage available through the Respondent trust at the time.

10) In 1977 the Oregon Legislature enacted Senate Bill 714, later codified as ORS 659.029, which provides that

> "pregnancy, childbirth or related medical conditions or occurrences shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs . . ."

11) The contract covering the period August 1, 1978, to July 31, 1981, included pregnancy coverage for employees on the same basis as any other medical condition, but pregnancy benefits were excluded for spouses of employees. The contract did not exclude any other medical condition of a spouse besides pregnancy from coverage. A plan for providing pregnancy benefits for spouses was available as a "rider" on a medical policy and could have been obtained through the Respondent trust.

12) During negotiations on the August 1, 1978, to July 31, 1981, contract, Respondent union presented a proposal for health care coverage which included pregnancy benefits on a flat fee basis for employee spouses. This proposal was not accepted by Respondent employer.

13) Once Respondent employer and Respondent union agreed upon a contract and the medical benefits to be provided to employees and their spouses beginning August 1, 1978, Respondent trust was instructed to purchase coverage for the agreed upon benefits from a medical insurance carrier through a broker. Respondent trust did not participate in the negotiations between or decision by Respondent employer and Respondent union regarding what medical benefits would be provided for employees or their spouses. At the request of Respondent employer and Respondent union, Respondent trust obtained and provided information on what medical plans and riders were currently available for adoption by the parties. None of the plans presented by Respondent trust provided coverage for spousal pregnancies on an equal basis with other medical conditions. Respondent employer and Respondent union were free to accept the plan or reject them all.

14) Once Respondent employer and Respondent union agreed on a medical benefits plan, Respondent trust purchased the necessary coverage through United of Omaha Insurance Company. Respondent trust was then responsible for enforcing payment by Respondent employer of the required premiums. The purchase of a medical benefits policy by Respondent trust from United of Omaha created a contract for delivery of

benefits between Respondent trust and United of Omaha. Respondent trust is required to enforce the terms of the policy on behalf of the employees represented by Respondent union.

15) In October of 1978, after the 1978-1981 agreement between Respondent employer and Respondent union was signed and in effect, the United State Congress enacted 42 USC. 2000e-2(k) as part of the federal Civil Rights Act. The language of that statute is virtually identical to the language of ORS 659.029. The proposed federal legislation (S995) which ultimately was enacted had been introduced sometime earlier and served as the model for the wording of SB 714.

16) On March 9, 1979, the Equal Employment Opportunity Commission (EEOC) issued its Final Interpretive Guidelines on Sex Discrimination. In response to its illustrative Question 21, included as part of the Guidelines, EEOC stated that if an employer provides medical coverage for the spouses of both male and female employees, the coverage for all employee spouses must be equal and must cover all medical conditions, including pregnancy of a male employee's spouse. (Guidelines published at 44 Fed. Reg. 23804 *et seq.* (1979)) The federal civil rights law contains a section, 42 USC 2000e-2(a)(1), which is virtually identical to the provisions of ORS 659.030(1)(a) and forbids an employer to "discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's . . . sex." The EEOC guidelines were based on the language of newly enacted 42 USC 2000e-2(k) which provides that the term "because of sex" or "on the basis of sex" includes "because of or on the basis of pregnancy."

17) After the EEOC guidelines were issued, Mary Roberts, Commissioner of the Bureau of Labor and Industries, requested an Attorney General's Opinion on the question of whether Oregon statutes require employers to provide pregnancy coverage to the wives of male employees equal to the medical coverage provided to the husbands of female employees. The answer was "yes". 40 AG 231 (1980).

18) As a result of passage of state and federal legislation and the issuance of the EEOC guidelines, and upon the advice of its insurance agent, Respondent employer purchased pregnancy coverage for spouses of the male employees who were not covered by the collective bargaining agreement with Respondent union, but did not reopen the union contract or take any other steps to provide the benefits to the spouses of union employees. Nor did Respondent employer check with its attorney to determine what its legal obligation was to provide pregnancy benefits to employee spouses.

19) In August of 1980, Respondent trust made available to Respondent employer and Respondent union for the first time a rider on existing medical coverage which would provide coverage for spouses' pregnancies on the same basis as any other medical condition.

20) Approximately one month prior to expiration of the collective bargaining agreement on July 31, 1981, Respondent union gave Respondent

employer the written notice of opening of new negotiations required under the existing contract. Prior to that time however, Respondent union had not attempted to reopen the contract in order to obtain pregnancy benefits for employee spouses. Nor did Respondent union contact Respondent employer to inform it that any problem existed regarding employee spouse coverage.

21) The medical coverage provided to the employees and their spouses and other dependents is part of the total compensation negotiated by the Respondent union and paid to employees by Respondent employer.

22) Negotiations on a new collective bargaining agreement between Respondent employer and Respondent union to cover the period from August 1, 1981, to July 31, 1982, began shortly before the existing contract expired on July 31st, and lasted until an agreement was signed on October 27, 1981.

23) During negotiations on the new agreement Respondent employer sent a letter to Respondent union in July of 1981 offering to upgrade medical coverage under the new contract to include pregnancy benefits for employee spouses effective August 1, 1981. However, in a later letter to Respondent union, dated September 29, 1981, Respondent employer offered to upgrade the medical coverage for spouses effective from the date the new contract is signed.

24) Respondent union attempted to have Respondent employer agree to Plan C with maternity option which included pregnancy coverage for spouses and to make the coverage retroactive to August 1, 1981, under the new contract. Respondent employer ultimately agreed to Plan C with maternity option, but refused to agree to make benefits retroactive, although pension benefits were made fully retroactive. It was Mr. Cate's decision to not make the new medical coverage for spouses retroactive to August 1, 1981, and his decision was based on the fact that it would have cost Respondent employer several thousand dollars to do so.

25) Under the terms of the new contract, equal coverage for all medical conditions of both male and female spouses of employees did not take effect until October 1, 1981, notwithstanding the fact that the August 1, 1978, to July 31, 1981, contract required that any retroactively of benefits under a new contract shall date from the date of expiration of the existing contract, which, in this case, was July 31, 1981.

26) As of August 1, 1981, Respondent employer's union employees were covered under Plan C provided by United of Omaha and purchased by Respondent trust. Plan CCV-M which provided pregnancy benefits to spouses on the same basis as any other medical condition took effect for Respondent employer's union employees on October 1, 1981.

27) At the time of the birth of Complainant's first child in March of 1980, the medical benefits coverage for spousal pregnancy under the 1978-1981 collective bargaining agreement (Plan A) provided only $350.00. The total cost of this first pregnancy and delivery however was $4677.59. After the $350 was paid under the

policy, Complainant was left with a bill of $4327.59. If Plan AM had been in effect, which included "M" rider treating spousal pregnancies on an equal basis with any other medical condition, the policy would have paid $4273.83, leaving Complainant with a bill of only $403.76.

28) At the time of the birth of Complainant's second child in September of 1981, the medical benefits coverage for spousal pregnancy under the new 1981-1982 collective bargaining agreement (Plan C), effective August 1, 1981, provided $1249.34. The total cost of the second pregnancy and delivery was $1943.71, leaving an amount to be paid by Complainant of $694.37. If Plan CM benefits had been in effect from August 1, 1981 (instead of having been made effective October 1, 1981, by the decision of Respondent employer), Complainant's spouse's pregnancy would have been treated on an equal basis with any other medical condition, and the policy would have paid $1860.95, leaving Complainant with a bill of only $82.76. As a result of an error the policy did pay the full $1860.95 on this second pregnancy, but Complainant has been billed for the $611.61 overpayment and is required to repay this amount.

ULTIMATE FINDINGS OF FACT

1) Complainant is a male and was employed by Respondent employer on March 16, 1979. From that date to the present he has been a member of Respondent union and has been covered by its collective bargaining agreements with Respondent employer.

2) Under the various collective bargaining agreements negotiated between Respondent employer and Respondent union, Respondent employer has provided a medical benefits policy to its union employees and their spouses and dependents as part of the employees' total compensation. Respondent trust provided information regarding available medical benefits plans to Respondent employer and Respondent union during the course of negotiations on the collective bargaining agreements. Respondent trust then purchased the agreed upon policy through an insurance broker and enforced Respondent employer's obligation to pay the premiums in the agreed amount.

3) Under the collective bargaining agreement in existence from August 1, 1978, until July 31, 1981, the medical benefits policy provided to the spouses of male union employees excluded coverage for pregnancy and pregnancy-related medical conditions. The policy provided to the spouses of female union employees provided coverage for all medical conditions.

4) Complainant's wife delivered a baby on March 12, 1980. The medical benefits policy did not provide coverage for spousal pregnancies on the same basis as any other medical condition, and as a direct result Complainant was required to pay expenses of $3923.83 above what he would have paid if his spouse's pregnancy had been treated like any other medical condition. Complainant has been damaged in that amount.

5) The collective bargaining agreement between Respondent employer and Respondent union in effect for the period from August 1, 1981, to July 31, 1982, did include full coverage for spousal pregnancies on the same basis as any other medical condition. However, the agreement was not signed by the parties until October 27, 1981, and Respondent employer would only agree to make the new spousal pregnancy coverage retroactive to October 1, 1981. Thus the limited coverage under the 1978-1981 agreement continued to apply until October 1, 1981. Other provisions of the new agreement, such as pension benefits, were made retroactive to August 1, 1981.

6) Complainant's wife delivered a second baby on September 17, 1981. As a direct result of the fact that benefits for this pregnancy and delivery were still governed by the 1978-1981 agreement, Complainant was required to pay expenses of $611.61 above what he would have paid if the pregnancy had been treated like any other medical condition, and Complainant has been damaged in that amount.

CONCLUSIONS OF LAW

1) At all times material herein Respondent employer was an employer subject to the provisions of ORS 659.010 to 659.110, specifically ORS 659.030.

2) At all times material herein, Respondent union was a labor organization subject to the provisions of ORS 659.010 to 659.110, specifically ORS 659.030.

3) Respondent trust is a person within the meaning of ORS 659.010 and is therefore subject to the provisions of ORS 659.010 to 659.110.

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

5) Respondent employer's failure to provide medical benefits to the spouses of male employees equal to the benefits provided to the spouses of female employees constitutes discrimination against Complainant in the "compensation, terms and conditions" of his employment because of his sex, and is an unlawful employment practice in violation of ORS 659.030(1)(b).

6) Respondent union's failure to reopen the August 1, 1978, to July 31, 1981, collective bargaining agreement to obtain pregnancy benefits for the spouses of male employees constituted discrimination.

7) Respondent trust did not "aid, abet, incite, compel or coerce" the doing of any of the acts of discrimination committed by Respondent employer or Respondent union and therefore did not violate ORS 659.030(1)(g).

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

OPINION

The essential facts, including the amount of damages, in this matter are not in dispute and there was little conflicting testimony at the hearing. Thus the proposed decision and conclusions of law do not turn on the resolution of and findings on disputed facts but whether, given the agreed set of facts, one or more of the Respondents discriminated against Complainant in the ". . . compensation . . . terms, conditions or privileges of employment" on

the basis of sex and in violation of ORS 659.030.

It is important to keep in mind throughout the discussion in this Opinion that the resolution of the ultimate issues does not depend on the existence in the statutes of ORS 659.029, which defines the phrase "because of sex" to include "because of pregnancy, childbirth and related medical conditions," but depends, rather, on the existing principles of ORS 659.030.

During the hearing in this matter the issue was raised of whether the legislative history regarding passage of Senate Bill 714 (now codified as ORS 659.029) during the 1977 regular legislative session should be read to limit the application of its provisions to female employees only. While the legislative history submitted was admitted into evidence and made part of the record in this matter, it was not done so with the intention of allowing the terms of ORS 659.029 to be read to limit the otherwise general applicability of the provisions of ORS 659.030 against discrimination in employment on the basis of sex. ORS 659.029 does not control the outcome of this case and as a consequence the legislative history surrounding passage of that statute is not instructive and will not be addressed further.

In order to reach a decision in this matter a number of separate legal issues had to be addressed and resolved. These issues were outlined at the close of the hearing on December 21, 1982, and all parties submitted post-hearing briefs stating their various positions on each issue. For ease of discussion, the issue are set out separately below.

1. If an employer provides medical benefits to the dependents of its employees, does the failure to provide pregnancy benefits for the wives of male employees on the same basis as all other medical conditions constitute unlawful discrimination against the male employee in the "terms, conditions or privileges" of his employment under ORS 659.030?

The medical benefits policy for employees of Respondent Portland Electric and Plumbing Co. which was in effect when Complainant's wife delivered a baby on March 12, 1980, and a second baby on September 17, 1981, provided a flat payment for a spousal pregnancy and delivery although all other medical conditions of a spouse were covered to the full percentage allowed, including conditions which were exclusive to males. The determinative issue then is whether the public policy of the State of Oregon against sex discrimination in employment, embodied in the language of ORS 659.030, prohibits an employer from providing a medical plan for employees and their spouses and other dependents which fully insures all medical risks except a common one to which only the wives of male employees, that is, females, are subject.

The result of the failure to provide medical coverage for the pregnancies of wives of male employees on the same basis as other medical conditions is that female employees receive greater medical benefits for their husbands since no medical condition which they might contract is excluded from full coverage. At the hearing the witnesses for both Respondent employer and Respondent union testified that the medical benefits policy provided to employees for themselves and their families constitutes part of the total compensation paid to the employees by Respondent employer.

Respondent employer contends that if any sex discrimination existed in the provision of medical benefits to the spouses of male employees it does not constitute an unlawful employment practice because it stems from a bona fide occupational requirement reasonably necessary to its business and the practice is therefore protected under ORS 659.030(1)(a). Respondent employer's argument is that Complainant was represented by a union with which employer was required by the National Labor Relations Act to bargain on the mandatory subject of health benefits, and that the collective bargaining process is a bona fide occupational requirement reasonably necessary to the normal operation of its business.

Although public policy and specific federal and state laws protect and encourage the collective bargaining process, such process and the contractual agreement which is its end result, cannot be used to thwart the separate statutory prohibitions on discrimination in employment. An employer and a union cannot avoid the force of Oregon's civil rights laws merely by contracting to provide unequal compensation to male and female employees. It is doubtful that either Respondent employer or Respondent union would argue, for instance, that a contract that permitted an employer to pay employees of one race lower wages than employees of another race for equal work would be exempt from the prohibitions of ORS 659.030 merely because it was entered into as a result of mandatory collective bargaining and was therefore claimed to be a protected bona fide occupational requirement. While the example may be extreme, the principle is directly applicable here. A labor contract cannot be used as a shield by either an employer or a union where the provisions of the contract are violating public policy and statute.

The Oregon Supreme Court has held in *Bronson v. Moonen*, that:

> "As a general rule, an agreement made in violation of a statute is void, but the rule is not 'inexorable and unbending.' * * *
>
> > "* * * An agreement is illegal if it is contrary to law, morality or public policy . . . Plain examples of illegality are found in agreements made in violation of some statute; * * * an agreement is illegal if it violates a statute or cannot be performed without violating a statute.'" (Citations omitted.) 27 Or 469, 478, 528 P2d 82, 86 (1974).

Just as the employer cannot justify the payment of unequal compensation to employees on the basis of sex on the grounds that it was required by a collective bargaining agreement, neither can Respondent union bargain away an employee's civil rights. An individual employee cannot waive or prospectively bargain away civil rights guaranteed by statute or by state or federal constitution, and a union representing the individual employee cannot usurp and bargain away those rights in the collective bargaining process.

Alexander v. Gardner-Denver Company, 415 US 36, 51 (1974).

Respondent employer further contends that because no plan was available from Respondent trust at any time material to the matter here it was "impossible" for Respondent employer to provide pregnancy coverage to the wives of male employees, and that such "impossibility" constitutes a sufficient and good defense to the Specific Charges. This argument fails on several grounds.

First, after the issuance of the EEOC guidelines in March of 1979 interpreting the new federal Pregnancy Discrimination Act, Respondent employer purchased separate pregnancy coverage for the spouses of its male employees who were not covered by the collective bargaining agreement, so such coverage was obviously available in the market place and Respondent employer was aware of its legal obligation to provide such coverage.

Second, in August of 1980, Respondent trust made available a rider on the existing medical coverage which would have provided coverage for spousal pregnancies on the same basis as any other medical condition. Neither Respondent employer nor Respondent union made any effort to add this rider to the existing plan.

Moreover, Respondent employer's argument of "impossibility" is completely without foundation as to Complainant's wife's second delivery, since that delivery occurred in September of 1981, after the previous collective bargaining agreement had expired and full medical coverage for spousal pregnancy was not only available but had been agreed upon as part of the new collective bargaining agreement concerning the period of August 1, 1981, to July 31, 1982. However, for strictly financial reasons, Respondent employer refused to allow the new medical benefits policy to take effect until October 1, 1981, thus precluding full coverage for Complainant's wife's second delivery. Financial exigency does not equal "impossibility."

The specially concurring opinion by Circuit Judge Eugene A. Wright in *EEOC v. Lockheed Missiles and Space Co., Inc.,* 680 F2d 1243 (1982), while agreeing with the holding of the majority that failure to provide equal coverage for pregnancy for employee dependents does not constitute sex discrimination, articulates a different rationale for the court's decision. This rationale is also cited by both Respondent employer and Respondent union. Succinctly, the argument is that all dependents' pregnancies are treated alike for coverage purposes, and that a female employee who has an unmarried pregnant daughter is required to pay for the cost of that pregnancy on the same basis as a male employee who has a pregnant dependent either a wife or a daughter, and therefore there is no impermissible discrimination between dependent health benefits provided to male and female employees.

While this point of view has some surface logic it breaks down upon closer analysis. Proponents of this argument assume one monolithic group of dependents, whereas, in fact there are two distinct classes of dependents, spouse and children, and the question of whether failure to provide equal coverage for dependent pregnancy

constitutes sex discrimination in violation of ORS 659.030 must be answered separately for each class. Indeed, the medical policy involved here delineates the two classes of dependents as "the spouse of the protected person" and the "protected person's unmarried minor children."

Looking at the class of dependents consisting of an employee's unmarried minor children, it is indisputable that male and female employees are equally likely to have an unmarried pregnant daughter, thus an employer could provide a medical policy which excluded or limited coverage for the pregnancies of employee's children without violating ORS 659.030, because such a policy affects both sexes of employees equally.

As to the class of dependents consisting of employee spouses, however, it is equally indisputable that under the laws of nature and the State of Oregon only a male employee can have a pregnant female spouse. Thus there can be no equality of spousal medical benefits for male and female employees where coverage for pregnancies is excluded or limited. If spousal medical benefits are unequal for male and female employees then compensation is unequal since, as representatives of both Respondent employer and Respondent union testified, medical benefits are part of an employee's total compensation. ORS 659.030 prohibits an employer from discriminating against an individual in compensation because of that individual's sex, whether male or female. By denying or limiting coverage for spousal pregnancies and not denying or excluding coverage for any other medical condition, Respondent employer and Respondent union have denied male employees, such as Complainant, coverage for a medical condition which is unique to their spouses and have thereby denied him equal compensation in employment.

2. Can the question of whether it constitutes an unlawful employment practice for an employer to provide to the dependents of its employees medical benefits which exclude coverage for pregnancy, or discriminate against male employees and their spouses, be decided wholly under Oregon law?

Under the National Labor Relations Act, 29 USC Section 151, *et seq.,* medical benefits for employees and their dependents are part of the "terms and conditions of employment" and as such are a mandatory subject of bargaining. Respondent employer argues that the medical benefits plan at issue here was provided to employees as a result of an agreement reached through collective bargaining between Respondent employer and Respondent union, and that once such agreement is reached the NLRA protects not only the bargaining tactics but also the terms of the agreement itself from any contrary provisions of state law. Respondent's stated position is that pre-emption of state law on a subject or issue by the NLRA depends on the effect of the state law on NLRA policy, and the fact that a state law is enacted for neutral purposes cannot save it from pre-emption.

Respondent employer cites the cases of *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission,* 427

US 132 (1976) (hereafter "*Lodge 76*") and *San Diego Building Trades Council et al. v. Garmon,* 359 US 236 (1959), for the proposition that so long as the parties engaging in collective bargaining meet the requirements set by Congress in the NLRA and negotiate in good faith on those items on which bargaining is mandatory, the actual terms of an agreement are subject only to the free play of economic forces.

The *Lodge 76* case involved the refusal by a Wisconsin union and its members to work overtime during a period when the union and the employer were engaged in negotiations for renewal of an expired collective bargaining agreement. The employer filed an unfair labor practice claim with the NLRB, but that charge was dismissed on the grounds that the refusal to work overtime was not a violation of the NLRA. The employer then filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission, which held that although such refusal was neither protected nor prohibited by the NLRA, it did constitute a violation of state law. A cease and desist order was entered against the union. The Wisconsin courts upheld the Commission order.

The United State Supreme Court, however, reversed the Wisconsin Supreme Court and held that the state cannot regulate peaceful and otherwise lawful conduct or activity engaged in by one party during labor negotiations, which is designed to bring economic pressure to bear on the other party, because the use of economic pressure is "part and parcel of the process of collective bargaining" and as such is specifically contemplated by the NLRA. *Id* at 149. The court concluded that the congressional purpose in enacting the NLRA would be frustrated if Wisconsin could enact state law prohibiting the use of non-violent "self-help" economic activity, in this case union members' refusal to work overtime, as part of a party's negotiating strategy.

The *San Diego Building Trades Council* case cited by Respondent actually is the later of two cases decided by the United States Supreme Court which arose from the same labor incident.

In the first case, *San Diego Building Trades Council et al.,* 353 US 23, a California trial court had entered an injunction and awarded damages to an employer for economic injury resulting from the peaceful picketing of the employer's plant by labor unions which were not in fact the bargaining agents for a majority of the employer's employees. The trial court found that the sole purpose of the unions' picketing was to compel the employer to execute a proposed contract which would require all employees to be union members, and the court consequently entered an injunction against the union and awarded $1,000 damages for losses sustained by the employer. At the same time the suit was filed by the employer, the union began a representation proceeding before the NLRB. The NLRB, however, declined jurisdiction over the proceeding because the amount of interstate commerce involved was not sufficient. On the basis of the declination by the NLRB, the California Supreme Court determined that it had jurisdiction, sustained the judgment of the trial court, and also decided that the conduct of the union was an unfair labor practice in violation of Section 8 (b)(2) of the NLRA and therefore was not privileged collective bargaining activity.

The United State Supreme Court granted *certiorari,* vacated the judgment, and remanded the case because the California Supreme Court had failed to state which law, state or federal, had been the basis for granting the injunction and awarding the damages.

On remand, the California Supreme Court set aside the injunction on the basis of the United State Supreme Court's holding in the case of *Guss v. Utah Labor Relations Board,* 353 US 1, which was decided together with the first *San Diego Building Trades Council* case. In the *Guss* case the Supreme Court held that the NLRB's refusal to take jurisdiction over a labor dispute does not empower a state to regulate activities that the NLRA would otherwise prohibit it from regulating. Thus, the California court could not enjoin peaceful union activity.

However, the California Supreme Court did affirm the damages award on the grounds that the union's picketing activities constituted a tort under general tort provisions of state law and under specific state statutes dealing with labor relations. The United States Supreme Court again granted *certiorari* to decide whether the NLRA also prevented a state from awarding damages for union activity which it had no authority to enjoin. This was the second *San Diego Building Trades Council* case and is the one cited by Respondent employer.

The United States Supreme Court decided that the NLRA precludes such an award of damages and stated that since the union activity involved is within the scope of Section 7 (concerted activities) and Section 8 (unfair labor practices) of the NLRA, California had no jurisdiction in the matter. The court stressed that it is the nature of the activity involved which will determine whether state jurisdiction is preempted.

> "Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting. (Footnote omitted) * * * When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield." 359 US at 243, 244.

It is apparently this language which Respondent employer relies on in arguing that the NLRA preempts any state law which purports to impose anti-discrimination standards on the actual benefits provided under an employee benefits plan by virtue of the fact that plan is the end result of collective bargaining activity. Distilled, the argument is that because the NLRA

protects collective bargaining activities and other labor practices from interference by the states, the substantive terms and conditions of a labor contract are protected.

However, the United State Supreme Court in both the *Lodge 76* case and the two *San Diego Building Trades Council* cases was careful to emphasize that its holdings extended only to protect activity and conduct which falls within the scope of the NLRA. The court stated in the second *San Diego Building Trades Council* case 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. (Citations omitted.) * * * 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." (Footnote omitted.) 359 US at 243, 244.

In this matter it cannot be rationally argued that the Commissioner of the Bureau of Labor and Industries is impeding protected collective bargaining activities or conduct by exercising her jurisdiction to enforce the law prohibiting discrimination in compensation on the basis of sex. However, if it could be construed that an agreement between the union and an employer to provide sexually discriminatory medical benefits to covered employees constitutes "activity or conduct," such activity or conduct would constitute the kind of conduct which "touched interests so deeply rooted in local feeling and responsibility" that federal law would not render a state powerless to prohibit the conduct.

The "conduct or activity" involved here touches and indeed thwarts the deeply rooted interest of this state in protecting its citizens from sex discrimination in the terms, conditions or compensation of employment. This state's concern is expressly manifested in ORS 659.020(1), which provides:

> "It is declared to be the public policy of Oregon that practices of discrimination against any of its inhabitants because of race, religion, color, sex, marital status or national origin are a matter of state concern and that such discrimination threatens not only the rights and privileges of its inhabitants but menaces the institutions and foundation of a free democratic state."

Respondent employer also raises the question of whether Oregon, by requiring an employer to provide equal medical benefits to the spouses of male and female employees, is acting inconsistently in an area on the periphery of the subject matter covered by the federal Employee Retirement Income Security Act (ERISA), 29 USC Section 1001 et seq. Respondent employer cites the cases of *Gast v. State ex. rel. Stevenson,* 36 Or App 441, 585 P2d 12 (1978), and *Attorney General v. The Travelers Insurance Company et al.,* 433 NE2d 1223 (Mass. 1982), in raising this issue.

One of the issues in the *Gast* case was whether ORS 659.029 is preempted by ERISA to the extent that it requires employee benefit plans to include pregnancy benefits. The Oregon Court of Appeals held that although ORS 659.029 does regulate medical fringe benefit programs which come within the definition of "employee benefit plans" under Section 1002 of ERISA, the question of whether the broad language of Section 1144(a) of ERISA preempts ORS 659.029 must still be addressed. Section 1144(a) provides that with certain exceptions, the provisions of ERISA

> "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

The Court of Appeals found that

> "The subject matter of ERISA does not compel the conclusion that Congress intended to preempt states in regulating such things as pregnancy benefits." *Id.* at 452. (Emphasis in original.)

The Court added that

> "there is no suggestion in the statute that Congress intended to regulate the substance of health and welfare benefits." *Id.* at 454 (Emphasis supplied.)

Since Congress had not acted to specify the types of benefits to be provided, Congress could not have intended to supersede state law on this issue, as "supersede" means to supplant one thing with another. *Id.* at 458.

In the *Travelers Insurance* case, the Supreme Judicial Court of Massachusetts was presented with the issue of whether a Massachusetts statute prescribing mandatory minimum mental health care benefits which must be included in any general insurance policy is preempted by ERISA. The court ruled that the state statute is one which "regulates insurance" and as such comes directly under the savings clause, Section 1144 (b)(2)(A), of ERISA, which exempts "any law of any state which regulates insurance."

The Massachusetts court also examined the question of whether the Massachusetts statute is pre-empted by the NLRA on the grounds that it affects health benefits, a subject of mandatory collective bargaining. In discussing whether the NLRA preempted the state statute, the court acknowledged that Congress enacted the NLRA to preserve an area for "autonomous private ordering by labor and management free from most forms of regulation by either the NLRB or the States," citing to *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, supra,* and that "when labor and management agree upon subjects of mandatory bargaining, the terms of their agreement 'themselves become expressions of federal law, requiring preemption of intrusive state law'," citing to and quoting from *Alessi v. Raybestos-Manhattan, Inc., supra* at 526. *Id.* at 1230. The Massachusetts Court, however, then went on to cite the various holdings by the United States Supreme Court where that court found exceptions to NLRA preemption, particularly the holding in the *San Diego Building Trades Council* case, *supra,* and concluded that there was no preemption because the Massachusetts statute requiring mental health coverage did not regulate or affect Labor-Management relations as such, and Congress could not have

intended, by enacting the NLRA, to prevent the states from enacting laws addressing such problems as mental health. *Id.* at 1231, 1232.

Neither the reasoning nor the holdings of the cases discussed above under Issue #2 support Respondent employer's argument that federal law impedes Oregon from prohibiting employment discrimination against a male employee on the basis of sex by limiting the medical benefits provided to his spouse.

3. Is the State of Oregon, through the Bureau of Labor and Industries, estopped from bringing and prosecuting the Specific Charges in this matter by virtue of the position which the state took at the retrial of the *Gast v. Stevenson* case in Multnomah County Circuit Court?

The decision of the Court of Appeals in the *Gast* case reversed the Circuit Court for Multnomah County, which had held in a suit for declaratory judgment filed against the State by Warehousemen's' Employers Trust Local 206, Respondent trust here, that ORS 659.029 (Senate Bill 714) was invalid on the grounds that it violated the Supremacy Clause of Article VI of the United States Constitution insofar as it applied to employee welfare benefit plans subject to ERISA. After the Court of Appeals decision was rendered, the matter came on for retrial of three remaining issues raised by the trust and not previously ruled on.

One of the issues raised by the trust was, as phrased by the trust:

> "Does Senate Bill 714 mandate benefits for pregnancy, childbirth or related medical conditions to be provided for the female dependents of male workers, likewise, must fringe benefits be provided to the male dependents of female workers? Does dependent coverage, if required by Senate Bill 714, apply to pregnancies experienced by workers' unwed children and their male counterparts?" (sic)

At the hearing the State submitted a supplemental trial memorandum which the trial court relied on and cited as the basis of its Final Amended Decree dated October 3, 1979. In the memorandum the State took the position that because the plaintiff trust regarded itself in compliance with the provisions of ORS 659.029, a justiciable controversy no longer existed and therefore the plaintiff was not entitled to a ruling. The State further alleged that because of the way Plaintiff had framed the issue no dispute existed between Plaintiff and Defendant because Defendant agreed that nothing in ORS 659.029 required an employer to provide <u>any</u> coverage or benefits whatever to employee dependents. The State added, however, that if benefits <u>are</u> provided they must be equal.

The Agency takes the identical position here that neither ORS 639.030 nor 659.029 mandate any medical coverage at all for employee dependents. The issue presented by the matter before us today, however, is whether an employer who <u>does</u> provide dependent medical coverage can exclude or limit pregnancy coverage. That question was <u>not</u> raised by Respondent trust in the *Gast* case and was not litigated. Therefore, neither the decision of the circuit court on retrial nor the position taken by the State are relevant and do not constitute any basis for alleging estoppel against the State.

Also, as pointed out by the Agency in the post-hearing brief filed in this matter, estoppel is not available to Respondent trust as a defense because

> "Estoppel protects only those who materially change their position in reliance on another's acts or representations. There must be a right to rely, and the reliance must be reasonable."

Hess v. Seeger, 55 Or App 746, 761, 641 P2d 23 (1982). Respondent trust has not alleged or proved that it acted or failed to act in reliance on the State's agreement in the *Gast* case that employers were not required to provide medical benefits to employee dependents.

4. Is the State of Oregon, through the Bureau of Labor and Industries, estopped from bringing and prosecuting the Specific Charges in this matter because the Attorney General's Opinion, stating that medical benefits provided the dependents of employees could not exclude pregnancy coverage, was based upon EEOC guidelines which subsequently have been held invalid by the US Court of Appeals for the Ninth Circuit?

In January of 1980, then Attorney General James A. Redden issued an opinion in response to the following question:

> "Do Oregon statutes require subject employers to provide medical benefits for pregnancy, childbirth or related medical conditions for the wives of male employees, equal to medical benefits provided for the husbands of female employees?"

The Attorney General answered "Yes" to this question citing as the basis for his answer ORS 659.030, the legislative history of the federal civil rights laws after which Oregon's laws are patterned, and the guidelines issued by the EEOC on March 9, 1979. The opinion stated:

> "To provide lesser medical benefits for male employees by not providing pregnancy coverage for their wives would discriminate against male employees as to the conditions and privileges of their employment * * * Pregnancy is a gender-related exclusion from medical benefits plans and not a condition-related exclusion as the Supreme Court held in *General Electric Co. v. Gilbert,* 429 US 125 (1976). *See* House Report No. 95-948. A gender-related exclusion is no more valid applied to the spouses of male employees than applied to female employees. Either application serves to favor employees of one gender over employees of another." 40 AG 231 (1980).

Although the issuance of the EEOC guidelines was a significant factor in the Attorney General's 1980 opinion, it was not the only reason. And the fact that the United States Court of Appeals for the Ninth Circuit held in the case of *EEOC v. Lockheed, supra*, that the EEOC guidelines went beyond Congress' intent in enacting the federal Pregnancy Discrimination Act and therefore would not be upheld, does

not mean that the opinion of the Attorney General of this state, interpreting this state's law, is not valid. Moreover, in the case of *Newport News Shipbuilding Co. v. EEOC,* 682 F2d 113 (1982), decided by the United States Court of Appeals for the Fourth Circuit, the EEOC guidelines were upheld.

> "At the time of the hearing on this matter and at the time counsel for all parties prepared and submitted post-hearing briefs, the federal courts were split on the issue of the validity of the EEOC guidelines, with the Ninth Circuit holding the guidelines invalid in the *Lockheed* case and the Fourth Circuit upholding the guidelines in the *Newport News* case. On June 20, 1982, the United States Supreme Court resolved this conflict by affirming the Fourth Circuit decision. The Court held that the employer's health plan discriminated against married male employees in violation of Section 703 (a)(1) of Title VII of the Civil Rights Act of 1964, by providing them with a benefits package for their dependents that was less inclusive than the benefits package provided to married female employees because the benefits package provided to male employees contained limitations on pregnancy coverage."

However, even if the federal courts, including the United States Supreme Court, were unanimous in finding that the federal Pregnancy Discrimination Act did not prohibit the exclusion of or limitations on medical benefits for the pregnancy of male employee's spouse, such federal case law, while often instructive, is not binding in this forum and would not and does not prohibit this state from granting greater protection against impermissible discrimination in employment under Oregon law and the Oregon Constitution.

We are constrained only in so far as we cannot provide less protection for a civil right than required by federal law or the United States Constitution; we can, as we choose to do here, guarantee greater protection.

The mere fact that the Bureau of Labor and Industries has received and relied upon a legal opinion from its attorney, which opinion is based in part on federal guidelines of disputed validity, does not in any way estop or prevent the Bureau from representing and protecting the civil right of an employee Complainant to be free of sex discrimination in employment. Again, as stated in the Agency's post-hearing brief submitted in this matter,

> "the state cannot be estopped from enforcing a public right. In *Corvallis Sand & Gravel v. State Land Board,* 250 Or 319, 328-29, 439 P2d 575 (1968), the Supreme Court noted that laches is similar to estoppel and then held that laches is not a defense against the state when it is enforcing a public right or protecting a public interest. The Court based its holding on previous cases in which it had decided that estoppel was not a defense unless the result would be inequitable to a high degree. No such inequity exists here. Enforcing the civil rights laws of the state is clearly protecting a public interest and enforcing a public right."

5. Do the provisions of ORS 659.028, as those provisions were written prior to November 1, 1981, supersede the provisions of ORS 659.030 where the alleged unlawful discrimination occurred as a consequence of the existence of a bona fide employee insurance benefit plan and the employer's observance thereof?

The Oregon Legislature sought, through adoption of its civil rights statutes, to prohibit and remedy discrimination in employment. In order to implement this manifest legislative purpose, the civil rights statutes must be given a liberal interpretation and, likewise, any exemptions from their applicability must be narrowly construed and applied.

One of he exemptions from Oregon's civil rights laws that Respondents seek to have applied here is contained in ORS 659.028, which at the time involved in this matter provided that:

> "It shall not be unlawful for an employer, employment agency, or labor, organization to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual."

On its face this statute appears to allow employers and labor unions to provide, as part of the collective bargaining agreement, a medical or other benefits package for employee which provides lesser benefits for one group of employees on the basis of their sex merely so long as such plan is not a subterfuge to evade the law of ORS chapter 659. Such a broad reading of the general provisions of this statute, however would serve only to abrogate the specific provisions against sex discrimination contained in ORS 659.030 and clarified in ORS 659.029. Therefore, in order to avoid the untenable consequences which would result from adoption of the broad interpretation urged by Respondents, and to insure that the policies embodied in Oregon's civil rights law are effectively implemented, ORS 659.028 must be narrowly construed.

In determining whether ORS 659.028 exempts Respondents' failure to provide equal spousal medical benefits to male and female employees, the key issue is whether the spousal benefits plan constituted a *bona fide* employee benefit plan. One of the provisions of the spousal medical benefits plan limits pregnancy coverage for dependents. Its purpose in treating pregnancy on a different, limited coverage basis was to provide less coverage for medical conditions of the wife of a male employee than was provided for the husbands of female employees. This purpose, however, violates separate Oregon law, ORS 659.030, against sex discrimination in the terms, conditions and compensation of employment. An employee benefit plan which violates the law against sex discrimination both when initially entered into and later when applied and adhered to, cannot be said to be a *bona fide* plan. The term *"bona fide"* means in good faith. A benefits plan which had as one of its purposes the provision of lesser benefits, and

therefore lesser compensation, to male employees cannot be said to be a "good faith" plan. And even though Respondent employer and Respondent union may argue that at the time they first entered into the medical benefits plan they did not appreciate that excluding spousal pregnancy from full coverage constituted unlawful discrimination in compensation against male employees, both Respondents were aware of the discrimination at the time that Complainant in this matter sustained his damages. They were aware at the time Complainant sustained his damages, that the benefits plan was not in fact a *bona fide* plan because it violated the provisions of ORS 659.030, yet they continued to apply, and did nothing to rectify, the discriminatory treatment of spousal pregnancies. Even a plan which was *bona fide* at the time it was entered into can lose that status if the principals to the plan know that its provisions are discriminatory, and yet continue to apply them.

Unfortunately, no Oregon cases have been found interpreting ORS 659.028, but the Iowa Supreme Court in 1978 addressed the identical issue raised here. In *Franklin Manufacturing Company v. Iowa Civil Rights Commission*, 270 NW 2d 829 (Iowa 1978) the court was called upon to construe Iowa statute section 601A.12 which provides:

> "The provisions of this chapter [601 A] relating to discrimination because of sex or age shall not be construed to apply to any retirement plan or benefit system of any employer unless such plan or system is a mere subterfuge adopted for the purpose of evading the provisions of this chapter."

The language of the Iowa statute is similar in purpose to ORS 659.028. The issue before the Iowa court was whether section 601A.12 exempted the group insurance plan provided by the employer to his employees from complying with the Iowa Civil Rights Act. The plan specifically excluded payment of benefits for "any period of disability due to pregnancy." The Iowa court held that the legislature's intent in adopting section 601A.12

> "was to exempt [from the Civil Rights Act] only those plans or benefits systems relating to retirement"

and further commented,

> "We are convinced any other interpretation would encourage, rather than inhibit, discrimination, policies." *Id* at p. 833.

This forum approves the reasoning and conclusions of the Iowa court as a separate basis for finding that the provisions of ORS 659.028 do not supersede the provisions of ORS 659.030 as they apply in this case.

6. To which Respondent is the discrimination chargeable, and how should the damages be assessed?

For purposes of this part of the Opinion, Complainant's wife's two deliveries will be considered separately.

The first pregnancy and delivery was subject to the medical benefits policy provided under the collective bargaining agreement in effect from August 1, 1978, to July 31, 1981. That policy provided coverage for spousal pregnancies only on a limited, flat fee basis. Respondent employer and Respondent union participated on an equal basis in the collective bargaining process and both Respondent employer and Respondent union are chargeable with knowing the minimum standards required by the law in providing spousal medical coverage.

Neither Oregon nor federal law required Respondent employer to provide medical benefits to either employees or their spouses or other dependents, even though NLRA does require an employer to bargain in good faith with a union on the issue of whether they will be provided and, if so, in what form. If agreement is reached that medical benefits are to be provided, those benefits must be provided in accordance with other applicable law, and an employer and a union are not free to collectively bargain away legally protected rights of employees.

Respondent employer is jointly and severally liable for Complainant's damages attributable to the first pregnancy and delivery because ORS 659.030 directly prohibits an employer from discriminating against an employee in compensation on the basis of the employee's sex. Providing lesser spousal medical benefits to a male employee discriminates against him in compensation.

Respondent employer argues in this matter that it was completely bound by the terms of the collective bargaining agreement in effect at the time and should be excused from all liability because of the agreement. This argument fails for the several reasons set out in other parts of this Opinion above. First, Respondent employer is the party who actually pays the agreed upon employee compensation and cannot avoid the requirement to pay equal compensation, and the employer is never prohibited by a collective bargaining agreement from paying more, if need be, to insure that compensation, in the form of medical benefits, is equal for both male and female employees.

Also, Respondent employer took affirmative steps to provide spousal pregnancy coverage to his non-union employees upon receiving outside advice that such coverage was required by law. This action was taken before Complainant's first baby was born. Thus Respondent employer knew that the coverage was required for employees and was available. It was unreasonable for Respondent employer to fail to provide this same coverage for its union employees because it assumed that the existence if a collective bargaining agreement nullified the requirements of the law.

Respondent union is also jointly and severally liable for Complainant's damages attributable to the first pregnancy and delivery because it failed to insist on the legally managed spousal pregnancy coverage for male employees, again, even though the EEOC guidelines were issued almost a year before Complainant's first baby was born. It also failed to initiate any reopening of the contract to provide full spousal pregnancy benefits after the Oregon Attorney General issued his Opinion in January of 1980, and it became clear that both Oregon and federal law required spousal coverage, when provided, to be equal, and that plans were available on the market. Respondent union is charged with

representing its members and protecting their legal rights in employment, and the failure of Respondent union to act, and its tacit agreement to and acceptance of the discriminatory compensation scheme for male union employees, constitutes aiding and abetting an unlawful employment practice under ORS 659.030(1)(f) (1979) (now ORS 659.030(1)(g)).

Complainant's damages for his wife's second pregnancy and delivery are solely attributable to Respondent employer because the 1978-1981 collective bargaining agreement containing the limited spousal pregnancy coverage had expired almost two months before Complainant's second child was born. Respondent employer does not dispute that it fully understood the requirements of the law to provide full spousal pregnancy coverage to male employees. Instead it chose, for purely economic reasons, to continue an illegal medical benefits policy for several months past the July 31, 1981, scheduled expiration date of the previous collective bargaining agreement.

Respondent trust is not liable for damages for either pregnancy involved in this matter because it took no part in negotiating the medical benefits to be provided to Complainant, nor is it an employer charged under the law with paying equal compensation to male and female employees. Its role was a passive one in that during the course of collective bargaining negotiations it provided information on medical plans available to Respondent employer and Respondent union upon their request. Once Respondent employer and Respondent union decided through the collective bargaining process on what medical benefits would be provided to employees, Respondent trust was charged with purchasing the agreed upon coverage and enforcing Respondent employer's obligation to pay the required premiums.

This case is distinguishable from the Final Order issued *In the Matter of Arden-Mayfair, Inc.*, 2 BOLI 187 (1981), because in this case Respondent trust did not make any decision or take any action to deny Complainant coverage for the birth of either of his children, whereas in the *Arden-Mayfair* case the trust had acted not only to pay the premiums required on the disability benefits policy involved, but had acted in concert with the insurance company to deny disability benefits to the complainant because the disability was occasioned by pregnancy.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of other similarly situated:

1) Respondent employer and Respondent union jointly and severally are hereby ordered to pay to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, by certified check payable to the Bureau of Labor and Industries in trust for John Peak, the amount of THREE THOUSAND NINE HUNDRED AND TWENTY THREE DOLLARS AND EIGHTY THREE CENTS ($3923.83), plus interest computed and compounded annually at the rate of nine percent from March 12,1980, the date of the birth of Complainant's first child, until the date upon which Respondents, or either of them, comply with this paragraph.

2) Respondent employer is hereby ordered to 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 John Peak, in the amount of SIX HUNDRED ELEVEN DOLLARS AND SIXTY ONE CENTS ($611.61), plus interest computed at the annual rate of nine percent from September 17, 1981, the date of the birth of Complainant's second child, until the date upon which Respondent employer complies with this paragraph.

3) Respondent employer and Respondent union are hereby ordered to cease and desist from discriminating on the basis of sex against employees.

In the Matter of
The CITY OF ROSEBURG,
Respondent.

Case Number 05-82
Amended Final Order of
the Commissioner
Mary Wendy Roberts
Issued February 22, 1984.

SYNOPSIS

The position of Transit Coordinator, held by female Complainant, involved work and responsibility that was substantially similar to that required of Respondent's Shop Superintendent, Water Foreman, and Maintenance Foreman positions, which were all held by males and were all compensated at a higher salary scale than the Transit Coordinator. Finding that Respondent failed to upgrade Complainant's compensation in accordance with a job analysis intended to achieve pay equity, and that the failure was due to Complainant's sex, the Commissioner ordered Respondent to increase Complainant's salary to the proper level immediately, and awarded Complainant the wage differential and retirement contributions she should have been paid, including periodic raises, since taking over the Transit Coordinator position. ORS 652.220; 659.030(1); OAR 839-04-030(3).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 1 and 2, 1982, in Room 200 of the Justice Hall Annex of the Douglas County Courthouse in Roseburg, Oregon, and in Room 216 of that Courthouse. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Robert D. Bulkley, Jr., Assistant Attorney General. Respondent City of Roseburg was represented by David A. Aamodt, Respondent's City Attorney. Complainant Debra Mobley was present throughout the hearing.

The Agency called as witnesses Michael Hoehn, Respondent's Director of Public Works; Carl Holmes, Respondent's Maintenance Superintend-

ent; Complainant; Valerion Piekarski, Greenskeeper for Respondent's Stewart Park Golf Course; Robert Triplett, Respondent's Maintenance Foreman; Mary Kent, Respondent's Assistant City Recorder; and Gay Fields, Chair of Respondent's Transportation Commission and member of its City Council.

Respondent called as witnesses Adney Bowker, Respondent's City Engineer and former Acting Director of Public Works; Ronald Thames, one of Respondent's Supervising Technicians; John Dunn, Respondent's Mayor; Roy Denham, Superintendent of Respondent's Sewer Division; Bruce Barton, Chief Treatment Plant Operator in Respondent's Water Division; Bill O'Byrne, a Serviceman IV in Respondent's Water Division; Dorothy Wolles, Administrative Secretary for Respondent's Public Works Department; George Stubbert, Respondent's City Manager; Complainant; and, jointly, Richard Salik and Kathleen Starostka, producers of a classification plan and salary study for Respondent.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about February 13, 1981, Debra Mobley filed a verified complaint with the Civil Rights Division of the Agency alleging that Respondent, her employer, had discriminated and continued to discriminate against her in her employment because of her sex.

2) Before the commencement of the hearing in this matter, both Complainant and Respondent received from this forum a copy of "Contested Case Rights and Procedures" and stated that they had no questions about it.

3) At hearing, all of the Agency's exhibits, plus six of Respondent's exhibits, were admitted before the Agency finished presenting its case in chief.

4) In documents which have been admitted as an administrative exhibit, the parties stipulated that the testimony of Robert Triplett can be considered as sworn. Accordingly, this forum has treated Mr. Triplett's testimony as sworn.

5) At hearing, after the Agency had concluded direct examination of Complainant and before Respondent began its cross examination, Respondent requested disclosure of statements Complainant had made to the Agency, to aid in Respondent's cross examination of Complainant. The Presiding Officer denied this request. On August 25, 1983, this forum reconsidered that ruling and granted Respondent's request.

To implement this grant, this forum removed from seal and examined an exhibit which had been offered at hearing by the Agency and admitted, with no objection by Respondent, as the direct statement of Complainant to which Respondent's request pertained and which Respondent did not already possess. The exhibit had been admitted under seal for the limited purpose of examination by any court reviewing the ruling not to disclose its contents.

The forum removed from the exhibit and struck from the record a statement concerning settlement efforts, because it was irrelevant to this matter and inadmissible. The forum sent to Respondent the remainder of the exhibit, which remains part of the record.

By letter dated September 1, 1983, Respondent notified this forum that as long as the exhibit remained part of the record "for the Commissioner's review," Respondent waived its right to cross-examine Complainant on the exhibit. Since the exhibit is an unsealed part of the record, Respondent's waiver is operative.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a municipal corporation which in the State of Oregon engaged the personal service of one or more employees, reserving the right to control the means by which such service was performed.

2) During all times material herein, Respondent served between 15,883 and 16,644 inhabitants through the operation of its mayor/council and city manager form of government. The elected Council appointed the City Manager, who administered Respondent's operation and reported to the Council.

3) During all times material herein, George Stubbert was Respondent's City Manager. As part of his duties, Mr. Stubbert was charged with full responsibility for Respondent's personnel (except its Municipal Judge) and was Respondent's only personnel officer.

4) During all times material herein, the Public Works Department was one of the ten departments of Respondent whose heads reported directly to Respondent's City Manager. Since February 1, 1980, the Public Works Department has consisted of five major divisions: Transit, Streets Maintenance, Engineering, Water/Sewer and Shops. (The Water/Sewer unit actually has been two separate divisions under the same person's administration.) During times material before February 1, 1980, the formal structure of the Public Works Department was the same, except that Transit was a unit within the Streets Maintenance Division.

5) In the mid 1970's, Don Bentz, Director of Respondent's Public Works Department, started Respondent's transit system. Respondent's Recorder/Treasurer, Richard Adams, worked with him in this endeavor. At Mr. Bentz' request, Carl Holmes, Respondent's (Streets) Maintenance Superintendent, assisted them by providing information for use in applying for a grant to support the transit system and helping lay out its routes. The transit system started operating in 1976. Mr. Holmes supervised its operation, using two donated twelve-passenger vans as buses and Streets Maintenance Division employees as drivers.

6) During all times material herein, the Transportation Committee, a body of lay people chaired by a member of Respondent's City Council, oversaw the transit system's operations, reviewed its budget and made recommendations to the City Council concerning transit policy, programs,

and budget requirements. During all times material herein, the Transportation Committee met on a monthly basis.

7) Effective October 1976 Respondent obtained federal funding to pay the transit system's drivers. The first driver Respondent hired for the transit system was Complainant, a female person. She began work on October 5, 1976, at the salary of $4.00 per hour, $694.00 per month.

8) Complainant's initial salary was equivalent to step one in Respondent's salary range seven. During all times material herein, each of Respondent's job classifications was assigned to a salary range consisting of six successively higher steps. Generally, the job performance of each of Respondent's employees was reviewed once each year, after the first year of employment, to determine whether that employee would receive a one-step "merit" (i.e., based on job performance) increase. Mr. Stubbert reviewed recommendations for merit increases before they were implemented, and he had the power to reject them.

9) When Respondent hired Complainant, she had driven large vehicles and done factory and restaurant work. She had not worked in transit, had not worked in an office since high school, and had no promotional or personnel supervision training or experience. Respondent hired her because she exhibited initiative.

10) After hiring Complainant, Respondent hired more drivers under federal funding and only used Streets Maintenance employees as relief drivers when necessary.

11) Complainant proved to be a hard-working employee who was very interested in and supportive of the transit system. During January of 1977, Complainant spoke with Mr. Bentz and Mr. Holmes, to whom she reported, about the fact that no one was promoting the transit system. Complainant volunteered to do so after her work hours.

Very shortly thereafter, Mr. Holmes took Complainant off her regular bus route and moved her into the Streets Maintenance Division's office to handle telephone calls concerning the transit system; do routine daily record keeping for the transit system; and handle public relations for the transit system, meeting with the public to explain the system. Complainant ceased driving buses unless a driver was absent.

Within a short time after this change, Mr. Holmes asked Complainant to attend the meetings of the Transportation Committee for him, which Complainant did. Mr. Holmes stopped attending them. In going to these meetings, Complainant began to work directly, particularly concerning promotion and scheduling of the transit system, with the Committee and Mr. Bentz, who also attended the meetings as staff. Both Mr. Bentz and the Transportation Committee reacted favorably to these direct interactions with Complainant.

12) As a result of moving Complainant into the office, Mr. Holmes spent less time on transit system work. He encouraged Complainant, who was very eager, to do more and more of what he had been doing concerning transit.

13) In April 1977, Respondent retired its vans from regular transit system use and began using two 22-passenger buses for that purpose. Complainant trained the drivers to operate these new vehicles and worked closely with Respondent's Shop Superintendent to learn everything she could about their operation, maintenance, and repair.

14) By June 1977, Complainant was speaking about Respondent's transit system at schools and on radio talk shows, staffing a transit system booth at the County Fair and State Transportation Week program, putting buses in local parades, developing a slide presentation on the transit system, making up and distributing fliers and posters notifying the public of a new route, working with non-profit organizations and a local hospital concerning their transit needs, taking a survey of the use of one of the routes, and holding monthly bus driver meetings to get feedback and suggestions from the drivers. When she reported these activities to the Transportation Committee on June 1, 1977, its Chair told her to "keep up the good work."

15) Effective July 1, 1977, Complainant's title was changed from Bus Driver to Senior Bus Driver. Her pay remained at step one of Respondent's range seven. By this time, Complainant was doing the work described in Findings of Fact 11 and 14 above, as well as doing the day-to-day supervision of the bus drivers, who now reported directly to Complainant. Her supervisory activities included but were not limited to driver scheduling and training and assisting in applicant interviewing. Mr. Holmes had asked Complainant to take on all of the above-described activities and responsibilities.

16) Effective October 1, 1977, Complainant received a raise in pay from step one to step two of range 7, pursuant to her annual job evaluation.

17) By at least early 1978, Complainant began preparing the monthly compliance reports required by the State of Oregon for the large ($25,000.00 - $49,700.00) state/federal operational grant which the transit system received during each year material herein. These reports outlined the transit system's administrative costs; operational costs; fare box, pass, and tax revenues, etc., and were required to verify that the grant moneys were being spent properly. Complainant created a new format and developed a system to generate better documentation for these reports, and made ridership calculation uniform among the drivers, thereby bringing the reports into compliance with the state's requirements.

At the same time, Complainant also was writing many of Mr. Holmes's reports and memos, at his request. No one else knew this, as Mr. Holmes signed these documents.

18) By early 1978, Complainant was devising and handling promotional campaigns for the transit system, creatively maximizing a small promotional budget. She thought up events such as jingle contests and drawings which generated a great deal of media coverage for the transit system. She worked with organizations in the area which expressed interest in the transit system. She expanded the activities described in Finding of Fact 14 above. At

the same time, Complainant continued to handle all transit system public relations, including investigating and resolving all complaints.

Mr. Bentz (and each of his successors) encouraged Complainant's promotional activities. The Transportation Committee approved each of her promotional recommendations and encouraged further promotional efforts. Active promotion of the transit system was a condition of Respondent's receiving the operational grants upon which the transit system depended. Only Mr. Holmes felt that promotion was "unnecessary;" he saw no reason to promote a system which already existed.

19)Mr. Holmes had instructed Complainant to do all bus driver supervision and not bring any personnel matters to him unless she had a problem which she could not handle. In complying, Complainant, by early 1978, was writing the drivers' annual performance evaluations, making driver hiring recommendations, doing all driver training and reprimands, and performing the supervisory activities described in Findings of Fact 14 and 15 above. Her monthly driver meetings had improved driver morale.

20)In a newspaper article printed on January 15, 1978, Richard Adams, still Respondent's Recorder-Treasurer and an active part of Respondent's transit system during all times material herein, was quoted as calling Complainant "head of (Respondent's) transportation." This quotation was part of Mr. Adams's response to a federal agency's charge that Respondent had insufficient female employees and that most of its female employees worked in lower job classifications. This quotation catalyzed Complainant's realization that she actually was working as head of Respondent's transit system and that she was not being paid adequately. Very soon thereafter, Complainant told Mr. Holmes that she believed that she should be paid more, because of her responsibilities. Mr. Holmes disagreed with Complainant as to how much she should be paid. He asked Complainant to justify her raise request, reviewed her justification, and recommended that she receive a five per cent raise.

21)On February 1, 1978, Complainant's title was changed to Lead Bus Driver/Public Coordinator, and her salary was raised five per cent, to step two of range eight. Until this time, Complainant had been paid in the same range as Respondent's bus drivers.

22)During 1978 Mr. Bentz continued expanding Complainant's report-writing activities. This increased Complainant's role in recommending transit policy. For example, in preparation for the May 1978 public vote on the transit system's first serial levy, Complainant assisted Mr. Bentz in making reports on ridership, in preparing a three-year transit budget, and in formulating recommendations for the Transportation Committee. By this time, Complainant also was formulating with Mr. Bentz the agendas for Transportation Committee meetings. In doing this, Complainant voiced her ideas about the transit system directly to Mr. Bentz, even if they were promotional ideas with which Mr. Holmes did not agree. Mr. Bentz responded favorably; he liked Complainant's ideas and had her put them before the Transportation Committee. The Transportation Committee came to expect Complainant to present to it ideas for improving the transit system.

23)After her February 1978 raise, Complainant let all her superiors know that she still believed that she should be paid more. She also started talking with Respondent's employees to find City positions similar to hers, in order to get an idea of exactly how much she should be paid. Neither Mr. Bentz nor Mr. Holmes appeared to be sympathetic to Complainant's pay complaint. At this point, difficulties between Complainant and Mr. Holmes arose. Mr. Holmes became more and more defensive with Complainant as she voiced her dissatisfaction with her pay. He did not feel that Complainant's job required sufficient technical knowledge or involved a big enough unit to warrant higher pay. He also was frustrated at the direct line of communication between Complainant and Mr. Bentz, because it did not include him. Twenty-two years of military experience had accustomed Mr. Holmes to a clear chain of command. He also felt that Complainant was "pushy." He saw her as an aggressive, enthusiastic supporter of a system which he did not support overall and with whose development he did not care to be involved.

24)On October 1, 1978, Respondent changed Complainant from a federally-funded employee to a permanent city employee.

25)By February 1979, at the request of the Transportation Committee, Complainant was performing reviews of all proposed route revisions, new routes, and bus schedule changes and reporting her evaluations to the Committee. A key component of these reviews was Complainant's analysis of impact upon ridership, which she based upon surveys (distributed on the buses and at potential impact points) which she had developed by herself. As exemplified by these and the activities described in Finding of Fact 22 above, Complainant did staff planning for the transit system, evaluating all system operations with a "fine-toothed comb."

26)As far as Complainant knew, Mr. Holmes was aware of and approved all her activities described above, which she was performing in the aggregate by at least February 1979. Complainant had acquired the skills, abilities, and knowledge necessary to do this work through her experience on-the-job and through reading, with no direct help from Mr. Holmes.

27)On February 1, 1979, Mr. Bentz left his position and Adney Bowker, Respondent's City Engineer, was appointed to also be Acting Director of Public Works for Respondent.

28)As of February 1, 1979, Complainant assumed some additional duties, at the direction of Mr. Bowker and the Transportation Committee, which was then renamed the Transportation Commission. With these additional assignments, Complainant's job became the same as it was in February 1980, when she formally became the head of Respondent's new Transit Division.

For the most part, Mr. Bowker asked Complainant to take on transit system duties, which had been Mr. Bentz's but which Mr. Bowker could not perform because of his dual status

as City Engineer and Acting Public Works Director. For instance, he asked Complainant to attend the conferences and meetings of the Oregon Transit Association (OTA). (Mr. Holmes attended one such meeting after Mr. Bentz left and had Complainant write his report on it for the Transportation Commission, based upon his tape-recording of the meeting.) Mr. Bowker also had Complainant become involved with the Public Transit Division (PTD) of the Department of Transportation (DOT) of the State of Oregon, talking with its planners regularly and going to its workshops and seminars.

In addition, Mr. Bowker asked Complainant to write a new capital assistance grant application for the purchase of buses. Respondent's existing application, which Mr. Bentz had prepared, had become obsolete due to new requirements. In preparing this application, Complainant, with Respondent's Shop Superintendent, inspected several different buses and developed specifications for and selected a bus to recommend, with the Public Works Director, to the Transportation Commission. Complainant also coordinated services with other transportation providers in the area, as required by this grant application. Complainant's grant application was approved.

Also in early 1979, the format for the transit system's operating assistance grant changed, and Complainant completed a new application for this grant, at Mr. Bowker's request.

At Mr. Bowker's direction, Complainant also prepared her first full transit system budget.

The Transportation Commission asked Complainant to do more and more work for it, providing it with information and recommendations on virtually every topic with which it dealt. Mr. Holmes attended the first Transportation Commission meeting after Mr. Bentz left, and then ceased attending its meetings once again.

29) At Mr. Bowker's direction, Complainant also continued all the work activities she had performed under Mr. Bentz. She continued to report to, discuss problems and issues with, and take direction from the (acting) Public Works Director. Mr. Bowker found it necessary to deal directly with Complainant, because he wanted transit matters to be handled expediently. He tried to advise Mr. Holmes, still the titular administrator of the transit unit, of transit developments when necessary.

30) On December 1, 1979, Michael Hoehn became Director of Respondent's Public Works Department. Mr. Hoehn then possessed a Bachelor of Arts degree in civil engineering, a Master's degree in public administration, and nine years of experience in engineering, including personnel supervision. In obtaining his graduate degree, Mr. Hoehn had taken personnel classes, which included training in evaluating jobs.

31) As Director of the Public Works Department, Mr. Hoehn, like his predecessors, was responsible for overseeing the day-to-day operations of his department's divisions, preparing his department's budget, giving final approval of hirings, firings, and evaluations of department personnel, and structuring the department to function properly. As an integral part of fulfilling these responsibilities, Mr. Hoehn personally evaluated the job performance of the head of each of his divisions, evaluated the department's structure, evaluated whether his division heads were appropriately compensated for the work they performed, and made recommendations for changes he believed necessary.

32) When (or shortly after) Respondent hired Mr. Hoehn, Mr. Stubbert told him that he was in favor of moving the positions of Water/Sewer Engineer (heading the Water/Sewer Division) and City Engineer (heading the Engineering Division) up in salary by what amounted to one pay range. Mr. Stubbert told Mr. Hoehn that if Mr. Hoehn saw no problems in these changes, after examining them, he should make them. Mr. Stubbert treated it as part of Mr. Hoehn's responsibilities to evaluate his subordinates for range changes and make recommendations concerning such changes.

Mr. Hoehn followed Mr. Stubbert's directive and, soon after he became Public Works Director, recommended changing the pay of the above-mentioned two positions as Mr. Stubbert had described. These pay range changes were not taken to the pertinent advisory commission for approval, but were approved by Respondent's Budget Committee as part of the Public Works Department's budget on January 30, 1980.

33) All positions within the Public Works Department, except for Water/Sewer Engineer, City Engineer and Transit Coordinator, have remained at the same pay range since Mr. Hoehn became Public Works Director.

34) From February 1, 1979, to the time of hearing, no first-line* supervisor or administrator-supervisor in the Public Works Department was paid at range 11 or below, except Complainant. Other than Complainant, the lowest-paid of the first-line supervisors and administrators-supervisors were the Supervising Technicians, who were paid at range 14. All of the first-line supervisors and administrators-supervisors, other than Complainant, were male.

35) When Mr. Hoehn became Public Works Director, Complainant was performing all the activities described in Findings of Fact 11 through 29 above, handling the entire day-to-day operation of the transit system, as she had been doing since February 1, 1979. She was still titled and classified as Lead Bus Driver/Public Coordinator, and Respondent's organizational chart showed her reporting to Mr. Holmes and the transit system a unit of the Streets Maintenance Division.

Mr. Bowker had advised Mr. Hoehn that he might want to look at whether the transit unit should continue to be part of the Streets Maintenance Division, as it was functioning separately from that division. It soon became obvious to Mr. Hoehn that Mr. Holmes was not participating in the administration or operation of the transit system. When Mr. Hoehn needed information about the transit system, either he first asked Complainant, or Mr. Holmes referred him to Complainant, and

* The lowest-paid employee in a work unit for whom the supervision of others is a continuing responsibility.

Complainant provided the information. Mr. Holmes was an unnecessary intermediary in the chain of command and communication between Complainant and Mr. Hoehn: Complainant was running the transit system and making the decisions concerning its daily operation.

There was considerable hostility between Complainant and Mr. Holmes. Mr. Holmes could not understand why the transit system had become so complex. He did not perceive all that had to be done to make the system operate successfully. Complainant had made several attempts to keep him abreast of what was going on in the transit unit, but Mr. Holmes had ignored her efforts even when he was complaining that he was not being kept informed. Mr. Holmes was occupied with his maintenance responsibilities and wanted Complainant to come to him only with transit matters she could not handle.

36) For all the reasons described in Finding of Fact 35 above, in February 1980 Mr. Hoehn formally moved the transit system out of the Streets Maintenance Division and made it a separate division with its head, Complainant, reporting directly to Mr. Hoehn. Mr. Stubbert approved this change. This altered the formal position of the transit system in Respondent's structure and incarnated Complainant's previous actual operating status as a division head. It did not change Complainant's actual duties or responsibilities at all, but merely conformed the formal organizational structure to the actual functioning structure. At the same time, Mr. Hoehn changed Complainant's title to Transit Coordinator, effective June 1980.

37) Within one month of the time Mr. Hoehn became Public Works Director, Complainant made him aware that she did not believe her pay was commensurate with her responsibilities. Mr. Bowker had told Mr. Hoehn that Complainant was seeking a pay increase. Mr. Hoehn told Complainant that he would make no recommendation for a pay change for her for at least one year, during which time he would evaluate her duties and responsibilities in relation to those of other Public Works Department employees to see if a pay change were necessary. He also told Complainant that if such a change were necessary, he would recommend it as part of his departmental budget for fiscal year 1981-1982 (beginning July 1, 1981). Mr. Hoehn informed Mr. Stubbert in early 1980 that he would be reviewing Complainant's position throughout the year and possibly making a range change recommendation for it as part of his 1981-1982 budget. Mr. Stubbert did not object.

38) Before October 8, 1980, in the course of his year-long evaluation of Complainant's duties in relation of those of other departmental employees, Mr. Hoehn had concluded that Complainant's position was paid at too low a range.

39) On October 8, 1980, Complainant submitted to Mr. Hoehn a memorandum asking that her position be paid at range 14. Before concluding that her work justified at least range 14 pay, Complainant had talked with and observed different supervisors employed by Respondent to ascertain

their duties and responsibilities, which she then had compared with hers. She had talked with Respondent's collective bargaining units about how they compared jobs. Having concluded that her responsibilities in many areas were much greater than those associated with positions paid at range 14, she felt that range 14 was the lowest acceptable range for her position. She felt that because of her administrative responsibilities, her job duties were greater than Public Works department crew leaders ("lead" persons), and more equivalent to positions which supervised those lead persons. At the time of Complainant's analysis, those supervisors were paid at least at range 14.

40) By late 1980, Mr. Hoehn had also concluded that Complainant's position should be paid at least at range 14. This conclusion was based upon his own year-long direct observation of Complainant's work and his independent evaluation of her duties and responsibilities, as compared with those of his other supervisors, and not on Complainant's evaluation and request for range 14.

41) As Director of Public Works and the Transit Coordinator's immediate superior, Mr. Hoehn was and is the best person in Respondent's employ to ascertain and evaluate the Transit Coordinator's work and to compare it with work done by other Public Works Department employees. Accordingly, this forum has given Mr. Hoehn's evaluation and comparison great weight.

42) In his evaluation and comparison, Mr. Hoehn had searched for positions within the Public Works Department which were comparable to the Transit Coordinator in the skills they required and the responsibilities they involved. He had ascertained whether comparable Public Works Department positions required similar skills and whether the responsibilities they involved were greater than, equal to, or lesser than the responsibilities of the Transit Coordinator. He had concluded that although the subject matter of the specific day-to-day activities of each comparable Public Works position differed from that of the Transit Coordinator, the positions of Shop Superintendent, Water Foreman, Maintenance Foreman and Supervising Technician were very similar to Transit Coordinator in the nature and level of skills required and the equivalence of the combinations of similar responsibilities they involved. These similarities were rooted in the fact that each of these five positions administered the operation of the unit each supervised.

43) Specifically, Mr. Hoehn had concluded that the skills required to work each of the above-noted positions were similar in that they could be obtained on-the-job, over time, by working up through the ranks. Mr. Hoehn had also concluded that the level of skills required by these positions was very similar, except that the Water Foreman had to have more, and the Supervising Technicians slightly more, technical skill than the Transit Coordinator.

Mr. Hoehn had concluded that the day-to-day supervisory responsibilities of the Transit Coordinator were comparable to those of each of the above-noted positions, particularly the Shop Superintendent. He had looked at the

amount of supervision done each day, the number of employees supervised, and the number of intermediate supervisors above and below each position.

Mr. Hoehn had concluded that the budget-planning responsibilities of the Transit Coordinator were comparable to those of each of his other division heads. He believed that the Transit Coordinator's budget-planning responsibilities were slightly greater than those of the Shop Superintendent and much greater than those of the Water Foreman, the Maintenance Foreman, and each of the Supervising Technicians.

Mr. Hoehn had concluded that the long-range planning responsibilities of the Transit Coordinator were comparable to those of the Maintenance Superintendent, slightly greater than those of the Shop Superintendent, the Maintenance Foreman, and the Water Foreman, and very much greater than those of the Supervising Technicians.

The Shop Superintendent, Water and Maintenance Foremen, and Supervising Technicians were each paid at least at range 14. Because Mr. Hoehn had concluded that each of these positions was very similar to the position of Transit Coordinator, in the general and specific respects described in this and the immediately preceding Finding of Fact, Mr. Hoehn had concluded that the Transit Coordinator also should be paid at least at range 14.

44) Complainant's actual work activities and responsibilities were substantially the same from February 1, 1979, to the time of Mr. Hoehn's analysis and recommendation, and they have continued to be substantially the same from that time to the present. Consequently, the present tense description of Complainant's work which follows applies to the time period from February 1, 1979, to the present.

Complainant is responsible for the entire operation of Respondent's transit system. Her position is unique in that Respondent has no other employee that performs the work Complainant performs. Complainant works directly under the Public Works Director, with the same independence as the other Public Works Department division heads.

Complainant spends roughly 70 percent of her work time handling all aspects of supervising four full-time and three part-time bus drivers. She is the only supervisor in the Transit Division and the only Transit Division employee other than the drivers. As of January 23, 1981, the drivers were required to have two years of professional driving experience and a good driving record, and were responsible for operating vehicles worth over $130,000.00 each. Complainant schedules the drivers' work and vacation times and handles personnel problems from the very minor through grievance and official reprimand levels. She investigates and resolves all public complaints concerning the drivers. She meets regularly with them to receive their complaints and suggestions. She observes them at work and evaluates their performance for merit raises, driver safety awards, and general safety. Like all division heads in the Public Works Department, she recommends to the Public Works Director who shall be hired and fired in her division. She conducts driver training

(even when, as in 1980, the system acquires an entirely different type of bus) and can drive the system's buses and vans herself. She can do the work of a bus driver, but she does not work as a bus driver. She handles emergency calls during the twelve hours the system operates each day, Monday through Saturday, and has personally assisted in medical and vehicular emergencies. She assists in the investigation of any accident involving a bus driver. She has and must have knowledge of Respondent's personnel policies and labor contracts, effective personnel management techniques, federal job safety requirements, etc.

Although her supervisory responsibilities take a lot of Complainant's work time, her other work activities (described below) are much more significant than the percentage of work time which each consumes indicates.

Complainant spends roughly 10 percent of her work time administering the transit system. For example, Complainant is the key staff person for the Transportation Commission. She attends all Transportation Commission meetings, with Mr. Hoehn and usually Mr. Stubbert. She reports all staff information, makes explanations and seeks suggestions. She formulates and presents all staff recommendations, and the Commission rarely, if ever, rejects her recommendations. She participates in discussion of all items, and the Commission asks her for transit information and expertise concerning every item it considers. Complainant also handles the Commission's correspondence, schedules and otherwise arranges its meetings, formulates the agenda items for those meetings, and writes (but does not transcribe or type) the minutes of the tape-recorded meetings. The Public Works Director signed those minutes before 1980, and Complainant has signed them since. Complainant plays the role of a division head before the Commission, and the Commission depends upon her guidance. Through her above-described activities before the Commission, Complainant makes the Commission aware of her work as head of the transit system.

Complainant also is the Transit Division liaison with the State of Oregon, OTA and other transit groups. She works closely with them, asking her own and answering their questions, and consulting with them on transit issues. Complainant has recently been appointed to a PTD task force evaluating statewide allocation of federal transit grants. Complainant also attends all meetings of Public Works Department division heads.

Since February 1, 1979, Complainant has prepared all transit system budgets, just as each other division head has done for his division. In so doing, Complainant has done the overall and in depth route, schedule, equipment, material, and personnel planning necessary to develop proposed one and three year budgets, as well as presented this planning to and reviewed it with the Public Works Director. The transit system's annual budget since July 1, 1979, has ranged from $233,289.00 to $544,157.00 and is currently $376,064.00.

As part of her administrative duties Complainant is responsible for keeping daily records of ridership, mileage, and expenses; recording all transit system

bills; and collecting and recording moneys from bus coin boxes and other revenue weekly. She calculates headway times, peak loading times, etc. Like all Public Works Department division heads, Complainant has the authority to expend funds budgeted for her division, up to the amount budgeted for the line item applicable to the expenditure. She must deal constantly with the division's current operating budget. She tracks day-to-day expenditures and monitors actual versus budgeted expenditures and revenues on a monthly basis.

Complainant also uses the above-noted and other data she has compiled to prepare numerous reports, including all divisional reports. Complainant prepares any report required for the receipt of the transit system's operational assistance grant, such as the monthly and annual compliance reports and supplements which the State of Oregon has requested, including an updated area transportation plan. The Public Works Director reviews these reports but very rarely makes changes in them.

One of Complainant's most important duties is the development of long-range plans concerning transit. In addition to the short and long range planning involved in budget preparation, Complainant continually evaluates the transit system's operations and predicts its needs. For example, Complainant has worked with the local college and regional council of governments to compile data on future transit needs for use in formulating an overall transportation study with long-term recommendations for the Transportation Commission. She also has been evaluating the need for a transit district. As part of a grant requirement, Complainant devised and wrote a transition plan, identifying what the transit system would do to accommodate the handicapped and elderly. Before ground was broken for the construction of a new shopping mall in Roseburg, Complainant had explored the feasibility of operating a bus through the mall and had coordinated the purchase of a mall bus shelter. Complainant has a thorough knowledge of the transit system's service area.

Finally, Complainant spends at least 20 percent of her work time handling all public relations and promotional activities concerning the transit system. (Respondent has no public relations officer.) This includes dealing with all passenger complaints or suggestions; answering telephone inquiries when she's in the office; handling all correspondence relating to the transit system; notifying the public and all media of information about transit operations (for example, devising and disseminating news releases and flyers); selling and otherwise handling all advertising for the interior and exterior of the buses; creating and arranging all advertising of the transit system (using newspapers, television, radio and telephone books); creating and handling all special promotions of the transit system; creating and conducting public surveys about transit service which are essential to Complainant's planning activities; and working closely with special interest groups and area organizations such as Douglas County. Through these activities, Complainant has demonstrated public relations and promotional skills. Using these skills is a significant part of Complainant's job.

As Transit Coordinator, Complainant does not type.

Complainant's scheduled work hours are from 8:00 a.m. to 5:00 p.m., Monday through Friday. She is on call for emergencies six days a week from 6:30 a.m. to 6:30 p.m. Complainant spends the majority of her work time in the crowded office space she shares with Mr. Holmes. The office of the Public Works Director is in a different building. There is no allegation that during times material herein Complainant performed any work activity without the knowledge and approval of the Transportation Commission and/or the Public Works Director.

The job of Transit Coordinator requires skill, knowledge, and ability which can be gained (as Complainant has done) through on-the-job experience. Respondent currently desires that an applicant for this position have a high school education with "some college level training in transportation or transit planning" or equivalent experience and/or training "which insures the ability to perform the work * * *."

45) The Shop Superintendent is the head of the City Shops Division of Respondent's Public Works Department. This division procures, maintains, and replaces Respondent's specialized pieces of equipment, including all vehicles Respondent owns.

The activities and responsibilities of the Shop Superintendent have been substantially the same during all times material. Until May 1, 1982, Elmer Estelle, a male person, held this position; since that date, Stanley Eccles, a male person, has held it. This position is unique in that no other employee of Respondent performs the work the Shop Superintendent performs. The Shop Superintendent works directly under the Public Works Director, with the same independence as heads of other divisions in the department.

The Shop Superintendent spends 10 to 20 percent of his work time talking with employees from Respondent's other divisions and departments who come to him with an equipment problem. In so doing, he determines what will be repaired or maintained and when.

The Shop Superintendent spends 40 percent of his work time on other administrative-supervisory tasks, such as determining priorities in and scheduling shop work, assigning vehicle work to mechanics, helping establish the criteria and schedule for equipment replacement, developing bid packages to go out for such replacement, evaluating bids and recommending whether or not they conform to specifications, and making sure new equipment conforms to specifications. During this work time, the Shop Superintendent also maintains records of all vehicle-related expenses, accounts for staff hours and money spent on different accounts, maintains vehicle records, and prepares the division's budget (currently $325,000.00 per year).

The Shop Superintendent spends approximately 10 percent of his time actually supervising two shop mechanics and one clerical support person. He observes the mechanics at work and reviews their work performance, provides advice and answers questions, but does not operate machines

or equipment himself. He also interviews applicants with the Public Works Director and recommends to him who shall be hired or fired in his division.

The Shop Superintendent spends 10 to 40 percent of his time procuring (i.e., finding) parts and materials. He spends about four percent of his work time opening the shop each morning and doing daily fuel management (i.e., checking fuel use and ordering fuel as needed).

The Shop Superintendent has no public relations or promotional responsibilities, and is not involved in obtaining any grant or fulfilling any grant obligations.

The Shop Superintendent works from 8:00 a.m. to 5:00 p.m. from Monday through Friday. He responds to emergency repair needs but never is called to work himself on after-hour emergencies. His office is located in the same building as Complainant's, and he spends a substantial amount of his work time there. It is one floor above the area where the mechanics work and occasionally is very noisy.

The Shop Superintendent must have a thorough knowledge of the tools, equipment, and technology used in his division. This includes considerable knowledge of preventive maintenance and repair of automotive equipment, as well as of the standard supplies and parts associated with equipment maintenance and repair. Essentially, he should have the same level of mechanic's skill as do the mechanics he supervises. In addition, he must have the other skills, knowledge, and abilities necessary to do the above-described tasks. He can acquire these requisites through on-the-job experience, coming up through the ranks over time. Respondent does not require or prefer any particular level or type of formal education in applicants for Shop Superintendent.

The Shop Superintendent is, and has been during all times material, paid at range 15.

46) The Water Foreman is part of the Water/Sewer Division of Respondent's Public Works Department. The Water Foreman is responsible for the direction and supervision of the daily operation and maintenance of Respondent's water distribution system. During all times material herein, the Water Foreman has been Niles Spears, a male person.

The activities and responsibilities of the Water Foreman have been substantially the same during all times material. The position is unique in that no other employee of Respondent performs the work the Water Foreman performs. The Water Foreman works directly under the Water Superintendent, who reports in turn to the Water/Sewer Engineer heading the Water/Sewer Division.

The Water Foreman directly supervises four to five water distribution system employees. His primary responsibility is supervising three of these employees, lead people who head a total of up to three crews staffed by a total of six journey-level workers. The Water Foreman directly supervises the journey-level workers only in unusual situations requiring his particular input. The Water Foreman's supervisory duties include assigning work to the crews, scheduling that work, lining up materials the crews will use, checking crew work in progress, and instructing on proper procedures. The Water Foreman assists the Water Superintendent and the Water/Sewer Engineer in the preparation of personnel evaluations, the interviewing of water distribution system job applicants, and the formulation of hiring recommendations.

The Water Foreman also maintains records of material and labor used, and other project information required for official water distribution records; keeps track of the water distribution material inventory and reorders materials when necessary; and analyzes and corrects problems in the water distribution system. He assists the Water Superintendent in preparing the portion of the division's budget concerning the water distribution system. His role in budget preparation and long-range planning is limited to offering input to the Water Superintendent as to future equipment and material needs of the water distribution system. The Water Foreman does not make reports to other agencies or to the state or federal government.

In doing the above work, the Water Foreman performs technical tasks such as reviewing plans for the construction and maintenance of the water distribution system and reading and interpreting maps and blueprints relating to the installation of distribution services. He should be able to perform chlorine tests in the field and calculate dosages required for approved disinfecting of mains and reservoirs. The Water Foreman should be able to perform all the duties of the journey-level position in the unit he supervises.

Although there is no specific evidence on this point, the forum infers, from the above findings concerning the Water Foreman's work, that like the Maintenance Foreman the Water Foreman works outside most of the time and is subjected to the attendant difficulties.

The Water Foreman must have thorough knowledge of the operation and maintenance of the system for which he is responsible. He must be able to operate all equipment necessary to that system. He must also have the other knowledge, skills, and abilities required to do the above-described tasks. The Water Foreman can work and has worked his way up through the ranks, gaining requisite work skills, knowledge, and abilities on-the-job over time, with some college level classes taken while working. Currently, Respondent asks that applicants for the position have two years of college education in a waterworks-related field.

During all times material, Respondent has paid the Water Foreman at range 16.

47) The Maintenance Foreman is part of the Streets Maintenance Division of Respondent's Public Works Department. Robert Triplett, a male person, has been the Maintenance Foreman during all times material herein, and his activities and responsibilities have been substantially the same during those times. The Maintenance Foreman's position is unique in that no other employee of Respondent performs the work the Maintenance Foreman performs. The Maintenance Foreman reports directly to the head of the Streets Maintenance Division, the Maintenance Superintendent.

The Maintenance Foreman's primary responsibility is to directly supervise three lead people who head crews of up to four laborers each, doing different projects. These crews maintain Respondent's eighty miles of streets and rights of way. This maintenance includes doing minor street overlays (but not building new streets), pothole patching, curb and gutter repair, sidewalk repair, and culvert and drainage clearouts.

The Maintenance Foreman receives job assignments from the Maintenance Superintendent, and spends most of his work time assigning this work to his lead people and supervising the performance of these assignments. In doing so, he decides how many employees will do each of several jobs and when. He coordinates the timing of these jobs to maximize use of personnel and equipment, and to make sure necessary materials are available. He personally checks the work progress of each crew, sometimes directing the completion of work. He performs no crew work unless it is required in an after-hours emergency. He instructs his subordinates on the safe use of equipment, tools, and materials. He responds to questions and problems arising at work sites and makes adjustments in jobs which do not require engineer input. While out in the field, he also inspects streets for necessary maintenance. He coordinates with other divisions or public agencies on projects which involve them. He makes hiring and firing recommendations for his subordinate positions to the Maintenance Superintendent.

The Maintenance Foreman maintains simple cost records of the materials, labor, and equipment used on each assignment and prepares time sheets for his subordinates. He assists the Maintenance Superintendent in checking actual project costs against amounts budgeted therefor, six to eight times each month. His only involvement in preparing the division's budget, currently about $533,000.00 per year, is to inform the Superintendent if equipment needs to be fixed or repaired. The Maintenance Foreman assists in responding to public complaints or questions about specific work projects and attempts to resolve disagreements involving the public. He files reports on some of these activities, such as an investigation of a road chuckhole.

The Maintenance Foreman usually works forty hours per week, Monday through Friday, and is on call at all other times. He is called out frequently on night emergencies. He spends about 80 percent of his work time in the field and 20 percent of his work time in a crowded office proximate to Complainant's.

The Maintenance Foreman must have thorough knowledge of street maintenance and repair operations, including considerable knowledge of materials, procedures, tools, and equipment used in the repair and maintenance of equipment. He must also have the other knowledge, skills, and abilities requisite for the performance of the above-outlined duties. The Maintenance Foreman can acquire these requisites by working his way up through the ranks, over time. Currently, Respondent prefers that an applicant for this position also have a high school education.

During all times material herein, Respondent has paid the Maintenance Foreman at range 15.

48) Respondent employs three Supervising Technicians in the Engineering Division of its Public Works Department. (The Amended Specific Charges refer to them as Engineering Supervisors.) Each Supervising Technician performs sub-professional engineering work as the supervisor of one or more of the four units within the Engineering Division. The activities and responsibilities of each have been substantially the same during times material. All report directly to the City Engineer, who heads the Division, and all supervise and evaluate the work of one to three Engineering Technicians. Their supervisory duties include participating in hiring and making recommendations for firing. All Supervisory Technicians have been male during all times material herein.

One Supervising Technician is the supervisor of the construction inspection and survey units. This person directs contract administration work, directs subdivision work including the inspection and preparation of certain drawings, purchases supplies for the Division, and assists the City Engineer in the preparation of the Division's budget.

Another Supervising Technician is the supervisor of the special projects unit. He directs the design of water and sewer system improvements; performs special studies and writes reports; responds to the engineering aspects of questions or complaints from the public; directs one subordinate in water system design and drafting, etc.; coordinates his unit with Respondent's other divisions and departments; and conducts investigations and reviews concerning building site plans and land use proposals. His planning activities are limited to planning how (when and with what design) to meet existing needs for water main extensions. His budget-planning responsibilities are minimal, limited to suggesting materials or equipment needed in his unit.

The third Supervising Technician supervises the design unit. This person supervises and performs moderately complex design work concerning roads, streets, storm drains, sewer and water systems, etc.; prepares rights-of-way and easement descriptions and plats; maintains public records and files for engineering maps, drawings, etc.; reviews and coordinates approval of subdivision improvements and maps; reviews and comments on proposals from other agencies and utilities; responds to questions and complaints from the public; and trains subordinates. This person's budget-planning responsibilities are the same as those of the Supervising Technician in the special projects unit.

None of the Supervising Technicians makes grant applications or reports to the state or federal government, but each maintains records to comply with grant requirements.

Supervising Technicians should have considerable knowledge of the terminology, methods, and practices of technical engineering, including construction inspection, design, and surveying. This can be obtained through

working as an Engineering Technician 2. A Supervising Technician must also have the other knowledge, skills, and abilities requisite for the performance of the above-outlined duties. Respondent's Supervising Technicians have gained these requisites by working their way up through the ranks, but most also have had some advance college level education in science, mathematics, and civil engineering.

During all times material herein, Respondent's Supervising Technicians have been paid at range 14.

49) In December 1980 or January 1981, Mr. Hoehn submitted to Mr. Stubbert his proposed 1981-1982 Public Works Department budget (including his proposed three-year transit system budget for an upcoming serial levy vote). As part of this submission, Mr. Hoehn recommended that Mr. Stubbert change the Transit Coordinator's salary range from 8 to 14. Specifically, he proposed that Complainant's gross salary be raised $176.00 per month, from step 4 of range 8 to step 1 of range 14. In discussing this recommendation with Mr. Stubbert, Mr. Hoehn commented that Respondent probably would face a discrimination claim if it did not adjust the Transit Coordinator's salary. He also thoroughly explained the analysis which had led to his range 14 recommendation.

50) In response, Mr. Stubbert told Mr. Hoehn that his range 14 recommendation should be taken to the Transportation Commission for its consideration in the budget process, because that recommendation would have an impact on the transit system's budget. Mr. Stubbert did not tell Mr. Hoehn whether he favored the range 14 recommendation or not.

51) On January 23, 1981, Mr. Hoehn presented his range 14 proposal to the Transportation Commission as part of his transit system budget proposal. Thoroughly, he described the Transit Coordinator's job and explained why he believed that it merited range 14 pay. He argued very strongly in favor of his recommendation, telling the Commission that the Transit Coordinator's duties and responsibilities were very comparable to specific Public Works Department positions earning at least range 14 pay. He also told the Commission that it would probably face a discrimination action if it did not give the Transit Coordinator a pay raise.

52) Gay Fields has been a member of Respondent's City Council since January 1979. As the Council member designated to serve on the Transportation Commission, she has chaired that Commission since January 1979. She has been present at virtually all Commission meetings during her tenure on the Commission, including the meeting described in Findings of Fact 52 above and 55 below. Since January 1979, Ms. Fields also has been the President of Respondent's City Council for one year and a member of Respondent's Equipment Fund Committee.

For the last eight years, Ms. Fields also has been Chief Deputy for the Douglas County Clerk. In this capacity, she supervises the 40 to 54 people who work for the County Clerk. This duty includes reviewing personnel evaluations and making pay recommendations. Ms. Fields has done business college coursework and seminars in personnel management.

For all the above reasons, since January 1979, Ms. Fields should have known more about Complainant's work and the transit system than any other member of the Transportation Commission.

Ms. Fields did not hear the testimony of Complainant or Mr. Hoehn describing Complainant's work.

Ms. Fields testified that she knows "quite a bit about what * * * (Complainant) does."

Until six months before the instant hearing, Ms. Fields "always assumed" that Respondent's Maintenance Supervisor, Mr. Holmes, was Complainant's supervisor and that Complainant reported to the Public Works Director through Mr. Holmes. Even though Mr. Holmes apparently has attended only one Commission meeting during Ms. Fields's tenure on the Commission (the first), Ms. Fields assumed that because Complainant once "deferred" to Mr. Holmes, she still does.

Ms. Fields has never thought of Complainant as a division head. She is aware "in a vague way" that Mr. Hoehn feels that Complainant works at the division head level. She testified and this forum finds that Complainant is treated by the Transportation Commission comparably to the way the Equipment Fund Committee treats the two division heads who report to it, and that Complainant plays a role before the Commission comparable to the role those two division heads play before the Equipment Fund Committee.

Ms. Fields testified that she did not know until she testified herein that Mr. Hoehn had changed the structure of the Public Works Department in early 1980 to make the transit unit a separate division and to formalize Complainant's status as a division head. Ms. Fields also testified that she "kind of" but not surely found out about this when Mr. Hoehn recommended to the Commission that Complainant's pay range be raised to range 14. Ms. Fields attempted to explain her ignorance by stating that between February and June 1980 Mr. Hoehn did not "formally inform" the Commission of his above-noted actions.

Ms. Fields testified that she does not remember what Mr. Hoehn told the Transportation Commission that the Transit Coordinator does or the explanation he gave of his recommendation that her pay be raised to range 14, when he made that recommendation to the Commission.

It is Ms. Fields' "impression" that Complainant's job responsibilities have not changed much since January 1979. Ms. Fields testified, and this forum finds, that she perceived Complainant during all times material as the Public Works Director's secretary and as the Commission's secretary. At another point in her testimony, Ms. Fields stated, and this forum finds, that at all times material herein, the Commission considered Complainant its secretary. Ms. Fields also testified, and this forum finds, that the Commission has perceived Complainant during all times material as the person who takes and transcribes the Commission's meeting minutes, is "on the phone a lot with the public," and is lead person for the bus drivers. Ms. Fields does not know whether Complainant occasionally

drives a bus route. Ms. Fields testified, and this forum finds, that on March 10, 1981, Roseburg's newspaper was accurate when it quoted Ms. Fields as saying, "It's not my understanding she (Complainant) was a supervisor, she was a coordinator, an assistant to Mike (Hoehn) like a secretary would be." Ms. Fields made this public comment in response to Complainant's filing the instant complaint.

Ms. Fields testified that during times material herein Complainant's work as transit coordinator has been like that of Mary Kent, Respondent's Assistant City Recorder (whom Ms. Fields labeled an administrative secretary), because like Ms. Kent, Complainant attends meetings, takes notes and enters into discussions. Ms. Kent drafts or edits and types minutes of City Council meetings, and Ms. Fields equated this task with Complainant's writing and signing the Transportation Committee's minutes. Ms. Fields admitted, and this forum finds, that Ms. Kent does not, and Complainant does, make policy recommendations at such meetings. Ms. Fields attributed this important difference merely to the fact that City Council meetings are more formal than Transportation Commission meetings, rather than acknowledging it as the indication of a major difference in roles, which it is. Ms. Fields summarized the comparability of the positions of Transit Coordinator and Assistant City Recorder by stating that Ms. Kent knows the city like Complainant knows the "transportation department." Ms. Fields believes that range 11 (which is one range below the range at which Ms. Kent is paid now, but the same range as Ms. Kent was paid in January 1981) is the appropriate salary range for Complainant's position.

Ms. Fields testified, and this forum finds, that the Transportation Commission made no independent assessment of Complainant's work in response to Mr. Hoehn's recommendation for range 14, and that its evaluation of her work was based upon what Mr. Hoehn had told it and what it saw at its meetings. (This forum has disregarded Ms. Fields' testimony that the evaluation also was based upon what the Commission members observed when walking around City Hall, because Complainant's primary work location was/is not in City Hall.)

Ms. Fields testified that she had a problem with an employee jumping more than one pay range at a time unless there had been a drastic change in that employee's job. Ms. Fields testified that if Complainant's job had changed drastically and Complainant had continued performing it adequately, Ms. Fields would have wanted to make a commensurate raise in Complainant's salary, as determined by evaluating what people at comparable salaries were doing. Ms. Fields also testified that an unprejudiced person supervising many different employees at many different salary ranges could make this type of evaluation and advise the Commission as to those comparisons. However, Ms. Fields would not acknowledge that Mr. Hoehn was the appropriate person to give the Commission such advice and called Mr. Hoehn "kind of prejudiced." Ms. Fields stated that she disagreed with Mr. Hoehn's judgment as to the extent and importance of

Complainant's work activities and that she believed he proposed range 14 because Complainant had asked him for range 14. Ms. Fields could not name any reason for thinking that Mr. Hoehn was prejudiced, and would not testify that Mr. Hoehn showed any favoritism toward Complainant. There is no credible evidence that Ms. Fields or the Commission had any reason for thinking that Mr. Hoehn was prejudiced or for concluding that he had not accurately described Complainant's work to the Commission.

There is no indication on the record that the perceptions of the Transportation Commission as a body concerning Complainant differed in any respect from those of Ms. Fields described above. Given this fact, and because during all times material herein Ms. Fields was Chair of the Commission, its only City Council member, and the Commission member who should have known most about Complainant's work, this forum finds that her perceptions of the nature and worth of Complainant's work played a key role in determining the Transportation Commission's judgments on that subject during times material herein.

53) In the United States before and during times material herein, secretarial jobs have been predominantly held by women, and the performance of secretarial work has been viewed as a female role.

54) The Transportation Commission's overall reaction to Mr. Hoehn's explanation of Complainant's work and his range 14 recommendation was not favorable. There was considerable discussion. The Commission felt surprised and concerned as to whether, and if so why, Complainant's responsibilities were so great. As a whole, the Commission felt that Mr. Hoehn's recommendation was far too high a pay range and that Complainant's job had not changed enough to warrant that great an increase in pay. The Commission continued to view Complainant's job as secretarial in nature.

55) During all times material herein, Respondent had paid none of its secretaries at (or above) range 14.

56) After declining to accept Mr. Hoehn's recommendation that the Transit Coordinator's pay be raised to range 14, the Transportation Commission asked Mr. Hoehn to come to its next meeting with a compromise recommendation, which he did. On January 28, 1981, Mr. Hoehn recommended range 11 pay for the Transit Coordinator. However, he did not believe that range 11 was commensurate pay for this position; he felt it was appropriate for an administrative secretarial position. When he compromised at range 11 in 1981, his goal remained (and it still remains) to place the Transit Coordinator's pay at range 14.

57) In response to Mr. Hoehn's range 14 recommendation, neither Mr. Stubbert nor the Transportation Commission commented upon or questioned how range 14 pay for the Transit Coordinator would fit into Respondent's classification system. Mr. Stubbert was the appropriate person to have done so.

58) On January 30, 1981, the Transportation Commission approved a revised transit system budget, which recommended to Respondent's Budget Committee and City Council

that Complainant's pay be moved from range 8 (step 4) to range 11 (step 2).

59) On April 1, 1981, the transit system budget, which the Transportation Commission had approved and sent to the Budget Committee, was approved by that Committee. Subsequently, Respondent's City Council considered and approved the transit system budget which the Budget Committee had approved and sent to it, including the item changing the Transit Coordinator's pay from range 8 to range 11.

As part of the above-described budget formulation process, neither the Budget Committee nor the City Council had been presented with or had considered a proposal to raise the Transit Coordinator's pay from range 8 to range 14. In fact, there is no evidence that either body discussed or otherwise specifically considered the budget item which raised the Transit Coordinator's pay to range 11.

60) Since January 1981, Mr. Hoehn has not made another recommendation that Complainant's pay be raised to range 14, because of the pendency of Complainant's complaint with the Agency.

61) In an election during the Spring of 1981, the serial levy to help fund Respondent's transit system for fiscal years 1981 to 1984 passed. Effective July 1, 1981, Complainant's pay was changed from step 5 of range 8 to step 2 of range 11. Her classification remained the same. As of the date of hearing, Respondent still paid Complainant at range 11 and had advanced her to step 3 thereof, as a merit raise.

62) Respondent has not disciplined Mr. Hoehn for his evaluation of Complainant's work, his comparison of it with that of other supervisory-administrative positions within the Public Works Department, or his recommendation that Complainant's range be raised to 14. Respondent has not told Mr. Hoehn to change Complainant's job duties and responsibilities since the rejection of Mr. Hoehn's recommendation for range 14.

63) Throughout Complainant's employment with Respondent, the testimony of her record of accomplishments indicates she has been an excellent employee. She has educated herself thoroughly in transit, division administration, and personnel management. Under her leadership, Respondent's transit system has become an important and effective, albeit controversial, city service for the community, with excellent equipment, competent drivers, and an appropriate scheduling and route system. Ridership has increased each year. The transit system has been supported throughout its existence entirely by its own voter-approved serial levies, fare revenue, and state and federal grants.

64) During her employment with Respondent, Complainant has received every merit increase for which she has been considered. If her position had been placed at range 14 per Mr. Hoehn's recommendation, he would have recommended her for each merit increase for which she would have been eligible thereafter, to date. Mr. Stubbert has always approved and implemented Mr. Hoehn's recommendations for merit increases. There is no indication on the record that Complainant would not have received every merit increase for which she would have been eligible, had she been paid at range 14 since February 1, 1979.

65) Respondent's Transit Coordinator and its Greenskeeper are the only positions with continuing supervisory responsibilities which Respondent pays at range 11.

The Greenskeeper is responsible for maintaining Respondent's Stewart Park Golf Course in a satisfactory playing condition at all times. This position is unique in that no other employee of Respondent performs the work the Greenskeeper performs. Valerion Piekarski, a male person, has been Respondent's Greenskeeper since approximately April 1979.

The Greenskeeper is part of Respondent's Parks and Recreation Department. He reports to the Parks Superintendent, who works under the Director of the department.

The Greenskeeper's duties include doing general maintenance of the course, inspecting the course daily, installing and maintaining the course's irrigation system in the summer, scheduling the daily work of his subordinates, training new subordinates at their work, recognizing and treating disease and other turf problems, and interacting with golfers. Fifty to sixty percent of the Greenskeeper's work time is spent doing journey-level work, the physical labor to maintain the course (including operating a tractor and a mower).

The Greenskeeper supervises one full-time and one part-time employee, except in summer when he generally supervises three to four employees. His subordinates help him maintain and care for the course. The Greenskeeper's supervisory responsibilities are limited to the day-to-day, immediate supervision of his workers, and his supervisory activities consist mostly of the scheduling and training mentioned above, which take a small percentage of his work time. The Greenskeeper does not hire or discipline his subordinates. He has little involvement in the Parks Superintendent's formulation of hiring and firing recommendations concerning the Greenskeeper's subordinates.

Rather than administering the operation of his work unit, the Greenskeeper assists the Parks Superintendent, who has that responsibility. For example, the Greenskeeper's planning activities are limited to suggesting new equipment and chemicals to the Parks Superintendent. His budget-planning activities are limited to making suggestions to the Parks Superintendent, who prepares a budget for the golf course and assists the Parks and Recreation Department Director in preparing the departmental budget.

The Greenskeeper has no public relations or promotional activities beyond a small amount of contact with golfers.

The Greenskeeper should have a working knowledge of all types of grasses and their life cycles, of turf management, and of herbicides and pesticides. He should also have the ability to operate and maintain the equipment used to maintain the course. In addition, he should have the other knowledge, skills, and

abilities necessary to perform the duties described above.

66) On April 27, 1982, Respondent contracted with the Local Government Personnel Institute (LGPI), a joint venture of the Association of Oregon Counties and the League of Oregon Cities, to have LGPI conduct a classification and salary study for Respondent. A comprehensive study of Respondent's classifications and salary ranges had not been performed for twenty-five years. The study took three months and was completed in October 1982. It was performed by Richard Salik, an LGPI subcontractor, and Kathleen Starostka, Respondent's student intern from the University of Oregon's graduate program in public administration. Mr. Salik's background qualifies him as an expert in "human resources improvement services." Ms. Starostka has completed extensive personnel coursework.

The classification study took Respondent's 173 jobs and grouped them into 68 classifications, which were ranked into hierarchies within occupational areas. The salary study recommended a salary range for each classification. The process consisted of:

a) analyzing job content as described in the position description questionnaire completed by each employee and checked by each employee's supervisor;

b) establishing tentative groupings into classifications, each of which contained jobs similar in terms of kind of work, level of difficulty and sameness of recruitment and selection criteria;

c) doing on-site interviews of at least one worker in each tentative classification, plus any workers about which the studiers had a question;

d) writing a classification description for each classification, to which the subject employees and supervisor thereof agreed;

e) establishing horizontal and vertical internal relationships between classifications by establishing the relative worth of the classifications within each occupational series, evaluating the level of difficulty of the work performed by the lowest classification within each occupational series, and comparing it with the lowest classification within other occupational series.

These evaluations used ten factors to assess classifications:

1. knowledge and skill necessary to perform duties;

2. variety and difficulty of tasks performed;

3. mental and physical demands required to perform those tasks;

4. nature and degree of supervision exercised and received;

5. authority and responsibilities delegated to the classification;

6. independent judgment and decision-making involved in interpreting policies, procedures, and similar guidelines ;

7. working conditions;

8. internal and external communication;

9. opportunity for error and consequence of errors;

10. hazards of employment.

f) applying traditional percentage spreads to determine ideal relative salary placement of each successively more difficult classification in an occupational series;

g) obtaining external salary data by ascertaining what comparable employers pay to certain benchmark (standard) classifications;

h) formulating recommendations as to what ranges of salary should be paid each classification based upon the above-described internal relationship and external salary data.

The study recommended that Respondent continue to place its Transit Coordinator position in its own classification and pay it at range 11; that Respondent move downward in range the pay of 44 male and 3 female employees; that Respondent move upward in range the pay of 9 male and 28 female employees; and that Respondent keep at the current range the pay of 68 males and 4 female employees.* The study concluded, in effect, that Respondent is relatively underpaying 80 percent of its female employees and overpaying 36.36 percent of its male employees, and that in its Public Works Department, Respondent is relatively underpaying 70 percent of its female employees and overpaying 71.15 percent of its male employees.** The study recommended that the pay for all positions with which the Specific and Amended Specific Charges compare the Transit Coordinator, except Sewer Superintendent, be lowered one range and that the pay of the Water Foreman and Greenskeeper be lowered two ranges.

As of the date of hearing, Respondent hoped to implement the study's salary plan on July 1, 1983, but this depended upon negotiations with appropriate collective bargaining units and agreement of Respondent's management team.

67) In resolving the issues in this matter, this forum has given little weight to the conclusion of the Salik/Starostka study that range 11 is the appropriate pay range for Respondent's Transit Coordinator, for the following reasons:

a) The study recommends a future pay pattern for Respondent's entire employment system. It does not recommend pay for any one position in a vacuum. Accordingly, the appropriateness of the recommended salary for any one position is predicated upon the adoption of the recommended salaries for all other positions. This study is not helpful, therefore, in determining the appropriateness of Complainant's salary range during times material herein, i.e., now and in the past, when none of the recommended

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* These numbers do not include the very few part-time employees for whom the record contains no gender or range information, or the two employees who are not paid in a range.

** If Complainant were not counted, this finding would be modified to state that the study concluded, in effect, that Respondent is relatively underpaying 82.35 percent of its female employees, including 77.78 percent of those in the Public Works Department.

changes to the pay of other positions have been or were made.

b) The study is based upon the stated premise that the "only obligation of the employer is to establish salary ranges which are competitive with the labor market in order to recruit and retain people." This is not the only obligation of Respondent according to ORS 659.030, the statute which guides this forum in its determination of the instant claim.

c) Mr. Salik/Ms. Starostka testified that Complainant and Mr. Hoehn are the best sources of information concerning Complainant's job. Both Complainant and Mr. Hoehn participated in steps A, C, and D of the study process described in Finding of Fact 66 above. However, neither was consulted in the rest of the process which evaluated the relative internal and external worth of the Transit Coordinator's work. Only Mr. Salik and Ms. Starostka were involved, for example, in applying the ten factors specified in step E of Finding of Fact 66 to the Transit Coordinator's occupational series and in deciding what weight would be given each factor. Furthermore, although they supplied detailed evidence as to the general methodology used in this study, neither Mr. Salik nor Ms. Starostka presented sufficient evidence as to how they went from the Transit Coordinator's classification specification (the last step in the study process in which Complainant or Mr. Hoehn participated) to her recommended salary range. Whatever notes Mr. Salik and Ms. Starostka have on that process were not available at hearing. They asked this forum to trust their professional judgment on its face. However, in attempting to recreate or explain her analysis of the relative worth of the Transit Coordinator's work at hearing (and in the classification specifications, which she formulated), Ms. Starostka's use of terms of which she should know the significance (such as job titles and names of work units) was inexact at best. In testifying, she could not follow an analysis format based upon the methodology she had purportedly used in the study. Her answers in comparing positions seemed to be off-the-cuff, visceral impressions, even though she had very recently completed the study. She exhibited more subjectivity in these comparisons than any other witness. Ms. Starostka summarized job responsibilities rather than comparing them. She was very defensive. For all these reasons, this forum has little confidence in, and cannot trust, the professional judgments of Ms. Starostka upon which substantial parts of the study relied.

d) Because Complainant said that she spent 70 percent of her work time supervising, Mr. Salik/Ms. Starostka denominated her a supervisor. Because she was seen as a supervisor, her appropriate pay was determined at least in part by an analysis which bases supervisor pay upon traditional percentage spreads between supervisor and subordinate pay. This concept is rooted in the idea that a supervisor's job is based upon the worth of his/her subordinate's job. The accepted spreads are that a lead worker should be paid 105 to 110 percent of a journey-level worker's salary, and a supervisor should be paid 110 to 135 percent of that journey-level worker's salary. According to this formula, the Transit Coordinator should be paid between 110 to 135 percent of the salary range at which Respondent's bus drivers are paid.

The purpose of the 25 percent variation in the acceptable journey-supervisory level spread is to take into account differences in kinds and levels of supervisory responsibilities in relation to lead workers. There is no intermediate, or lead, position between Respondent's Transit Coordinator and her bus drivers, or between the Transit Coordinator and the Public Works Director. The Transit Coordinator does all the supervisory work for an entire division. For those reasons alone, if the percentage spread analysis is applicable to Complainant's position at all, the highest possible spread is the most appropriate.

Mr. Salik's and Ms. Starostka's application of the percentage spread concept to the Transit Coordinator's salary is based upon their presumption that the Transit Coordinator is primarily a supervisor. In fact, although she does spend 70 percent of her time supervising, the non-supervisory activities at which she spends 30 percent of her time consist of very significant, high level administrative and technical work, which is extremely different by any measure from the work her bus drivers perform, and more difficult than her supervisory work. For this reason, the Transit Coordinator's work cannot be called mostly or primarily supervisory in nature.

Although he testified that Complainant's position was unusual in this respect, Mr. Salik said that the study took her high-level non-supervisory work into account by recommending a 25 percent, rather than lower, spread between her range and that of the bus drivers. However, Mr. Salilk/Ms. Starostka had already attributed variations within the acceptable spread to differences in supervisory responsibilities. Furthermore, Mr. Salik/Ms. Starostka did not evidence at hearing that they understood the nature or extent of the Transit Coordinator's non-supervisory activities. For instance, Mr. Salik called the Transit Coordinator's public relations activities comparable to those of an Office Assistant 4, who does not handle complaints, independently develop advertising campaigns, do public speaking, or devise or handle promotions. Ms. Starostka could not say what level of difficulty she attached to the Transit Coordinator's non-supervisory work. She seemed to dismiss the Transit Coordinator as a bus driver supervisor. Ms. Starostka admitted that the Transit Coordinator does "some" reports, but testified that the majority of them consist just of the routine compiling of information routinely flowing into the Transit Coordinator's office, which probably could be done by a secretary. Ms. Starostka also minimized the Transit Coordinator's policy-recommending role before the Transportation Commission.

Finally, the study recommended in fact that step 1 of the Transit Coordinator's salary range be only 21.6 percent higher than step 1 of the bus drivers' recommended range. (Step 1 of range 14, by contrast, is 32.3 percent higher than step 1 of the bus drivers' recommended range, well within the 10 to 35 percent spread which Mr. Salik/Ms. Starostka testified was acceptable.)

e) The salary the study recommended for the Transit Coordinator

position apparently was based not only upon the percentage spread guideline but also on external salary data. However, it does not appear that this external data was sufficiently validated. Respondent's transit system is unique, so appropriate comparators to Complainant's position in other transit units are rare at best. The employers which Ms. Starostka consulted listened to her read her classification specification for the Transit Coordinator, which is very general, and told her which of their positions they felt most closely matched the Transit Coordinator position. For example, Ms. Starostka did not check those judgments as to comparability by having any employers read to her the description of the job the employer had named as the closest job to the Transit Coordinator. Ms. Starostka did not gather sufficient information to make her own professional assessment of the applicability of the external salary data she collected.

For the reasons explained in sections d and e above, this forum has concluded that neither the percentage spread concept nor the external salary data were appropriately applied to the Transit Coordinator classification in the Salik/Starostka study.

68) Both Respondent's Mayor, Mr. Dunn, and Mr. Stubbert referred in their testimony to Respondent's City Council having rejected a request for a new position and higher pay for Complainant. Neither witness offered consistent explicit testimony as to the context in which, or process by which, this request may have been brought before, considered by, or rejected by the Council. One testified that it was as part of the 1981 budget process. Later testimony was that the request was made when staff was trying to make the Council aware of a new supervisory position in the Public Works Department. Still later testimony indicated that the range 14 request came up within the context of a possible discrimination complaint which Complainant had not filed yet, and that the rejection occurred after Mr. Hoehn, Mr. Stubbert, and the Transportation Commission had taken their actions concerning the range 14 request. Finally, there was testimony that the Council rejected the range 14 proposal in February 1981.

From this incongruous testimony, and from the evidence concerning Respondent's process of budget formulation, this forum concludes that the City Council did respond to the idea of range 14 pay for its Transit Coordinator, by informal negative comment, upon being apprised that Mr. Hoehn had made a range 14 proposal to Mr. Stubbert and the Transportation Commission, and that the Commission had rejected it and/or upon being apprised of Complainant's filing her complaint on February 13, 1981. In neither case was the Council making a formal or determinative rejection as part of the budget process within which Mr. Hoehn's range 14 proposal was made, because that proposal never reached the Council for its disposition in that process. It never went beyond the Transportation Commission. There is no evidence that much later, when the Council approved the transit system budget proposed by the Transportation Commission and the Budget Committee, the Council discussed or in any way considered the appropriateness of

the raise to range 11 pay contained in that budget as opposed to range 14 pay, or the Transportation Commission's reasons for rejecting Mr. Hoehn's range 14 proposal. Accordingly, and absent any evidence to the contrary, this forum concludes that it was the Transportation Commission's rejection of the recommendation that Complainant's pay be raised to range 14, and not any response to that recommendation by the City Council, which killed that recommendation in the 1981 budget process. Furthermore, since there is no evidence that range 14 pay for Complainant was officially proposed to or considered and rejected by any of Respondent's bodies before the Transportation Commission rejected it or thereafter, and since Mr. Hoehn, its only proponent besides Complainant, did not resurrect it thereafter, this forum concludes that it was not. Once Mr. Hoehn formulated his range 14 recommendation, it was the only step anyone took (other than filing the instant complaint) to cause Complainant's pay to be raised beyond range 11 during times material.

69) Mayor Dunn testified that in discussing range 14 pay after being apprised of the Transportation Commission's rejection of it or of Complainant's instant complaint, Respondent's City Council did not question whether Complainant was in fact functioning as an administrator-supervisor and division head, and did not consider whether the work she was doing merited range 14 pay. He testified instead that the Council responded negatively to range 14 pay for Complainant because the Council believed that Respondent should not have a position which performed, or was paid for performing, the work Complainant was doing. However, that alleged "reason" for the Council's negative response was not officially articulated at that time or when the Council later ratified the transit system budget containing the range 11 item, as far as the record shows. Furthermore, that alleged "reason" for the Council's negative response has never been translated by the Council or any other body or official of Respondent into the obvious action which would have been necessary to implement that response, if it had been an operative official Council decision: downgrading Complainant's work activities and responsibilities to the range 11 level.

Accordingly, because the City Council's negative response to range 14 pay for Complainant was merely an informal reaction, which was not officially articulated or translated into any action, and because the Council subsequently approved the transit budget containing a range 11 pay item with no specific consideration of that item or of range 14 pay for its Transit Coordinator, this forum finds that the above-cited reason offered for this response was not a legitimate or actual reason for Respondent's rejection of range 14 pay for Complainant on its failure to pay her at range 14 between February 1979 and the present.

70) The testimony of Mr. Hoehn and Mr. Stubbert conflicted concerning certain relevant facts. Mr. Stubbert's testimony was indefinite overall, confused in part, and at times it contradicted itself. Mr. Hoehn's testimony was much clearer and more consistent. Furthermore, in testifying against

his employer's position herein, Mr. Hoehn was testifying against at least some of his own interests. For all these reasons, this forum has found Mr. Hoehn to be more credible than Mr. Stubbert and has given more weight to Mr. Hoehn's testimony than to Mr. Stubbert's testimony, where they differ.

71) The parties stipulated that an exhibit in the record shows what back pay damages Complainant suffered, according to the Amended Specific Charges, between February 1, 1979, and November 30, 1982. The exhibit indicates, and this forum finds, that if Respondent had paid Complainant at the step increments of range 14 between February 1, 1979, and November 30, 1982, Complainant would have earned $64,734.90 in wages, from which $1228.62 would have been withheld and deposited into Complainant's retirement account. Furthermore, Respondent would have contributed an additional $9169.17 to Complainant's retirement account. The exhibit also indicates, and this forum finds, that between February 1, 1979, and November 30, 1982, Complainant actually earned $52,829.00 in wages, from which $943.90 was withheld and deposited into Complainant's retirement account. Furthermore, Respondent contributed an additional $7471.37 into Complainant's retirement account.

72) If Respondent had paid Complainant according to the steps of range 14 between February 1, 1979, and November 30, 1982, Respondent would have paid her thereafter at whatever step of range 14 she would have attained with a one-step merit raise each June 1.

73) If Respondent had paid Complainant at the step increments of range 14 between February 1, 1979, and June 30, 1979, Respondent would have expended $1258.21 more than it did on wages and retirement account contributions for Complainant. In its transit system budget for July 1, 1978 to June 30, 1979, Respondent set aside $105,772.00 in a reserve account. Respondent finished that fiscal year with an outgoing transit system fund balance of $70,000.00 cash plus $10,500.00 in property taxes.

If Respondent had paid Complainant at the step increments of range 14 between July 1, 1979, and June 30, 1980, Respondent would have expended $3127.14 more than it did on wages and retirement account contributions for Complainant. In its transit system budget for the fiscal year, Respondent set aside $33,329.00 in a reserve account and levied $76,000.00 less in property taxes than it could have (according to the proposed transit system budget for that year). Respondent finished that fiscal year with an outgoing transit system fund balance of $77,000.00 cash plus $2,000.00 in property taxes.

If Respondent had paid Complainant at the step increments of range 14 between July 1, 1980, and June 30, 1981, Respondent would have expended $3700.42 more than it did on wages and retirement account contributions for Complainant. In its transit system budget for that fiscal year, Respondent set aside $11,600.00 in a reserve account. Respondent finished that fiscal year with an outgoing transit system fund balance of $55,500.00 cash plus $5,000.00 in property taxes.

The passage of the transit system's serial levy for July 1, 1981, through June 30, 1984, gave Respondent the authority to assess sufficient taxes to be able to pay Complainant at the step increments of range 14 with a one-step merit raise each June 1 thereafter.

ULTIMATE FINDINGS OF FACT

1) Complainant is a female person.

2) Respondent, a municipal corporation, has employed Complainant in its transit unit since October 1976. Since at least February 1, 1979, Complainant has worked as the administrator-supervisor of Respondent's transit system, running what was actually a division within Respondent's Public Works Department between February 1, 1979, and February 1980, and what formally and actually has been such a division since. Respondent has never employed Complainant as a secretary.

3) Complainant's work for Respondent has been excellent throughout her employment by Respondent.

4) Since February 1, 1979, Complainant has reported directly to the Director of the Public Works Department, an employee of Respondent, and to the Transportation Commission, Respondent's agent and the body which has overseen Respondent's transit operations and made recommendations to Respondent's City Council concerning transit policy, programs and budget. Through their supervision and oversight of Complainant since February 1, 1979, which were within the scope of their official responsibility and authority, both Public Works Directors since February 1, 1979, and the Transportation Commission, have had Complainant administer and supervise Respondent's transit system. By their failure to object to this use of Complainant by the Public Works Directors or to reject the recommendations of the Commission which were based upon this use of Complainant, Respondent's City Manager (to whom its Public Works Director reports) and Respondent's City Council (to which its City Manager reports) have allowed Complainant to work as an administrator-supervisor and a division head. Respondent thereby has employed Complainant to work in those capacities since February 1, 1979.

5) From February 1, 1979, to July 1, 1981, Respondent paid Complainant at range 8 of its pay scale. Since July 1, 1981, Respondent has paid Complainant at range 11. Throughout these periods, Complainant has continuously sought higher pay.

6) Since February 1, 1979, all of the administrators-supervisors and first-line supervisors which Respondent has employed in its Public Works Department have been male persons, except Complainant. Throughout this time, Respondent has paid each of these male employees at range 14 or above.

7) From February 1, 1979, to the present, at least three of the male Public Works Department administrators-supervisors (the Shop Superintendent, Maintenance Foreman, and Water Foreman) have been performing work which was substantially similar to the work Complainant has been performing. By "substantially similar," this forum means that the positions chiefly involved equivalent combinations of

substantially similar supervisory and administrative responsibilities and the substantially similar skills and efforts required to meet those responsibilities, and similar working conditions. Specifically, they involved skills which could be gained on-the-job, while working up through the ranks over time. They required technical skills which were substantial. They involved equivalent combinations of substantially similar supervisory, long-range planning, budget-preparing and other administrative skills, efforts, and responsibilities. The working conditions for each position involved difficulty.

8) Since February 1, 1979, Respondent has paid the Shop Superintendent at range 16 and the Maintenance and Water Foremen at range 15. The differences between these positions and Complainant's position do not explain or justify the fact that Respondent paid the Shop Superintendent and Maintenance and Water Foremen at seven to eight ranges above Complainant's range until July 1, 1981, and has paid them at four to five ranges above Complainant's range since then.

9) In December 1980 or January 1981, the Public Works Director asked the City Manager, who functions as Respondent's personnel director, to raise Complainant's pay to range 14. Instead of ruling on this request, the City Manager asked the Public Works Director to make it part of the Public Works Director's transit budget proposal and refer it directly to the Transportation Commission. During all times material herein, the Transportation Commission has been charged with evaluating the yearly and three-year budgets proposed by the Public Works Director, and with preparing the proposed budgets to be considered by Respondent's Budget Committee and, finally, its City Council.

10) The Public Works Director's recommendation for range 14 was based upon his year-long direct observation and evaluation of Complainant's work, and comparison of her work with that of other positions in his department. The Public Works Director was and is the best person to do this observation and evaluation and make this comparison. (Although personnel analysts Salik and Starostka conceivably could have been more competent to perform these acts, they did not prove to be, as explained in Finding of Fact 67 above.) Accordingly, this forum has given great weight to the conclusion of the Public Works Director that, because of the nature and extent of her work as compared with the work of other Public Works Department positions, Complainant should be paid at least at range 14.

11) The Public Works Director presented his range 14 recommendation to the Transportation Commission in January 1981. At the same time, he explained it by describing Complainant's work in detail and comparing her work to that of supervisor-administrator positions earning at least range 14 pay. The Commission rejected the Public Works Director's recommendation and asked him to develop a compromise proposal. In compliance, the Public Works Director proposed a range 11 salary for Complainant (even though he believed that anything below range 14 was not commensurate with Complainant's duties and responsibilities). The Transportation Commission agreed to this proposal and incorporated it into the transit system budget, which the Commission passed onto Respondent's Budget Committee. Because the Budget Committee and City Council ultimately approved that budget, and the public passed a serial levy to help fund it, Complainant received a raise to range 11 effective July 1, 1981.

12) The Transportation Commission's rejection of the Public Works Director's range 14 recommendation effectively killed this proposal. Because of the pendency of Complainant's instant complaint, the Public Works Director has not made another range 14 recommendation since January 1981, and no other body of Respondent has been presented with, considered, or disposed of such a recommendation at any time material herein.

13) The Transportation Commission did not recommend a range 14 salary for Complainant because overall it believed that her work was secretarial in nature and therefore did not merit range 14 pay. From February 1, 1979, through the date of hearing, the Transportation Commission failed or refused to know or acknowledge the fact that Complainant was a supervisor-administrator and a division head. Even though it had been exposed directly and fully to the nature and extent of Complainant's work since at least February 1, 1979, even though Complainant played the role of a division head before it, and despite the recommendation of range 14 and detailed explanation of Complainant's work by the Public Works Director (the Commission's best source of information on Complainant's work), the Commission persisted in underrating Complainant's work and in erroneously equating it with that of an administrative secretary. The Commission knew or should have known that Complainant was a division head and a supervisor-administrator and that her work was not, therefore, secretarial. Under these circumstances, this forum must and does attribute the Commission's perception of Complainant's work to Complainant's gender: the Commission assumed Complainant was functioning in the traditionally female role of secretary because Complainant is a female.

14) Other than Complainant, only Respondent's Greenskeeper has continuing supervisory responsibilities and is paid by Respondent at range 11. However, Respondent's Greenskeeper has substantially less supervisory responsibility and substantially less administrative responsibility than Complainant. While Complainant does no journey-level work (except in emergencies), the Greenskeeper spends at least one-half of his work time doing journey-level physical labor. For these reasons, this forum has concluded that the work of Respondent's Greenskeeper is not substantially similar to Complainant's work. Specifically, Complainant's position is a substantially higher level position than the Greenskeeper position. The few similarities between these positions do not justify their being paid at the same range. Respondent's Greenskeeper has been a male person during all times material.

15) Between May and October 1982, Respondent had two personnel analysts devise a new classification

system and pay plan for Respondent. For the reasons articulated in Finding of Fact 67 above, this forum has given little weight, for the purposes of resolving the issues herein, to that study's conclusion that range 11 is the appropriate salary range for Complainant's position. However, for reasons articulated in the Opinion below, this forum has:

a) considered the conclusion inherent in that study's salary recommendations that Respondent relatively underpays most of its female employees in general and in its Public Works Department, and that Respondent relatively overpays many of its male employees in general and most of its male employees in the Public Works Department;

b) found that the latter conclusion shows an at least notable current pattern of relative underpayment by Respondent of female employees both in the Public Works Department and in general, and relative overpayment of male employees in the Public Works Department, i.e., an at least notable link between being a female employee of Respondent and not being paid commensurably by Respondent; and,

c) noted that even the study recommended in effect that Respondent narrow the gap between the salary range of its Transit Coordinator and the salary range of its Shops Superintendent, Maintenance Foreman, and Water Foreman, and that Respondent pay its Transit Coordinator at a higher range than its Greenskeeper.

16) By engaging in the employment practices described in the above Ultimate Findings of Fact, Respondent has paid Complainant, since February 1, 1979, at a range of pay which has not been at all commensurate with her work, because of her sex.

17) Respondent had and has the financial ability to pay Complainant at the step increments of range 14 between February 1, 1979, and May 31, 1982, with a one-step merit raise each June 1 thereafter.

18) If Respondent had not engaged in the employment practices described above, Respondent would have paid Complainant at the step increments of range 14 between February 1, 1979, and November 30, 1982. If Respondent had compensated Complainant thusly, Complainant would have earned $11,905.00 more than she did in wages, from which $284.72 more would have been withheld and deposited into Complainant's retirement account. Furthermore, Respondent would have contributed $1697.80 more than it did to Complainant's retirement account. Since November 30, 1979, Respondent would have continued paying Complainant at the step increments of range 14 raising her one step each June 1 thereafter.

19) During all times material herein, Respondent's merit system determined the step, but not the range, at which Respondent paid its employees.

CONCLUSIONS OF LAW

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

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

3) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing Respondent and Complainant of the matters described in ORS 183.413(2)(a) through (i).

4) The actions, and motivations for those actions, of Respondent's employees Don Bentz, Carl Holmes, Richard Adams, Adney Bowker, Michael Hoehn, George Stubbert, and Respondent's agents the members of its City Council and Transportation Commission and its mayor, described herein, are properly imputed to Respondent.

5) Respondent engaged in an unlawful employment practice in violation of ORS 659.030 as charged, in that Respondent discriminated against Complainant in compensation, by paying Complainant at a range of pay not at all commensurate with her work, because of her sex.

6) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant and to order her range of pay raised under the facts and circumstances of this record, and the sums of money awarded as damages and the increase in pay range ordered in the Order below are an appropriate exercise of that authority.

RULINGS ON MOTIONS

1. Respondent's Motion to Dismiss

For the reasons stated in Section 2 of the Opinion below, this motion is denied.

2. The Agency's Motion to Amend the Specific Charges

At the hearing, the Agency moved to amend the Specific Charges in the following respects: delete "substantially equal skill, effort, and responsibility" and insert in its place "work of comparable character, the performance of which requires comparable skills".

Respondent objected that this motion was untimely, because Respondent had finished presenting its case when the motion was made. Respondent also objected that this motion was an attempt to incorporate the standards of ORS 652.220, from which the proposed new language is taken, into this proceeding brought under ORS 659.030.

OAR 839-04-030(3)(b)(A) provides in pertinent part that when issues not raised in the Specific Charges are raised at the hearing by the express or implied consent of the parties, they shall be treated in all respects by this forum as if they had been raised in the pleadings. This subsection also provides that upon motion, a party may amend its pleadings to conform to the evidence and to reflect the issues which were presented. Paragraph (B) of this provision states in pertinent part that even if evidence is objected to at hearing on the ground that it is not within the issues raised by the Specific Charges, the presiding officer may allow the pleadings to be amended. Paragraph (B) goes on to provide that the presiding officer shall allow such amendment freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the presiding officer that the admission of such evidence would prejudice it in maintaining its defense upon the merits. This subsection also allows the presiding officer to grant a

continuance to enable the objecting party to meet such evidence.

The clear thrust of OAR 839-04-030(3)(b) is to allow evidence and issues not raised in the Specific Charges to be presented at hearing and treated as if they had been raised in the pleadings, if 1) the respondent makes no objection that they are not within the scope of the Specific Charges, or 2) the respondent would not be prejudiced thereby and the merits of the action would be served. This provision favors continuation of the hearing (to allow the objecting party to meet such evidence) over exclusion of such evidence. In this matter, Respondent did not object to evidence of job comparability on the grounds that it went beyond the issues raised by the Specific Charges, nor did Respondent request a continuation to meet such evidence. In fact, not only was this evidence presented without such an objection, but the oral advocacy of both counsel and the written brief Respondent filed at hearing make it obvious that despite the language of the Specific Charges which the Agency wants to amend, both parties were prepared to, assumed they would, and did treat this case as one involving allegations of comparable worth or work, rather than equal or substantially equal work. This was probably because, at two lines below the lines of the Specific Charges which the Agency proposes to amend, the Charges allege that the work of six of the compared jobs was "specifically comparable." In these circumstances, it would be ludicrous to find that the proposed amendment would prejudice Respondent or that it would not serve the presentation of the merits of the action.

For all these reasons, and because the proposed amendment better conforms to the evidence and better reflects the issues presented than do the original Specific Charges, the proposed amendment should be allowed.

Because this forum found it unnecessary herein to specifically consider incorporating the standards of ORS 652.220 into ORS 659.030, this forum need not consider the part of Respondent's objection to the amendment of the Specific Charges which argued against such an incorporation.

The motion to amend the Specific Charges is granted.

However, to the extent that other issues not raised in the pleadings were raised by the evidence presented at hearing with no objection, this forum will also view those issues as impliedly consented to by the parties and will treat them in all respects as if they had been raised in the pleadings. This includes but is not limited to the issue (and evidence) of the substantial similarity of the work of Transit Coordinator and Water Foreman, and the issue (and evidence) of sex discrimination in compensation in particulars beyond and other than unequal pay for comparable work.

3. Respondent's Motion to Continue Deliberation

Respondent's April 4, 1983, motion for an order continuing this forum's deliberation of this matter is denied. The issues in this matter can be resolved by this forum before the Supreme Court of the State of Oregon decides *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), *pet. for rev. granted* (1983).

OPINION

1. The Substantial Similarity of the Work Performed

A. Supervising Technician Classification Excluded

The description of the Supervising Technician classification in the record is phrased for the most part in technical language which has not been explained to this forum. Furthermore, this classification includes three positions doing related but different types of work, and there is little evidence beyond the above-mentioned description as to the duties and responsibilities of each position. Although this forum is prepared to give great weight to Mr. Hoehn's conclusion that overall the work of this classification is comparable to that of Transit Coordinator, this forum cannot entirely base its finding herein as to the substantial similarity of this position to that of Transit Coordinator solely upon Mr. Hoehn's latter conclusion. Therefore, because of the lack of complete and inscrutable first-hand evidence concerning the nature of the Supervising Technician classification, this forum has declined to rule on whether it is or is not substantially similar to the Transit Coordinator.

B. Explanation of the Substantial Similarities Found

Performance of the work of Transit Coordinator requires and involves skills, efforts, and responsibilities and working conditions which are comparable to those required or involved in the performance of a number of jobs which Respondent has filled with male employees and for which Respondent has paid those employees at or above range 14. The position of Transit Coordinator is specifically substantially similar to the positions of Shop Superintendent, Maintenance Foreman, and Water Foreman. Each is a supervisory -administrative position within Respondent's Public Works Department. Each deals with the same general subject matter: public works. Because each position is unique (with only one of Respondent's employees working in it and no other employee of Respondent performing the work of it), the specific subject matter of each position differs.

The positions of Transit Coordinator and Shop Superintendent are very similar because of the following shared characteristics. They each head a small division and are responsible for seeing that division runs smoothly. Both report directly to the Public Works Director. Both prepare their divisional budgets for the Public Works Director. (The budget of the Shop Superintendent's division is somewhat smaller than that of the Transit Coordinator's division.) Both make policy recommendations. Both directly supervise a similar number of journey-level employees in their divisions, with no intermediate positions between them and all other division employees. For both, this supervision involves observing and evaluating their subordinates' work, training subordinates, interviewing applicants with the Public Works Director, and making recommendations to that Director as to who should be hired and fired. Neither performs the work of his/her subordinates except in emergencies, but both can if necessary.

Both interact with a "public:" the Shop Superintendent is accountable to Respondent's other divisions and departments but not to the general public, while the Transit Coordinator is accountable to the public at large and persons and groups involved in transit. Both maintain records for budgetary and other purposes. Both prepare reports, but those of the Transit Coordinator can be far more complex, given her work with grants and long-range planning. The Shop Superintendent has no report responsibilities associated with obtaining or keeping grants. Both respond to divisional emergencies, and both are on call for emergencies after hours. (The Shop Superintendent is never called out; the Transit Coordinator has sometimes been called out.) Both work in offices in the same building and spend substantial time in that building. Both work the same hours each week. Although the subject matter of the technical knowledge each must have differs, each must have thorough knowledge of the subject matter with which his/her division is concerned. That subject matter is somewhat specifically related, in that the operation of both divisions revolves around vehicular equipment. These two positions have worked together in preparing specifications for new transit vehicles and in the maintenance and repair of transit vehicles. Both positions require skills, knowledge, and abilities which can be learned through on-the-job experience, over time.

The most startling difference between the Shop Superintendent and the Transit Coordinator is their pay: the Shop Superintendent is paid at range 16 and the Transit Coordinator at range 11.

The positions of Transit Coordinator and Maintenance Foreman are substantially similar because of the following shared characteristics.

Both spend most of their work time doing supervisory tasks. Both assign work and schedule subordinates, both personally check work progress and direct work, both make hiring and firing recommendations, and both instruct subordinates. The Maintenance Foreman directly supervises three people who lead nine employees. The Transit Coordinator directly supervises seven employees doing the same job at the same rank. Both positions maintain routine records. Both do planning for their divisions, in the sense of planning future division activities, but while the Transit Coordinator is the only person doing so in the transit division, the Maintenance Foreman is assisting the Maintenance Superintendent. For instance, while the Transit Coordinator prepares her division's budget, the Maintenance Foreman assists the Maintenance Superintendent in preparing the Streets Maintenance Division budget. Both the Transit Coordinator and the Maintenance Foreman write reports, but those of the Transit Coordinator can be far more complex. Both have public relations responsibilities, but the Transit Coordinator is responsible for all of her division's public relations, while the Maintenance Foreman helps his division head respond to public complaints or questions. The Maintenance Foreman does not have promotional responsibilities. Neither the Maintenance Foreman nor the Transit Coordinator performs journey-level work except in emergencies, but both can do so. Both are involved in budget administration, but while Complainant has entire responsibility for administering a $376,000.00 budget, the Maintenance Foreman maintains cost records and otherwise helps his division head administer a $533,000.00 budget. Each works the same hours each week; each is subject to call in emergencies. The Transit Coordinator spends most of her work time in buildings, while the Maintenance Foreman spends most of his outside. Although the subject matter of the technical knowledge each must have differs, both must have thorough knowledge of that subject matter. Both can gain the knowledge, skills, and abilities requisite to the performance of their work on-the-job, as supplemented with reading and seminars.

The chief difference between the work of the Transit Coordinator and the Maintenance Foreman is that the former works on a divisional level, reporting in all matters directly to the Public Works Director, while the latter is more an assistant to the head of his larger division, to whom he reports. This difference does not justify the fact that the Maintenance Foreman is paid four ranges above the Transit Coordinator. (It might justify the opposite.)

The positions of Transit Coordinator and Water Foreman are substantially similar because of the following shared characteristics. Both supervise four to five full-time employees directly. (The Transit Coordinator also directly supervises three part-time employees, while three of the Water Foreman's subordinates lead six workers.) In supervising, both the Transit Coordinator and the Water Foreman schedule employees, assign work, make hiring and firing recommendations, do personnel evaluations, and train subordinates. Both work to analyze and correct problems in their systems. Both keep work and cost records.

Both have purchasing authority under a budget. While the Water Foreman has input to the Water Superintendent concerning part of the Water Division's budget, the Transit Coordinator is solely responsible for preparing her division's budget for presentation to the Public Works Director. Both the Transit Coordinator and the Water Foreman can perform the work of the journey-level positions in their units. Although the subject matter of the technical knowledge each must have differs, both must have thorough knowledge of that subject matter. (The Water Foreman may have slightly more technical knowledge than Complainant. However, the Transit Coordinator's technical skills are more people-oriented and administrative in many respects and therefore more difficult to measure.) The Transit Coordinator's long-range planning responsibilities are more equivalent to those of the Water Foreman's superior, the Water Superintendent. Both the Water Foreman and the Transit Coordinator have come up through the ranks, learning their skills on-the-job. The Water Foreman spends most of his work time outside, while the Transit Coordinator spends most of hers in buildings.

The chief difference between the Transit Coordinator and the Water Foreman is that the Transit Coordinator works on a higher level: she is

responsible for the entire division and reports directly to the Public Works Director. The Water Foreman, on the other hand, reports to the Water Superintendent, and is responsible for just one aspect of the Water Division's operation: water distribution. There are two administrative ranks between the Water Foreman and Public Works Director. These differences certainly do not justify the fact that the Water Foreman is paid five ranges above the Transit Coordinator.

C. Overall Comparisons

The skills required to perform each of the above four jobs are substantially similar in that they can be gained over time, through on-the-job experience, by working up through the ranks; they include substantial technical skills; and they include equivalent combinations of substantially similar supervisory, long-range planning, budget-preparing, and other administrative skills.

All of these positions spend most of their work time doing supervisory work. They all directly supervise similar numbers of subordinates, and they all schedule and assign work and workers, evaluate and train personnel, and make hiring-firing recommendations. Only the Transit Coordinator and Shop Superintendent report directly to the heads of their departments and have no intermediaries between them and their subordinates.

As heads of divisions, the Transit Coordinator and the Shop Superintendent have very significant and similar administrative responsibilities. For instance, the Transit Coordinator and the Shop Superintendent both prepare division budgets for review by the Public Works Director (although the Transit Coordinator's budget is larger and involves grant responsibilities.) The Maintenance and Water Foreman each assist their immediate supervisors, the division heads, in the preparation of a division budget, and thereby have substantially less budget-planning responsibility than either the Shop Superintendent or the Transit Coordinator. The Transit Coordinator has substantial long-range planning responsibilities, which are slightly greater than those of the Shop Superintendent and substantially greater than those of either foreman.

In sum, the combination of responsibilities and skills which the Transit Coordinator has is at least equivalent to the combinations of substantially similar responsibilities and skills which the Shop Superintendent, Water Foreman, and Maintenance Foreman have. (In the Transit Coordinator's above-described long-range planning responsibilities, and in that she is the point person in explaining, defending, promoting, and maintaining an important and controversial city service, the Transit Coordinator's responsibilities are probably greater than those of any of the above positions. This forum need not decide this point.)

The efforts of the Transit Coordinator and the other three positions are substantially similar in that the employee in each position makes the significant, primarily mental exertions common to supervisory-administrative positions.

The working conditions of these four positions are similar in that they all involve difficulty. While the Water and Maintenance Foremen work outside in all kinds of weather conditions, the Transit Coordinator works in a very crowded office with added tension arising from the difficult relationship between her and the Maintenance Superintendent with whom she shares the space. The Shop Superintendent works proximately to the Transit Coordinator, in an office which is often noisy.

The above-described numerous common factors make comparisons between these positions very meaningful. The result of these comparisons is the conclusion that performance of the work of Transit Coordinator requires a combination of skill, effort, and responsibility which is equivalent, overall, to the combinations of substantially similar skills, efforts, and responsibilities required to perform the work of Shop Superintendent, Water Foreman, or Maintenance Foreman, and that these positions involve similar working conditions. For that reason, the work performed by Transit Coordinator is substantially similar to that performed by each of the three other positions.

2. Application of ORS 659.030

It is important to make clear what this case is not. It is not a case of unequal pay for equal work, for Respondent does not have another position which is equal or substantially equal to Complainant's position. It is not a case of unequal pay for work of comparable worth, for it involves comparison of positions of like kind rather than positions which are so completely unlike that they are comparable only in their value to Respondent. It is not properly denominated a case of unequal pay for comparable work, for the work for which a female employee is paid less than male employees is not just comparable, but substantially similar, to the work of those males; and that substantial similarity is but one of the elements which has led this forum to conclude that there has been unlawful discrimination in compensation herein.

A. Prima Facie Case Established By the Completion of Agency's Case in Chief

At the conclusion of the Agency's case in chief, Respondent moved for dismissal of the Complaint and the Specific Charges on the ground that the Agency had failed to make a prima facie case of sex discrimination in compensation under ORS 659.030. The Presiding Officer reserved ruling.

ORS 659.030 makes it an unlawful employment practice for an employer to discriminate against an employee in compensation because of that employee's sex. In order to assess Respondent's motion, this forum must examine the evidence admitted before the conclusion of the Agency's case in chief. A careful analysis of that portion of the record reveals that evidence admitted before the Agency concluded its case in chief showed these basic facts:

1) Between February 1, 1979, and the present, Complainant, Respondent's female employee, performed work which was substantially similar to that performed by at least three of Respondent's male employees. During that same period, Respondent paid Complainant at a much lower rate than it paid any of these three male employees.

2) Respondent pays Complainant at the same range of pay as it pays a male employee who performs lower-level work than Complainant.

3) Respondent's agents rejected the proposal of Complainant's immediate superior to raise her pay range to within one to two ranges of the abovementioned three male employees, because these agents believed that Complainant's duties and responsibilities did not warrant that high a pay range. They failed or refused, from February 1, 1979, through the present, to know or acknowledge the nature and extent of Complainant's duties and responsibilities, even though Complainant played a division head's role before them. They persisted in underrating Complainant's work and viewing it as secretarial in nature, despite their substantial exposure to that work, which did apprise or should have apprised them of the fact that Complainant was a supervisor-administrator and a division head.

For the reasons explained below, this forum has inferred from the above basic facts that it is more likely than not that Respondent failed to pay Complainant at a range at all commensurate with her duties and responsibilities because of her sex.

It is rational to presume that employees doing substantially similar work for the same employer will be compensated therefor at substantially similar rates of pay, unless their employer determines compensation on the basis of some factor other than the work performed. Likewise, it is rational to presume that if one employee is performing work at a higher level than another employee of the same employer, the former employee will be compensated more therefor, unless the employer determines compensation on the basis of some factor other than work performed. Herein, Complainant has been and is paid much less than three people doing jobs substantially similar to hers, and she is paid in the same range as a person doing a lower level job. In terms of the work performed therefore, Complainant is "underpaid" relative to the pay of the four other positions.

In the absence of a showing in the Agency's case in chief that the work involved in these jobs explained the relative compensation therefor, one can deduce that Respondent must have used a factor other than work to determine compensation. In the Agency's case in chief, the evidence links only one factor, sex, to relative compensation: each of the four people overpaid relative to Complainant is male, while Complainant is female.

Beyond showing a pay pattern aligned with gender (and not with work performed), the Agency's case in chief shows that even when Respondent's agent the Transportation Commission was told outright that Complainant was underpaid in comparison with certain male workers doing similar work, it rejected a proposal to raise Complainant's pay to range 14 because it felt her duties and responsibilities did not warrant that pay. Despite clear information to the contrary from the best source of information on Complainant's work and from its direct and full exposure to Complainant's work at its monthly meetings for two years, the Commission viewed Complainant as working in the role of secretary. (This finding is based upon the fact that the Commission viewed Complainant as its secretary; that its Chair, who played a key role in forming the Commission's judgments as to Complainant's work herein, viewed Complainant as an administrative secretary rather than as a division head; and that the Commission recommended that Complainant's pay be raised just to the range of the administrative secretary with whom its Chair equated Complainant.) The Commission's conclusion that Complainant's role was secretarial was so blatantly wrong in fact and so contradicted the information the Commission had been given about Complainant's work that it logically cannot be based upon Complainant's work. It logically can only be explained by, and therefore consciously or unconsciously must have been based upon, the fact that Complainant is a female. The Commission's perception that Complainant did secretarial work certainly must have (and should have) influenced the Commission to decide that Complainant's work did not merit range 14 pay. After all, Respondent does not pay at or near range 14 for secretarial work. In sum, in the absence of any other explanation for the Commission's conclusion that Complainant's work did not merit range 14 pay, this forum infers that it was based upon the Commission's perception that since Complainant was a female, she worked in the traditionally female role of secretary.

The above evidence of pay determinations aligned with gender and of a gender-caused decision not to remedy the inequity to Complainant of those determinations establishes a prima facie case of sex discrimination. It does so because it shows treatment by Respondent from which one can infer, if such treatment remains unexplained in the remainder of the case, that it was more likely than not that such treatment was based upon Complainant's sex. That is to say, this evidence established a prima facie case of sex discrimination because it gave rise to an inference of unlawful discrimination. *See International Brotherhood of Teamsters v. US,* 431 US 344, 358, 14 FEP 1514, 1528 (1977). For that reason, Respondent's motion for dismissal is denied.

B. Conclusion Established By the Entire Record

The ultimate question in a disparate treatment case is whether the Agency has proved by a preponderance of the evidence that the employer treated the complainant in a discriminatory way because of the Complainant's protected class status. Whereas the previous section of this Opinion concerned just the evidence introduced during the Agency's case in chief, this section must examine the whole record.

A preponderance of the evidence in the whole record shows that Respondent did not pay Complainant a salary at all commensurate with her work: Respondent paid others doing substantially similar work at much higher salary ranges than Complainant and paid an employee doing lower-level work at the same range as Complainant. Although there were some differences between Complainant's job and the jobs which were paid much more, each of the latter jobs was so like Complainant's job that it was substantially similar thereto. For that reason, the differences which did exist between them did not justify the broad pay differentials between them.

Similarly, although the evidence showed that Complainant's job and the lower-level job mentioned above shared enough general characteristics to allow this forum to compare them, that comparison revealed that these jobs certainly were not similar enough to explain their being paid at the same range.

This forum's inquiry focused upon whether the Agency proved by a preponderance of the evidence that Respondent's pay treatment of the Complainant was based upon her sex.

A preponderance of the evidence as a whole indicated that Respondent's compensation scheme, as it related to Complainant, was correlated with employee gender. The three employees doing work substantially similar to Complainant and getting paid much more therefor by Respondent were all male. The person doing work at a lower-level than Complainant and getting paid the same by Respondent as Complainant was male. Complainant is a female.

Furthermore, the record as a whole showed that despite the fact that it knew or should have known that Complainant was a division head and a supervisor-administrator, the body which rejected the proposal to make Complainant's pay commensurate did so because it had slotted Complainant into the traditionally female role of secretary. Given the overwhelming evidence that Complainant was not a secretary, the only logical explanation for the Transportation Commission's perception that she was is that the Commission assumed she was doing a traditionally female job because she is a female. Given the Transportation Commission's exposure to the fact that the Transit Coordinator supervised and ran the transit system and made the policy recommendations which catalyzed and were the bases for Commission actions, the Commission certainly would not have assumed that the Transit Coordinator position was secretarial if the Transit Coordinator had been male. (One illustration of this is provided by the view of the Transportation Commission's Chair of Complainant's role in generating the minutes of its meetings. The Commission knew that Complainant wrote and signed these minutes. Instead of viewing this action as the administrator's action which it had been when performed by two male Public Works Directors, the Chair viewed Complainant's action as an administrative secretary's task identical to what Mary Kent, apparently an administrative secretary, did when she drafted or edited and typed City Council minutes.)

Finally, according to Respondent's own study, Respondent is relatively underpaying most of its female employees (80 percent generally and 70 percent in the Public Works Department) and relatively overpaying many of its male employees (36 percent generally and 71 percent in its Public Works Department). (If one did not consider Complainant's position, the percentages of relatively underpaid female employees would rise to 82 percent generally and 78 percent in the Public Works Department.) Respondent appeared to argue in its exceptions to the Proposed Order that if this forum gave little weight to Respondent's study as it related to Complainant, this forum should not consider the study at all. However, not one of the reasons (articulated in Finding of Fact 67 above) for this forum's decision to give little weight to the study's conclusion that range 11 is the appropriate pay range for Complainant necessarily impacts the overall conclusions of the study as to the appropriate pay ranges for all of Respondent's other positions. Although the flaws in the study of Complainant's classification described in Finding of Fact 67 could have pervaded the study of every classification, there is no assertion or evidence that they did. In fact, neither party has disputed the study's overall conclusions concerning Respondent's other classifications. Consequently, although this forum needs to make and has made no judgment as to what weight to give the study's pay recommendation for any particular classification, this forum has noted the study's pay recommendations for Complainant's comparators and has considered the pattern of relative underpayment of most female employees and overpayment of many male employees indicated in the study's overall conclusions for all classifications. Since this pattern is inherent in Respondent's own evidence, evidence which as it relates to all positions but Transit Coordinator is undisputed, this forum has found this pattern to be a showing of an at least notable link between being a female employee of Respondent and not being paid commensurably by Respondent. Although this showing is not necessary to the inference of unlawful discrimination herein, it does buttress that inference.

None of the above-described employment practices by Respondent were accidental or isolated. They were intentional actions by Respondent's employees or agents for which Respondent is responsible, which raised the inference, based upon the record as a whole, that Respondent did discriminate against Complainant in compensation because of her sex.

Respondent did not rebut this inference of unlawful sex discrimination by articulating any legitimate nondiscriminatory reason for the above-described practices which the evidence did not show to be pretextual. Respondent attempted to attribute Complainant's pay to its merit system. The Agency showed, however, that Respondent's merit system accounts for the step, but not the range, at which Respondent pays an employee. Respondent produced evidence as to why its City Manager and City Council opposed the one proposal to make Complainant's pay commensurate, i.e., to raise it to range 14. However, the evidence shows that it was not the City Manager or Council who disposed of that proposal; it was the Transportation Commission. Although the City Manager considered the range 14 proposal, he did not reject it or even articulate his disapproval of it to the proposer or to the Transportation Commission, to which the City Manager had it referred. Once the Transportation Commission dismissed the range 14 proposal and transformed it into a range 11 recommendation, the range 14 proposal no longer existed. The City Council as an entity had played no discernible role in the Transportation Commission's action. There is no evidence that the City Council ever officially considered the range 14

proposal or otherwise officially decided not to raise Complainant's salary to range 14. The City Council made an informal comment upon being told about the range 14 proposal or about Complainant's instant complaint, after the Transportation Commission had disposed of the range 14 proposal. This forum has found that the alleged reason for that negative Council response was not the actual or legitimate reason for Respondent's rejection of range 14 pay for its Transit Coordinator. At most, in ratifying the recommended budget containing the range 11 item created by the Transportation Commission, without apparently considering the Commission's reason for the range 11 item, the Council implicitly ratified the Commission's reason for rejecting the range 14 proposal. The Transportation Commission killed that proposal, and it did so because of its perception that Complainant was doing secretarial work.

This perception was not a legitimate non-discriminatory reason for denying Complainant range 14 pay and otherwise failing or refusing to pay Complainant commensurately. For reasons discussed adequately above, this perception was blatantly erroneous, and it could not have been based upon what the Transportation Commission knew or should have known about Complainant's work.

As noted above, the perception that Complainant's work was secretarial was not only not a legitimate non-discriminatory reason for failing to pay her commensurably for the work she did, it was itself an element leading to the inference, based upon the whole record, that Respondent's treatment of Complainant herein was sex-based. The only possible explanation for this perception, and therefore the inference this forum has made, is that, despite overwhelming evidence to the contrary, the Transportation Commission assumed that because Complainant was female, she was doing a traditionally female job: that of a secretary. In other words, the Transportation Commission's decision not to recommend range 14 pay was based upon Complainant's sex.

Because the inference of unlawful discrimination has been raised and has not been rebutted in the record as a whole, this forum has found that Respondent did discriminate against Complainant in compensation because of her sex, in violation of ORS 659.030.

3. Damage Calculation: Effective Date of Complainant's Annual Merit Raises

This forum has concluded that if Respondent had paid Complainant at range 14 since February 1, 1979, Complainant would have received every yearly merit increase thereafter for which she would have been eligible. It is not clear from the record, however, whether she would have been eligible for a merit raise effective each February 1 or each June 1. Because the parties stipulated in effect that an exhibit shows Complainant's back pay damages, and because that exhibit uses June 1 as the effective date of the latest range 14 merit raise for Complainant, this forum has concluded that if Respondent had paid Complainant at range 14 since February 1, 1979, Respondent would have given Complainant annual merit raises on the dates shown in the exhibit and thereafter on each June 1.

AMENDED ORDER

NOW, THEREFORE, as authorized by ORS 659.030(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Increase Complainant's salary to step five of range 14 immediately.

2) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Debra Mobley in the amount of ELEVEN THOUSAND SIX HUNDRED TWENTY DOLLARS AND TWENTY-EIGHT CENTS ($11,620.28), plus interest thereon compounded and computed annually at the annual rate of six percent between February 1, 1979, and July 31, 1979, and at the annual rate of nine percent thereafter until the date upon which Respondent complies with this paragraph. This award represents damages or wages Complainant lost because of Respondent's unlawful employment practice set out above.

3) Deposit $1,982.52 into Complainant's retirement account immediately, plus whatever interest would have accrued on this amount had it been deposited in the increments and at the times described in the exhibit herein. This award represents damages for retirement account deposits and interest Complainant lost because of Respondent's unlawful employment practice set out above.

4) 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 Debra Mobley in an amount equal to the difference in wages, between what Complainant has earned and what she would have earned at step four of range 14, from December 1, 1982, through May 31, 1983, and between what Complainant has earned and what she would have earned at step five of that range from June 1, 1983, through the date of this Order, plus interest thereon compounded and computed annually at the rate of nine per cent thereafter until the date upon which Respondent complies with this paragraph. This award represents damages for wages and retirement account deposits Complainant lost from December 1, 1982, through the date of this Order because of Respondent's unlawful employment practice set out above.

5) Deposit into Complainant's retirement account immediately an amount equal to the difference in retirement contributions between what Respondent would have deposited into that account, had it paid Complainant at step four of range 14 from December 1, 1982, through May 31, 1983, and at step five of that range from June 1, 1983, through the date of this Order, and what Respondent actually deposited into Complainant's retirement account during those time periods, plus whatever additional interest would have accumulated in Complainant's retirement account if Respondent had paid Complainant at the above-described steps of range 14 during the above-described time periods. This

deposit should be treated for interest-bearing purposes as a regular retirement account deposit. This award represents damages for retirement account deposits and interest Complainant lost from December 1, 1982, through the date of this Order because of Respondent's unlawful employment practice set out above.

6) Between the date of this Order and the date Respondent complies with paragraph one above, deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries by the tenth of each month a certified check payable to the Bureau of Labor and Industries in trust for Debra Mobley in an amount equal to the difference in wages between what Complainant has earned during the previous month and what she would have earned at step five of range 14 through May 31, 1984, and at one step higher during each successive twelve-month period thereafter. This award represents damages for wages and retirement account deposits Complainant will lose from the date of this Order through the date Respondent complies with paragraph one above, because of Respondent's unlawful employment practice set out above.

7) Between the date of this Order and the date Respondent complies with paragraph one above, deposit into Complainant's retirement account the amounts which Respondent would deposit into that account, at the times Respondent would make such deposits, if Respondent were paying Complainant at step five of range 14 through May 31, 1984, and at one step higher during each successive twelve-month period thereafter. These deposits should be treated for interest-bearing purposes as regular retirement account deposits. This award represents damages for retirement account deposits Complainant will lose from the date of this Order through the date Respondent complies with paragraph one above because of Respondent's unlawful employment practice set out above.

8) Cease and desist from discriminating against any employee in compensation because of that person's sex.

In the Matter of
DESIDERIO SALAZAR,
dba Salazar Reforestation,
Respondent.

Case Number 01-83
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 5, 1984.

SYNOPSIS

Respondent farm labor contractor made only cursory inquiries about the legal employability of his reforestation crew members, and accepted obviously suspicious "proof" of employability even from former employees he knew had been arrested and deported by the Immigration and Naturalization Service. The Commissioner found that (1) Respondent either knew or with reasonable diligence should have known that the crews he employed consisted of illegal aliens, and (2) Respondent failed to give the workers a written statement, as required by ORS 658.440(1)(f), containing their legal rights and remedies and the terms and conditions of their employment. The Commissioner refused to renew Respondent's farm labor contractor license with forestation indorsement. ORS 658.405; 658.410; 658.440(1)(f) and (2)(d); 658.445.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on September 13 and 14, 1983, in the Community Room of the Far West Federal Bank, 600 East Jackson Street, Medford, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Peter B. Higgins, Assistant Attorney General for the Department of Justice of the State of Oregon. Desiderio Salazar, doing business as Salazar Reforestation (hereinafter the Contractor), was represented by Jon H. Paauwe, Attorney at Law.

The Agency called as witnesses the Contractor; Ronald Kimmons, Compliance Specialist for the Wage and Hour Division of the Agency; John Lessel, Compliance Specialist Supervisor for the Wage and Hour Division; and Edward W. Fisher, Criminal Investigator for the U. S. Immigration and Naturalization Service. The Contractor called as witnesses himself and his former employees Fidel Estrada, Jesus Ramirez, Silvino Escalante, Sotero Ayon Sanchez, Jose Mendoza, and Adrian Barajas. Larry Francis was the translator for all of the Contractor's witnesses except the Contractor and for written exhibits.

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

FINDINGS OF FACT -- PROCEDURAL

1) By a notice dated February 14, 1983, the Agency informed the Contractor that the Agency proposed to refuse to renew the Contractor's farm labor contractor's license. This notice cited as the basis for that proposal the Contractor's having knowingly employed, in July 1982 and January 1983, alien workers not legally present or employable in the United States, in violation of ORS 658.440(2)(d), and the Contractor's having failed to furnish workers hired in January 1983 with the written statement required by ORS 658.440(1)(f). This notice was served upon the Contractor on February 16, 1983.

2) By a letter dated March 3, 1983, the Contractor through his attorney requested a hearing on the Agency's proposed action.

3) By a letter dated June 16, 1983, the Agency notified the Contractor through his attorney that at or before the time of hearing, the Agency would move to amend the February 14, 1983, Notice of Proposed Refusal to Renew License to also make

reference to the Contractor's knowingly having employed alien workers not legally present or employable in the United States in February 1983 (and at least in part after February 14, 1983). The Agency specified that it was informing the Contractor of this so that the Contractor would have adequate time to prepare for hearing on the additional allegation. The Contractor's attorney received this letter.

4) By notices dated July 21, 1983, and August 3, 1983, this forum notified the Contractor and the Agency of the time and place of the hearing. These notices were served upon the Contractor on July 25, 1983, and August 5, 1983, respectively.

5) By a notice dated August 31, 1983, the Agency amended the February 14, 1983, Notice of Proposed Refusal to Renew License in the respect specified in the Agency's June 16, 1983, letter to the Contractor. At a deposition taken on September 2, 1983, the Agency informed the Contractor that this Amended Notice had been or would be issued forthwith.

6) Before the commencement of the hearing, the Contractor received from this forum and read a copy of "Contested Case Rights and Procedures" and stated that he understood and had no questions about it.

7) At the hearing, the Contractor indicated that none of his witnesses (except the Contractor) could readily understand and communicate in the English language, but that they could do so in the Spanish language. Furthermore, an exhibit was written in Spanish. Because Larry Francis, a self-employed translator, was readily able to communicate with the Contractor's witnesses in Spanish, translate the proceedings for them, accurately repeat and translate their statements to the forum, and translate the exhibit, Mr. Francis was a "qualified interpreter" under ORS 183.418(3)(b). Accordingly, this forum appointed Mr. Francis to act in this capacity during the hearing, and he did.

8) This forum makes the following clarifying addendum to the record: when the Contractor's attorney referred to pointing to the "top right-hand card" in his examination of Mr. Estrada concerning an exhibit, he was referring to a particular page of that exhibit. Although this is not discernible from the tape recording of the hearing, it was clear to all those present at the hearing. (*See* Finding of Fact 30 below.)

RULINGS -- PROCEDURAL

1) At the hearing, the Contractor objected to proceeding to hearing on the allegation concerning February 1983, which was added to the Proposed Refusal to Renew License by the Agency's August 31, 1983, amendment thereof. The Contractor stated that he was not prepared to proceed on that allegation. The Contractor requested sixty days from his receipt of the Amended Notice to request a hearing on the new allegation.

Although the Contractor argued that he would be prejudiced by not being able to produce, at the September 13-14 hearing, each of the fifteen workers to whom the February 1983 allegation relates, the Contractor actually did produce testimony or affidavits by or concerning at least six of those workers. The Contractor did not satisfy the forum that his inability to produce the other workers was caused by the date

of the formal amendment of the Proposed Refusal. In fact, the Contractor admitted that fear of Immigration and Naturalization Service (hereinafter INS) official Fisher and risk of deportation kept the other February 1983 workers who were available (if any) away from the hearing. The Contractor did not subpoena any of these workers. Furthermore, the Contractor could not specify to the forum which absent workers he would be able to produce with the requested continuance. He also could not specify that he was alleging any of them would testify, other than that they had told the Contractor they were legally in the United States and that they had shown him a false "green card," birth certificate or permit to document that claim. The testimony that they had told the Contractor they were legally in the United States and that they had shown him false documentation of that claim would be cumulative to uncontroverted evidence on the record (corroborating the Contractor's testimony of that point) which has been found to be fact in this Order. With regard to any testimony as to exactly what type of documentation absent workers had shown the Contractor, four of the Contractor's six workers who did testify and who were available for examination by the Agency gave testimony which indicated that in fact they had not produced the type of documentation which the Contractor testified they had produced. (All of the four testifying workers who, according to the Contractor, showed him "green cards" indicated that they had not.) No testimony of additional workers as to what they produced could undo the testimony of these four workers on what they produced. In his responses to this forum's repeated requests (at the beginning, middle and end of the hearing) that the Contractor specify what he was alleging the absent workers would testify, the Contractor failed to allege that their testimony as to what documentation they had produced would materially enhance the Contractor's defense at all, much less support it (any better or injure it any less than did the testimony of those workers who did testify). Therefore, the Contractor did not satisfy this forum that the Contractor was prejudiced in maintaining his defense by not being able to produce some of his workers at the September 12-14, 1983, hearing on this matter.

Accordingly, because the Agency's June 16, 1983, letter put the Contractor on actual notice that the February 1983 allegation would be incorporated into the Proposed Refusal to Renew License; because the Contractor failed to satisfy this forum that proceeding to hearing on September 13-14, 1983, on the Amended Proposed Refusal would prejudice him in maintaining his defense on the merits; and because the presentation of the merits of this action would be served thereby, the Presiding Officer admitted the Amended Notice as the operative Notice of the Agency's Proposed Refusal to Renew License, and ruled that the hearing on September 13-14, 1983, would concern all the elements of that notice.

2) The Contractor also requested a continuance of the hearing when he realized that Mr. Fisher would be present throughout the proceedings. The Contractor argued again that his illegal alien witnesses would not appear at the hearing because Mr. Fisher's

presence would put them at risk of arrest and deportation. The Contractor asked for a continuance to devise a way to put the testimony of these witnesses before this forum.

Before the Presiding Officer could rule on this request, the Contractor and the Agency agreed that the Contractor's illegal alien* witnesses could testify at a time when Mr. Fisher would not be present at the hearing. The Contractor reserved his request for a continuance pending the appearance of those witnesses.

Six illegal aliens subsequently testified at the hearing, and the affidavits of two more were admitted into the record. The Contractor did not inform the forum how many others would have testified, absent their alleged fear of Mr. Fisher.

Although the Contractor did not explicitly renew his request for a continuance, this forum wishes to note its denial of the Contractor's request. Even if this request had a valid legal basis (and none was cited), it would be denied for the reasons cited in the above ruling concerning the absence of a showing of prejudice to the Contractor.

3) In his exceptions to the Proposed Order in this matter, the Contractor asked the forum to allow argument before this Order was entered. This forum assumes that by this the Contractor was requesting oral argument.

The Contractor has been accorded full opportunity and encouraged to make his arguments during and at the close of hearing and in his exceptions. The Contractor has offered no reason why this forum should give him yet another such opportunity. There is no point at issue herein on which the forum feels further argument would be elucidating. Consequently, the Contractor's request is denied.

FINDINGS OF FACT -- THE MERITS

A. General.

1. During all times material herein, the Contractor did business as Salazar Reforestation. In this business, the Contractor recruited, and/or solicited and employed workers** to perform labor in Oregon in the reforestation of lands, including but not limited to the planting, transplanting, tubing, and thinning of trees and seedlings; the clearing, piling, and disposal of brush and slash; and other related activities. The Contractor's workers performed this labor pursuant to the Contractor's contracts with the US Forest Service and the US Bureau of Land Management and with other contractors of those agencies. The Contractor performed these activities for remuneration or a rate of pay agreed upon in those contracts. Consequently, during all times material herein, the Contractor was a farm labor contractor, as defined in ORS 658.405, and was required by ORS 658.410 to have a farm labor contractor's license.

* By "illegal alien", this forum means an alien not legally present or legally employable in the United States.

** All the workers the Contractor employed in Oregon about which there is evidence on the record are male persons. Accordingly, this Order uses masculine pronouns in referring to the Contractor's workers.

2) At all times material herein, the Contractor was an experienced farm labor contractor. He has been licensed as a farm labor contractor in Oregon since about February 1, 1980. For approximately eight years before that date, he worked as a foreman for other farm labor contractors in the reforestation business.

3) The contractor is a citizen of Mexico. His native language is Spanish. He has been a legal permanent resident alien and has resided in the United States since 1971. He speaks and reads English fluently.

4) During all times material herein, the Agency has routinely sent to all farm labor contractor license applicants a packet which includes a copy of ORS 658.405 through 658.475 and ORS 658.991, Oregon statutes pertaining to farm labor contractors.

5) During all times material herein, the Contractor employed workers for his reforestation work on a project to project or bid job to bid job basis. He employed most of his workers repeatedly during times material herein, with those periods of employment separated by some ½ to 1 month intervals when the Contractor had no work.

B. Concerning the Charge that: The Contractor failed to comply with ORS 658.405 to 658.475 in that he failed to furnish workers hired to plant trees in January 1983 on the Oakridge Ranger District with the written statement required by ORS 658.440(1)(f).

6) In response to an Agency subpoena for the production of documents relevant to this matter at a September 2, 1983, deposition, the Contractor's counsel informed the Agency that he was not aware of the existence of any statement which would satisfy in this matter the requirements of ORS 658.440(1)(f). However, at hearing eleven days later, the Contractor furnished to his attorney a handwritten statement in Spanish, which has been admitted as an exhibit. The Contractor unilaterally stipulated that:

a) during all times material herein, the Contractor provided his workers with no written statement other than that exhibit; and

b) during all times material herein, the Contractor provided his workers with no written statement satisfying the requirements of ORS 658.440(1)(f), unless that exhibit satisfies that provision.

The Contractor admitted at hearing that during all times material herein, when he hired workers, he did not give each of them a written statement complying with ORS 658.440(1)(f).

7) Translated into English, the exhibit says:

"Rules for Personnel

Desi Salazar Reforestation

920 N. 10th Street

Central Point, Oregon

97502

"1. In order to give someone work, I require that they already know of all the state regulations and are aware of all the discounts that have to be taken out of their checks, according to state laws.

"2. Also it is required that every worker be legally in the US.

"3. Before starting to work, workers will fill out a W-4 form with their

social security number, number of dependents and address and give this to the foreman. This will be used at the end of the year for your income taxes.

"4. All workers have the obligation of remembering what they're making and their rights on the job, reading the cards that the Forest Department extends in every contract now that these are in Spanish, and one will find them in each one of the work trucks.

"5. Every worker has the right to complain if he has been badly treated on the job by the foreman. I will receive these complaints personally.

"6. Every foreman has the authority to fire any worker who does not fulfill his role as worker.

"7. These rules are for every worker without exception. I will answer any questions anyone has about this.

"Without any more,

"The owner of this Organization, Desiderio Salazar"

8) The Contractor testified that during all times material herein, one or two typed versions of the exhibit (with the same text as that exhibit) have been posted in the vehicles in which he transported his workers to job sites. He also testified that he did not physically give to each of his workers, during times material herein, a copy of the exhibit.

9) The Contractor admitted that the exhibit does not furnish all the information required by ORS 658.440(1)(f). He specifically admitted that it does not furnish the information required by ORS 658.440(1)(f)(A) through (D). He maintained that the US Forest Service provided him forms giving the information required by subsection (A), which he posted in his transport vehicles. Because the Contractor did not offer any such forms into evidence, and because of the Contractors stipulation noted in Finding of Fact 6 above, this forum has not considered the Contractor's testimony noted in the previous sentence.

10) During times material herein, the Contractor promised no bonuses to his workers and, generally, gave them no bonuses. However, he did pay bonuses to workers for working for him one full year. In this way, the Contractor "offered" workers bonuses according to the meaning of that term in ORS 658.440(1)(f)(B).

During times material herein, the Contractor made loans to workers between jobs, if they had worked for him three or four years and if he knew they would work for him when he asked in the future. The amounts of these loans were to be deducted from future wages. In this way, the Contractor "made" loans to workers, according to the meaning of that term in ORS 658.440(1)(f)(C).

During times material herein, the Contractor provided rent for housing to some of his workers, thereby providing housing services under ORS 658.440(1)(f)(D).

During times material herein, the Contractor provided transportation to his workers. This constituted a condition of employment under ORS 658.440(1)(f)(E).

During times material herein, the Contractor provided his workers with boots, raingear, and work equipment, thereby furnishing clothing and equipment to them under ORS 658.440(1)(f)(F).

During times material herein, no labor disputes existed at any of the Contractor's worksites.

11) The exhibit referred to in Finding of Fact 7 does not provide the information required by ORS 658.440(1)(f)(A), (B), (C), (D), (E), or (F)*.

C. Concerning the Charge that: The Contractor failed to comply with ORS 658.405 to 658.475 in that he knowingly employed alien workers not legally present or legally employable in the United States in violation of ORS 658.440(2)(d).

12) During the nearly four years the Contractor has been a licensed farm labor contractor, he has known that Oregon law prohibited him from knowingly employing an alien not legally present or legally employable in the United States.

13) Since the Fall of 1976, INS, the federal agency enforcing US immigration and naturalization law, has assigned criminal investigator Edward W. Fisher to the reforestation industry. He is familiar with the farm labor contractors in Oregon. He led all of the inspections of the Contractor's crews described below.

14) Some licensed farm labor contractors in Oregon employ illegal aliens, and some do not. Mr. Fisher has checked crews totally composed of Hispanic persons who were all legally present and employable in the United States. He has checked Oregon farm labor contractor crews in the last year which had no illegal alien workers.

15) In July 1982 the Contractor employed a crew of six people to thin trees on land owned by the US Bureau of Land Management located between Drain and Yoncalla, Oregon. INS checked that crew at its worksite and, on July 28, 1982, arrested all six of the Contractor's employees there as illegal aliens. None of the six showed INS any documentation that they were legally present or legally employable in the United States. Subsequently, all six were determined to be illegal aliens and were returned to Mexico, their country of citizenship.

16) There are two processes by which a person arrested as an illegal alien by INS may be returned to his/her country of citizenship:

a) The person signs a form confessing to being in the United States illegally and requesting to be returned to his/her country of citizenship as soon as possible and is thereafter "voluntarily returned" to that country. This is the most expeditious and most often utilized process.

b) The person requests an administrative hearing and is freed on bond or held in custody until the hearing. If,

* The inclusion of the findings noted regarding ORS 658.440(1)(f)(A) through (F) above does not mean that no information would be required by ORS 658.440(1)(f)(B), (C), (D) or (F) if the Contractor offered no bonuses, made no loans, provided no housing, health or day care services, or furnished no clothing or equipment, to his workers.

after the hearing, an immigration judge makes a finding that the person is deportable, the judge either orders deportation or offers the person a voluntary return to his/her country of citizenship. Once a person is deported (as opposed to voluntarily returned), it is a felony for him/her to return to the US.

17) In late January 1983, the Contractor employed a crew of approximately 24 people to work on the Contractor's reforestation contract with the US Forest Service in the Oakridge Ranger District of the Willamette National Forest in Oregon. INS checked the crew's worksite on January 31, 1983, and arrested twenty of the Contractor's employees there as illegal aliens. None of the twenty showed INS any documentary evidence that they were legally present or legally employable in the United States. Subsequently, all twenty arrested signed forms confessing to being in the United States illegally and were voluntarily returned by INS to Mexico, their country of citizenship.

18) In February 1983, the Contractor employed a crew of 19 to 20 people to work on the Contractor's reforestation contract with the US Forest Services in the Hebo Ranger District of the Siuslaw National Forest in Oregon. On February 16, 1983, INS checked this crew and arrested fifteen of the Contractor's employees as illegal aliens. None of the fifteen showed INS any documentary evidence that they were legally present or legally employable in the United States. Subsequently, INS determined that all fifteen were illegal aliens from Mexico.

19) There is no evidence or allegation that any of the above-mentioned employees of the Contractor arrested on July 28, 1982, January 31, 1983 and February 16, 1983, were legally present or legally employable in the United States. Accordingly, based upon the above-cited determinations they were illegal aliens and upon their subsequent returns to their country of citizenship, this forum finds that all of those employees were neither legally present nor legally employable in the United States when INS arrested them.

20) During times material herein, the Contractor was aware of the arrests and returns to Mexico of his employees pursuant to the above-noted July 28, 1982, and January 31, 1983, INS inspections, and of the arrests of his employees pursuant to the February 16, 1983, inspection.

21) On February 18, 1983, the Contractor assembled a crew to work for him on his contract with the Forest Service in the Hebo Ranger District of the Siuslaw National Forest in Oregon. Before transporting this crew to the worksite, the Contractor himself made clear to the crew that INS would probably check it and that everyone on the crew had to be "legal". The Contractor warned crew members not to get in the truck if they "weren't sure" of being legal. He made clear that he did not want any more problems with illegal workers. When, in response to the Contractors statements, seven or so workers decided that they did not want to go to the worksite, the Contractor fired them, certain then that they were illegal aliens. The Contractor "tried harder" on February 18, 1983, to have a completely legal crew because he knew, or strongly suspected, that INS would check the crew and he wanted to make sure its members were "legal".

22) When he arrived at the worksite on February 18, 1983, with the remaining seventeen members of his crew, the Contractor was convinced he had a perfectly "legal" crew. On that day, INS checked the crew at the worksite. All but one of its seventeen members had valid documentation of being legally present and legally employable in the United States. The one illegal alien admitted to INS, and this forum finds, that he had told the Contractor he was legal and displayed counterfeit documentation, a permit, to the Contractor.

23) During times material herein, many of the Contractor's workers had initially sought work with him after hearing through word of mouth that he had work available. It was known (among at least some Hispanics) that the Contractor would not hire a person who did not show him documentation of his or her legal status in the United States.

24) The Contractor personally had hired every member of his crews whom INS checked on July 28, 1982, January 31, 1983, February 16, 1983, and February 18, 1983.

25) Every one of the Contractor's employees whom INS arrested on its July 28, 1982, January 31, 1983, and February 16, 1983, inspections had worked for the Contractor at least once before. When the Contractor had originally hired each one of them, and each of the persons working on his Hebo Ranger District crew on February 18, 1983, the Contractor had asked each if he was in the United States legally. When each one of them replied "yes," the Contractor asked him to display documentation that he was in the United States legally. Each worker showed the Contractor documentation purportedly showing him to be "in the US legally." The Contractor asked at least one hiree if his documentation was genuine. Each of those arrestees were Hispanic.

The Contractor maintains that he thereby determined to the best of his ability that each of these employees was legally in the United States. (He did not specify, in his testimony, that he made the additional inquiry as to whether, or determined that, each employee was also legally employable in the United States.) The Contractor did not ask for documentation of an employee's legal status each time he subsequently employed that worker, if the worker had not been apprehended by INS while employed by the Contractor.

26) The Contractor maintains that the documentation mentioned in the previous Finding of Fact was a birth certificate showing birth in the United States, a "green card," or a "permit" from INS allowing its subject to be in the United States while his application for legal status was processed.

27) There is a booklet which INS prints and makes available to the general public, employers, and law enforcement agencies to make them aware of the documentary requirements for aliens in the United States. It contains a specimen of each type of proof of alien registration except the "permit" referred to in Findings of Fact 26 above and 29 below.

28) One form of proof of alien registration is what is commonly called a "green card". It is a permanent alien registration card issued by INS. It

entitles its subject to be and work in the United States. There are two types of "green cards": the old is an INS form I-151, the new a form I-551. The booklet contains a specimen and description of each. Some of the form I-151's have a green background. None have a photograph or fingerprint. The form I-551's have a white background, a photograph and a fingerprint of their subject. "Green card", therefore, does not necessarily mean a card colored green.

29) The permit referred to in Finding of Fact 26 above consists of a letter from the INS accompanied by a document which looks like that pictured in the booklet. This permit may or may not authorize employment of its subjects in the United States. If it does, it bears the stamp "Employment Authorized."

30) Four illegal aliens and former employees of the Contractor testified that when the Contractor hired them, each showed the Contractor a "green card" to document his claim of being legally in the United States. When the Agency asked each to identify the form on page 8, 9, or 12* of the booklet which most resembled the "green card" each had shown the Contractor, each separately pointed to the form on page 12. (Three said their card was the one on page 12, and one said it was [most] like the one on page 12.) Before giving his answer, each was told that the form depicted on page 12 has a photograph in its blank square. (*See* Procedural Finding of Fact 8 above.)

31) Page 12 of the booklet shows a form which authorizes entry into the US for reasons other than work on visits not to exceed 72 hours and 25 miles from the Mexican border. This form has a photograph (in the square which is blank on Page 12) and is clearly marked with the words "BEARER MAY NOT BE EMPLOYED IN THE U.S."

32) As they are rendered in the booklet (but with a photograph in the blank square of the form on page 12), the forms on pages 8, 9, and 12 of the booklet differ substantially from each other. Even if one could not understand the words on these forms, it would be difficult to confuse them with each other, because of their appearance. The form on page 8 does not resemble the forms on pages 9 and 12 at all. The prominent features on the forms on page 9 (a photograph and a fingerprint) and page 12 (a photograph) do not appear on the form on page 8, and the layout and lettering of the form on page 8 is completely different from that of the forms on pages 9 and 12. The forms on pages 9 and 12 are completely different from each other in that one bears a fingerprint and the other does not, and the layout and lettering on each is entirely different from that on the other.

33) After examining the booklet, the Contractor testified that when he stated that a worker showed him a "green card," he meant that the worker had showed him a card like that shown on page 8. The Contractor also testified that these "green cards" usually bore a photograph.

34) Federal law requires all aliens in the United States to carry proof of alien registration with them at all times. Legal aliens comply with this requirement 99 percent of the time. If an alien who claims to have proof of registration is apprehended by INS without that proof in his or her possession, INS may choose to accompany him or her to the location of the proof and inspect it. INS seldom goes as far as taking a legal alien who does not have proof of registration with him or her to jail to check his or her status.

35) Illegal aliens whom INS apprehends normally do not show or offer to show INS any identification, genuine or false. Three felonies may be committed by showing false identification to INS.

36) None of the six illegal aliens who testified at hearing produced the false identification cards which they testified they showed to the Contractor when he hired them. The affidavits of two other illegal aliens make reference to having such identification attached to the affidavits, but the affidavits actually submitted for and admitted into the record have no such attachments. All eight of these aliens testified or stated in affidavit that they lied to the Contractor when they were hired and told him that they were legally in the United States.

37) Two of the Contractor's employees whom INS arrested as illegal aliens on January 31, 1983, had been arrested in INS's inspection of the Contractor's Drain-Yoncalla crew on July 28, 1982: Silvino Escalante and Efrain Garcia. After being arrested on July 28, and subsequently returned to Mexico by INS, they had reappeared in Oregon and asked for documentation of their status in the United States, because of their July arrest by INS and return to Mexico.

The Contractor's testimony concerning what followed is inconsistent. First he testified that both Mr. Escalante and Mr. Garcia showed him a birth certificate showing US birth. Then he testified that he thought Mr. Escalante showed him a "green card" and Mr. Garcia showed him a birth certificate. Finally, the Contractor testified that he thought Mr. Garcia showed him a "green card." Mr. Escalante's testimony agreed with the Contractor's first testimony concerning his documentation. The Contractor employed both Mr. Escalante and Mr. Garcia again, after asking them why they had not shown these documents to INS when they were arrested. Both had told him that they did not have the identification with them at that time and therefore had not been able to prove they were born in the United States. Mr. Escalante testified that he promised the Contractor that his birth certificate was genuine and that he had been born in the United States. Mr. Escalante's reemployment occurred about one month after he was arrested and returned to Mexico.

38) If a person who has been arrested as an illegal alien and returned to Mexico reappears in the United States with a "green card" more than six months later, it is possible, but not probable, that person has changed

* Two were specifically asked about pages 8, 9, and 12 and one about pages 9 and 12. Since pages 8 and 9 face each other, it would be very difficult to examine one without seeing the other. Accordingly, this forum has inferred that each of these four illegal aliens saw both page 8 and page 9.

status since the return and that the "green card" is genuine. It is possible but not probable, therefore, that a person arrested by INS and returned to Mexico by INS in July could be legally present and employable in the United States by the end of the following January.

39) Fidel Estrada, one of the Contractor's employees whom INS arrested as an illegal alien on February 16, 1983, had been arrested in INS's inspection of the Contractor's worksite on July 28, 1982. Three of the Contractor's employees whom INS arrested as illegal aliens on February 16, 1983, Salvador and Pedro Antonio Orosco and Manuel Gonzalez de la Rosa, had been arrested in INS's inspection of the Contractor's worksite on January 31, 1983. One of the Contractor's employees whom INS arrested as illegal on February 16, 1983, Silvino Escalante, had also been arrested in INS's July 28, 1982, and January 31, 1983, inspections of the Contractor's worksites. (*See* Finding of Fact 37 above.)

40) After Mr. Estrada's July 28, 1982, arrest by INS and return to Mexico, Mr. Estrada had returned to Oregon and asked the Contractor for work. Because Mr. Estrada had been arrested and returned to Mexico, the Contractor had asked Mr. Estrada if he then was in the United States legally. Mr. Estrada had said "yes," and had produced a card which, Mr. Estrada testified at hearing, was the card depicted on page 12 of the booklet. It had a photograph but no fingerprint. This was the same identification that Mr. Estrada had showed the Contractor when the Contractor had originally hired him. Mr. Estrada had told the Contractor that he had not been able to prove he was legally in the United States in July 1982, but now "was in good shape." The Contractor had re-employed Mr. Estrada.

After the Orosco's and Mr. Gonzalez de la Rosa had been arrested on January 31, 1983, they had been returned to Mexico. They had subsequently reappeared in Oregon and asked the Contractor to employ them again. In response, the Contractor had asked them if they were legally in the United States, because of the January 31, 1983, arrest by INS and return to Mexico. The Contractor had re-employed the Orosco's when they had shown him birth certificates showing birth in the United States and had told the Contractor that they had been arrested on January 31 because they did not have those certificates with them. By affidavits, both Orosco's state that Mr. Gonzalez de la Rosa also showed the Contractor a birth certificate showing US birth in order to be re-employed after his January 31, 1983, arrest. The Contractor testified that he did not remember whether Mr. Gonzalez de la Rosa had shown him a birth certificate or "green card" in order to be re-employed. Later he testified that Mr. Gonzalez showed him a birth certificate.

There is no evidence on the record concerning the circumstances of the Contractor's reemployment of Mr. Escalante after his January 31, 1983, arrest and return to Mexico.

41) A reasonably diligent farm labor contractor would not believe someone who maintains that INS arrested him as an illegal alien and returned him to Mexico because he did not have a US birth certificate with him, and maintains that the US birth certificate he is displaying is genuine. INS will not return to another country a person who does not have in his or her possession, but who is able to produce or obtain, a valid US birth certificate. Persons holding a US birth certificate are not required to carry it with them at all times.

42) In explaining why he had not attempted to work for the Contractor after he had been arrested by INS as an illegal alien, a person who had worked for the Contractor testified that even if he had shown the Contractor another document showing his legal status, the Contractor would have known he was illegal because INS had arrested him.

43) The Contractor denied at hearing that during times material he re-employed anyone whom INS had arrested and sent back to Mexico who thereafter asked the Contractor for re-employment and offered a "green card" as proof of his legal status in the United States. He maintained that he only accepted birth certificates from such people as proof of their legal status in the United States.

44) The Contractor testified that although, during times material herein, he had become suspicious about the status in the United States of some of his workers after overhearing workers talk, he never knew any of the 42 who were arrested during the four INS inspections described above were illegal until INS arrested them. He had allayed his suspicions by asking their subjects if they were sure they were "legal."

45) When talking with a reforestation contractor such as the Contractor, Mr. Fisher advises him or her, and this forum finds, that taking the following measures will help a contractor detect illegal aliens:

a) Ask every applicant if she or he is a US citizen. If the applicant says "yes," end the inquiry. However, if the applicant produces a birth certificate, it should show birth in the United States.

b) If the applicant says that she or he is not a US citizen, and you decide to hire him or her, ask the applicant for proof of being "legally able to work in the United States." The only such proof is a "green card" (Form I-151 or I-551), an INS permit stamped "Employment Authorized", or one of the other documents pictured in the booklet allowing employment in the United States.

46) It is easy for an illegal alien to obtain false documentation of being legally present and legally employable in the United States (i.e., counterfeit documentation or documentation which does not belong to him or her). Quite often forgeries or alterations of "green cards" are so obvious that even a lay person can readily detect them, particularly if that lay person carries a "green card" himself or herself. However, it is not reasonable to expect an employer to detect every false "green card." It is reasonable to expect an employer to ask INS to check a "green card" if the employer has any suspicions at all about its validity.

47) For the last three to four years in Oregon, any employer has been able to telephone INS and have it run a computer check of the validity of the information on a "green card." INS will call back the employer immediately with the results.

48) The Contractor testified that he did not know before February 18, 1983, when Mr. Fisher told him, that he could telephone INS to check "green cards." This forum cannot find this to be fact because the Contractor indicated elsewhere in his testimony that he had tried to call INS to check a birth certificate before February 18, 1983.

49) If the Contractor knowingly employs illegal aliens, he can lose his farm labor contractor license. If he employs illegal aliens, he can be placed in default of his contracts with the US Forest Service and assessed liquidated damages. If he is convicted of transporting within the United States or harboring illegal aliens, he can be placed in default of his contracts or subcontracts for work on Bureau of Land Management land and barred from receiving such future contracts and subcontracts in the future. The Contractor can also lose his reforestation contracts by being unable to complete them on time, when his workers are not available to work for him because they have been arrested and returned to Mexico.

50) The Contractor pays all his reforestation workers above the hourly rate required by the contracts under which the Contractor is performing the reforestation work.

51) Between July 28, 1982, and February 18, 1983, the Contractor did not attempt to find out how INS could help him enlist INS's aid in detecting illegal aliens among his applicants, even though INS is expert in detecting illegal aliens. During that time, the Contractor did not attempt to apprise himself of INS procedures and practices in detecting/processing illegal aliens. At hearing, the Contractor several times testified that he was not aware of INS services for employers or of basic INS operating procedures or regulations, and he relied upon this ignorance in explaining his continued employment of illegal aliens between July 28, 1982, and February 16, 1983.

52) This forum did not find the Contractor's testimony on two key points credible, as it was inconsistent concerning the first point and persuasively refuted on the second. First, the Contractor testified that he accepted no documentation of legal status in the United States but birth certificates from persons who had been arrested as illegal aliens by INS while in his employ, when they later sought reemployment with him. He also testified that each such person showed him a birth certificate showing US birth, indicating US citizenship. However, the Contractor also at different times testified that three such people showed him "green cards" to document their status as aliens legally in the United States. The latter testimony was corroborated as to one of those people. Since all of the Contractor's above-cited testimony could not be accurate (one may not be both a citizen and an alien), some of it must be inaccurate.

Second, the Contractor's testimony identifying the "green cards" he testified he had accepted from many hirees was refuted by the testimony of every such person who testified at the hearing. At hearing, the Contractor's counsel asked him to point out every form in the booklet which showed a "green card" which had been presented to the Contractor by a hiree. The Contractor pointed out just the form on page 8 of

that exhibit, stating that form looked "exactly the same" as those "green cards," but that the latter "usually" had a photograph. If accurate, therefore, this testimony would mean that "usually" the "green cards" the Contractor was shown (and accepted) were counterfeit, because the "green card" on page 8 of the booklet never bears a photograph, and INS issues no form like the card on page 8 with a photograph. After having repeatedly heard at hearing that the form depicted on page 12 of the booklet has a photograph on it, the Contractor testified that his hirees had not shown him any form like that depicted on page 12. The Contractor's assertions that he had been presented with "green cards" like the form on page 8 of the booklet and not like the one on page 12 were refuted by the testimony of every single witness who testified he had displayed a "green card" to the Contractor. Each such witness testified that what he had shown the Contractor was a form which was (or was most like) that shown on page 12. This forum finds the testimony of the latter four witnesses more credible than that of the Contractor on this point, because:

a) it is the testimony of four people, each of whom rendered his testimony separately, out of the presence of the other three, and unequivocally;

b) it would have been difficult for these witnesses to confuse the form on page 12 with the form on page 8 of the booklet, because of the obvious differences in their appearance; and

c) because they could not read English, none of these four witnesses, each of whom was called by the Contractor to testify on the Contractor's behalf, could read the bold-faced inscription on the form on page 12 which so clearly incriminates the Contractor herein: "Bearer May Not Be Employed in the US" These witnesses did not know, therefore, that actually they were testifying against the Contractor in their testimony concerning the exhibit. On the other hand, the Contractor reads English fluently and indicated by his testimony that he had noted this inscription when he looked at page 12 and had realized that anyone shown this form would be charged with knowledge that its bearer was not legally employable in the United States.

Because the Contractor's testimony on these points was not credible, this forum has accorded it little weight.

ULTIMATE FINDINGS OF FACT

1) The Contractor acted as a farm labor contractor, as defined by ORS 658.405, and was licensed as such, during all times material herein.

2) At no time material herein did the Contractor furnish to any of his workers, when he hired, recruited, or solicited them, whichever occurred first, a written statement complying with the requirements of ORS 658.440 (1)(f). Even if all the Contractor's evidence on point is believed (except that which contradicts the Contractor's own stipulation), the most the Contractor did was:

a) post a statement

b) which does not contain a description of the information required by ORS 658.440(1)(f)(A), (B), (C), (D), (E) or (F)

c) where his workers could see it only after they had been hired, recruited, or solicited, whichever

occurred first, and while they were being transported to the Contractor's worksite.

3) During all times material herein, the Contractor knew it was a violation of law to knowingly employ an alien not legally present or legally employable in the United States.

4) The US Immigration and Naturalization Service inspected the Contractor's crews three times between July 28, 1982, and February 16, 1983, inclusively, and discovered that at least 82 percent (41) of the 49 or 50 employees of the Contractor it checked were not legally present or legally employable in the United States. All of these illegal aliens were arrested by INS and returned to Mexico, their country of citizenship.

5) The Contractor's crew which INS checked on July 28, 1982, was totally comprised of employees not legally present or legally employable in the United States.

6) During all times material herein, the Contractor was aware of the above-cited arrests and returns to Mexico of his employees. He should have known from these events that all of these workers were, at the time they were arrested and returned, not legally present or legally employable in the United States.

7) It is possible for a farm labor contractor to employ a crew comprised of persons who are all legally present and legally employable in the United States. Other Oregon farm labor contractors have achieved this, and the Contractor virtually did so two days after the last above-cited INS inspection. Because the Contractor took a few reasonable steps to detect illegal aliens among his Hebo District employees on February 18, 1983, over 94 percent of the employees at his Hebo District worksite were legally present and legally employable in the United States.

8) The Contractor had personally hired every one of the illegal aliens whom INS arrested on July 28, 1982, January 31, 1983, and February 16, 1983, and had required each to show him some indication that he was in the United States legally. The Contractor did not again inspect that indication thereafter, unless the worker was arrested by INS while in the Contractor's employ and returned to his country of citizenship as an illegal alien.

9) For reasons explained in Finding of Fact 52 above, this forum has given little weight to the Contractor's testimony as to the type of documentation of status in the United States he accepted from his hirees. Therefore, and because each and every one of the Contractor's witnesses except the Contractor attested to the following fact, this forum finds that during times material herein, the Contractor did not require that his alien hirees show him proof of being legally employable in the United States in the only valid form: an INS form I-551 or Form I-151, an INS permit stamped "Employment Authorized," or some other document depicted in the INS booklet allowing employment in the United States.

10) The Contractor re-employed workers who had been arrested by INS while in his employ and returned to Mexico as illegal aliens.

a) In one instance, the Contractor again employed a person whom, he knew, twice had been arrested by INS while in the Contractor's employ and returned to Mexico as an illegal alien. This person had shown the Contractor a birth certificate to substantiate his legal status the first time the Contractor re-employed him, and had maintained that he had been arrested because he had not had his birth certificate with him. The Contractor offered no explanation for re-employing the person the second time.

b) In three or four instances, the Contractor re-employed workers who he knew had been arrested by INS while in the Contractor's employ and returned to Mexico as illegal aliens, because those persons showed the Contractor birth certificates and told the Contractor they had been arrested because they had not had those certificates with them.

c) In at least one instance, the Contractor had re-employed a worker who he knew had been arrested by INS while in the Contractor's employ and returned to Mexico as an illegal alien, after that person had shown the Contractor the same alien identification that he had produced when the Contractor originally hired him.

11) Any person born in the United States is a US citizen. There is no requirement that US citizens carry with them at all times their birth certificates. There is a requirement that aliens carry with them at all times proof of alien registration, and there is virtually total compliance with this rule by legal aliens.

12) A reasonably diligent farm labor contractor should know it is easy to obtain false documentation of legal status in the United States, including false proof of alien registration and false US birth certificates.

13) A reasonably diligent farm labor contractor should presume that a person who was arrested by INS as an illegal alien and returned to his or her country through voluntary return or deportation was then an illegal alien. A reasonably diligent farm labor contractor should not accept from such an alien the same "proof "of being legally present and legally employable in the United States which is the same alien registration that the person displayed to the contractor before being arrested and returned to his or her country. A reasonably diligent farm labor contractor should assume that an alien cannot adjust his or her status to "legal" within less than six months of voluntary return or deportation to Mexico as an illegal alien.

14) A reasonably diligent farm labor contractor should presume that if a person is deported from the United States or voluntarily returned to his country (once, much less twice), that person is not a US citizen. That is, a reasonably diligent farm labor contractor should presume that if a person is a US citizen, a) that person will assert this before deportation or voluntary return; and b) if that person does so assert, he or she will not be deported or asked to request a voluntary return just because she/he does not have a birth certificate with him or her at the time.

15) During times material herein, when the Contractor became suspicious about the status in the United States of a worker because of "talk" he heard, he did no more than ask that worker if he was "legal".

16) Between July 28, 1982, and February 16, 1983, the Contractor did not inform himself of INS regulations, procedures, or practices concerning the detection or processing of illegal aliens, or seek INS's advice or other aid as to how he could better detect illegal aliens among his applicants for employment.

CONCLUSIONS OF LAW

1) At all times material herein, the Contractor was a farm labor contractor subject to the provisions of ORS 658.405 to 658.475 and ORS 658.991 (2) and (3).

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

3) During all times material herein, the Contractor failed to comply with ORS 658.440(1)(f) in that he did not furnish to any of his workers, at the time he hired, recruited, or solicited them, whichever occurred first, a written statement that met the requirements of ORS 658.440(1)(f).

4) The Contractor's failure during times material herein to require documentation from his alien hires that showed that they were legally present and legally employable in the United States; the Contractor's employment, on the three occasions INS checked his employees between July 28, 1982, and February 16, 1983, inclusively, of forty-one aliens not legally present or legally employable in the United States (i.e., 82 percent of those checked); the Contractor's failure, after he discovered that every member of the crew he employed on July 28, 1982, was an illegal alien, to take any additional steps before February 18, 1983, to discourage or detect the presence of illegal aliens among his hires and workers (including seeking the aid of the appropriate federal agency); the Contractor's failure, at all times material before February 18, 1983, to take the reasonable step which he demonstrated on February 18, 1983, could detect virtually all illegal aliens among his workers; the Contractor's failure to do anything more to check the status of workers he already employed who he suspected were illegal aliens than ask them if they were "legal;" the Contractor's re-employing, during times material herein, workers who he knew had been illegal aliens and had been arrested and returned to their country of citizenship as such while in his employ, after they showed him the same identification (a birth certificate in some instances) which they had shown him before their arrests, together constitute, as a matter of law, knowledge on the part of the Contractor that he was employing alien workers not legally present or legally employable in the United States, within the meaning of the word "knowingly" as it is used in ORS 658.440(2)(d).

5) The Contractor failed to comply with ORS 658.440(2)(d) in that between July 28, 1982, and February 16 1983, inclusively, he knowingly employed aliens not legally present or legally employable in the United States.

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 and may refuse to renew the Contractor's license to act as a farm labor contractor.

OPINION

Careful scrutiny of the record herein has made it apparent to this forum that the Contractor took some steps to either ascertain whether his hirees were legally in the United States or to make it appear that he was doing so. However, his efforts were somewhat superficial and not reasonably diligent in light of the circumstances and the Contractor's statutory responsibility not to knowingly employ illegal aliens. This requirement means that the Contractor cannot employ persons whom he actually knows are not legally present or legally employable in the United States and that he cannot employ persons whom he would know were illegal aliens if he made efforts to ascertain their status which were reasonably diligent under the circumstances as he knew them.

> "...Knowledge of facts and circumstances which would put a reasonable man on his inquiry is tantamount to knowledge of such facts as a reasonably diligent inquiry would reveal." *In the Matter of Alfonso Gonzales,* 1 BOLI 121(1978), *aff'd without opinion, Gonzales v. Bureau of Labor,* 39 Or App 407, 593 P2d 532 (1979).

What does the record reveal about the Contractor's employment practices at issue? The Contractor did not in fact require that his alien hirees display documentation of their legal employability in the United States. He accepted "documentation" which was false and which may well have evidenced non-authorization to work in the United States. The Contractor knew, at least after INS inspected his crew on July 28, 1982, that all of the employees on that crew were illegal aliens and that, therefore, the steps he was taking to detect illegal aliens were not working at all. Nonetheless, according to the record, the Contractor did nothing more after July 28, 1982, to make sure his workers were legally present and legally employable in the United States. He did not reinspect their documentation. He did no more when he became suspicious that an employee was an illegal alien than ask if he was "legal." The Contractor re-employed persons whom he knew had been arrested and returned to Mexico as illegal aliens while in his employ and, as "proof" of their being legally in the United States when he re-employed them, the Contractor accepted birth certificates or the same alien registration from these aliens that they had displayed to him when he originally hired them. Reasonable diligence would have led the Contractor to presume that these people were illegal aliens. Reasonable diligence would have caused the Contractor to ask INS to verify the status of these people in the United States. The Contractor, however, did not even ask INS how he could better detect illegal aliens. He did not inform himself of INS regulations or procedures. He did not attempt to find out whether INS could help him, much less actually enlist its aid. Apparently, the Contractor did not even reiterate to people already working for him the requirement that they had to be "legal," until February 18, 1983. When (and because) he finally took (just) the last precaution, after being inspected three times by INS in 6 ½ months and having 82 percent of his

workers found to be illegal aliens, he achieved a crew with 94 percent of its members legally present and legally employable in the United States. An astounding and revealing reversal!

It seems apparent that even just a slightly more assertive approach to his workers, by the Contractor personally, about requiring them to be legally present and legally employable in the United States could have produced "legal" crews for the Contractor at all times material herein. This change in approach certainly constitutes reasonable diligence by the Contractor not to employ illegal aliens, as do all of the above-named actions. Instead however, during times material herein, the Contractor took actions which seem almost calculated to produce illegal alien workers, and failed to take anything but superficial steps to achieve the opposite. Consequently, the Contractor's employment of illegal aliens under the above-described circumstances, including his failure to make any of the above-described efforts before February 18, 1983, to identify them as such, does constitute, under ORS 658.440(2)(d), the Contractor's knowingly employing persons not legally employable or legally present in the United States.

ORDER

NOW, THEREFORE, as authorized by ORS 658.445, the Commissioner of the Bureau of Labor and Industries hereby refuses to renew the Contractor's license to act as a farm labor contractor for the 1983 licensing year, which ran from February 1, 1983, through January 31, 1984.

In the Matter of
PACIFIC CONVALESCENT FOUNDATION, INC.,
dba McKenzie Manor Nursing Home,
Respondent.

Case Number 02-83
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 19, 1984.

SYNOPSIS

Complainant had an unacceptable record of absenteeism, about which he had been repeatedly warned both orally and in writing by Respondent. The Commissioner found that it was this record, and not Complainant's report of an on-the-job injury or his eventual receipt of compensation therefor, that caused Respondent to terminate his employment as a nurse's aide. Finding no unlawful employment practice, the Commissioner dismissed the complaint and Specific Charges. ORS 659.410; 659.415; OAR 839-06-100; 839-06-105(2).

The above-entitled contested case came on regularly for hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 7, 1983, in Room 221 of the Federal Building, 211 E. 7th Avenue, Eugene, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Respondent Pacific Convalescent Foundation, Inc., dba McKenzie Manor Nursing Home, was represented by Timothy J. Harold, and Erwin B. (Sam) Pace, Jr., Attorneys at Law. Florence Miller, Administrator of McKenzie Manor Nursing home was present as the representative of Respondent. The Agency called as witnesses Complainant James A. Dupre and Diane Anthony, Director of Nurses at McKenzie Manor Nursing Home. Respondent called as witnesses Paula Ogan, registered nurse working for Respondent; Vivian Jenson, registered nurse working for Respondent; and Fran Weitzel, a certified nurse's aid working for Respondent. Respondent also called Complainant as Respondent's witness.

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

RULINGS UPON MOTIONS

At the beginning of the hearing the Agency moved to amend the Specific Charges pursuant to a motion which was hand-delivered to the Bureau of Labor and Industries on October 28, 1983, from Ms. Smith. A ruling on the motion to amend the Specific Charges had been postponed until the day of the hearing. The Agency moved to amend the Specific Charges as follows:

> Amend to add a new subparagraph stating:
>
> "1. "Respondent employed six or more persons in September, 1981;"
>
> Renumber subparagraphs 1 through 5 to be 2 through 6, respectively; and change original subparagraph 5 (Amended subparagraph 6) to begin
>
> "On or about September 21, 1981 ..."
>
> Amend to add a new subparagraph stating :
>
> "2. Complainant applied for and received Worker's Compensation Benefits as a result of his September, 1981 on-the-job injury.";
>
> Renumber original subparagraph 2 to be subparagraph 3; At the end of original subparagraph 2 (Amended subparagraph 3), part (a), add, after the word "employment," the words
>
> "and asked to be reinstated to his former position with Respondent."

Respondent did not object to the motion to amend the Specific Charges and it was therefore allowed. It was agreed between Respondent and the Agency that Respondent's original answer, received at the Bureau on October 7, 1983, would serve as the answer to the Amended Specific Charges.

Respondent renewed the motion to dismiss the Specific Charges for lack of jurisdiction that it originally filed with the Bureau on October 7, 1983. That motion was denied in a ruling dated the 27th day of October, 1983. The motion to dismiss was renewed at the hearing both as to the original Specific Charges and the Amended Specific Charges and was again denied.

The Agency also moved to exclude all witnesses from the hearing. This motion was granted. Respondent, however, requested that Diane Anthony be permitted to remain in the hearing room as the legal representative of Respondent. The Agency objected on the grounds that Ms. Anthony had no official position with the Respondent except as an employee and therefore could not act as the legal representative. Respondent's request that Ms. Anthony be allowed to remain in the hearing room was denied and she was therefore excluded along with other witnesses.

Respondent then moved to exclude Complainant from the hearing on the grounds he was merely a witness to the proceedings and not a party thereto. That motion was denied and Complainant was allowed to remain in the hearing room.

FINDINGS OF FACT – PROCEDURAL

1) On October 21, 1981, James A. Dupre filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been discriminated against in connection with his employment in that Respondent failed and refused to reinstate Complainant to his former position of employment or work which was available or suitable after Complainant had sustained an on-the-job injury and had received Worker's Compensation therefore.

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

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

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Pacific Convalescent Foundation, Inc., dba McKenzie Manor Nursing Home, employed more than six persons in September 1981.

2) Complainant was employed by Respondent on October 30, 1980, as a nurse's aide.

3) At all times relevant to this matter Complainant worked the 11:00 p.m. to 7:00 a.m. shift. He worked four days on and had two days off on a rotating schedule.

4) On March 16, 1981, Complainant was given a copy of an employee warning record indicating that his absences from the job were excessive and that any further excessive absenteeism would result in being put on "on-call" status for Sunday through Thursday if he was unable to work on Friday and Saturday. The employee warning record stated that Complainant was not working his shift as scheduled and was not working on Fridays and Saturdays although scheduled to do so. It indicated also that in January he had been absent five days: Thursday, January 1; Saturday, January 17; Saturday, January 31; Tuesday, February 6; and Sunday, February 18. This employee warning record was presented and signed by Diana L. Taylor, R.N. (now Diana Anthony as a result of marriage in November 1982) and was signed by Complainant on March 17, 1981, indicating that he had received it. Employees of Respondent sometimes called in to report that they would be absent without giving any explanations.

5) At the time that Complainant received this employee warning record in March of 1981, he had been playing with a band which caused him to miss work frequently on Friday and Saturday nights. After the warning in March of 1981, he quit his job with that band.

6) In July of 1981, Complainant began playing with another band. In August of 1981, he again missed a number of days of work: Saturday, August 1st; Saturday, August 8th; Wednesday, August 19th; Tuesday, August 25th; and Saturday, August 29th. He also worked only six hours of an eight-hour shift on Monday, August 31st. Thus of 21 working days in the month of August when Complainant was scheduled to work he missed five days completely and worked only part of the day one of those days.

7) On Saturday night, August 29th, Complainant was playing with a band at the Rodeway Inn in Springfield.

8) On September 10, 1981, Complainant received another written employee warning record. This employee warning record was shown to him and he was given a copy of it by Vivian Jenson, R.N. It listed the dates of his absences in August and one day in September. The employee warning record indicated on it that any further excessive absenteeism would result in dismissal. Complainant did not sign this employee warning as a result of a dispute over whether or not the dates listed were correct. Prior to the September 10th warning, Ms. Jenson had verbally warned Complainant on at least two occasions about his excessive absenteeism.

9) Despite having received this second written warning on September 10th, which indicated that any further excessive absenteeism would result in dismissal, Complainant worked only two hours of an eight-hour shift on Friday, September 11th, and missed work entirely on Saturday, September 12th. On September 12th, Complainant was playing with a band in Malheur County.

10) Even though Complainant missed work on the two days immediately following the warning of September 10, he was not terminated at that time. On September 16th, Ms. Anthony warned Complainant verbally that his absenteeism was excessive. However, she did not fire him on the 16th.

11) Complainant reported for work at 11:00 p.m. on September 18th, which was a Friday, and in the early morning hours of September 19th at approximately 2:45 a.m., he sustained an on-the-job injury when he pulled his back lifting a patient in bed. After sustaining this injury Complainant filed an incident report with Respondent as all employees were required to do. Complainant worked the rest of his shift until 7:00 a.m. on Saturday morning, September 19th, but said nothing about this injury to anyone other than filing the report. That night, September 19th, when Complainant was again scheduled to work he called in and said he was not able to work because his back hurt.

12) On Sunday, September 20th, Ms. Anthony was in the office

preparing to leave for a convention for the week and at that time reviewed the incident reports filed for September 19th and learned that Complainant had injured his back on his work shift that began on September 18th. She also discovered at that time that Complainant had failed to report for work on Saturday night, September 19th. She then gave instructions to Ms. Ogan to terminate Complainant the next day.

13) During the conversation of September 16th with Ms. Anthony, Complainant represented to her that he had been ill during the August and September absences. This statement to Ms. Anthony was not true, as on at least two occasions, August 29th and September 12th, when Complainant missed work, Complainant was in fact playing with a band. At the time of the September 16th conversation when Complainant made the statement to Ms. Anthony that he was ill, Ms. Anthony knew that Complainant was not being truthful but she did not confront him at that time. On the basis of Complainant's misrepresentations about missing work because of illness, Ms. Anthony had a basis for disbelieving that Complainant had missed work on the night of Saturday, September 19th, for a legitimate medical reason.

14) In September of 1981, Complainant was a member of the Smokey Valley String Band. That band performed at the Lane County Fairgrounds at 10:00 p.m. on Saturday night the 19th of September. However, not all members of the band played for all scheduled performances of the band.

15) On Monday, September 21st, Ms. Ogan telephoned Complainant's house but was not able to speak with him and left a message with his girlfriend. Later that afternoon Complainant called the nursing home and spoke with Ms. Ogan. At that time Ms. Ogan informed Complainant that he was terminated for excessive absenteeism. This occurred at approximately 2:30 in the afternoon. Complainant became angry and said Ms. Ogan did not have authority to fire him. Complainant asked to talk to Florence Miller, the administrator of the nursing home, and also stated that he would come to work despite having been fired by Ms. Ogan. Ms. Ogan told him he would be removed from the premises if he showed up. At several times during the conversation Complainant stated to Ms. Ogan "I can get a doctor's slip."

16) That same day, September 21st, Complainant saw Dr. John P. Merrick at the Eugene Hospital and Clinic at 4:00 p.m. and stated at that time that he had injured his back at work on September 19, 1981. Dr. Merrick's examination revealed that Complainant had muscle spasm and tenderness bilaterally in the low back. His impression was that Complainant had suffered a lumbar strain. Dr. Merrick advised him to go home and stay in bed for two more days and not work until September 24, 1981. Later in the evening of September 21st, Complainant returned to the nursing home and spoke with Ms. Weitzel and with Arthur Lucy, a patient of the nursing home. This conversation took place in Mr. Lucy's room. Complainant told Ms. Weitzel and Mr. Lucy that he had been fired that day for absenteeism and because he couldn't get along with "Sheldon". Complainant also said to them that he had hurt his back and that was the reason he had missed work on the 19th. Complainant again spoke with Mr. Weitzel and Mr. Lucy in Mr. Lucy's room on September 29th. At that time, Complainant said he did not want to come back to work at the nursing home, but that someone at the Bureau of Labor and Industries had told him that the nursing home would have to hire him back or pay him. He stated that he was angry at the nursing home for firing him and would "harass" them and that they would have to pay him.

17) Dr. Merrick gave Complainant a work release slip indicating that he could return to work on September 24th. Complainant presented this work release to Respondent on September 24th and requested that he be reinstated to his position. Respondent refused to reinstate Complainant.

18) On September 24th, 1981, Complainant completed a form 801, State of Oregon Worker's and Employer's Report of Occupational Injury or Disease. As a result of the on-the-job injury, Complainant received Worker's Compensation Benefits from the date of injury to September 24th, 1981.

19) Several weeks after Complainant presented his back to work slip on September 24th, he again went back to the nursing home and spoke with Ms. Anthony. At that time he said that he had been to the Bureau of Labor and Industries and had filed a complaint but would drop everything if he could have his job back. He also went to the administrator of the nursing home to ask for his job back.

20) At the time that Complainant filled out the incident report in the early morning hours of Saturday, September 19th, he did not know that his injury would result in a compensable worker's compensation claim. The reason he filed the incident report was because all employees were required to do so regardless of how minor the injury.

21) Complainant enjoyed his job at the nursing home. Aside from his record of absenteeism, Complainant was considered a satisfactory worker.

22) Although all employees of the nursing home were required to fill out incident reports for any injury, however minor, the filling out of such incident report does not initiate a worker's compensation claim. A worker's compensation claim is initiated by completion of Form 801 by the employee. This form 801 is available in Respondent's business office only during regular business hours Monday through Friday. Thus, Complainant had no opportunity to complete the Form 801 at the time of his injury in the early morning hours of September 19th, 1981. However, failure to fill out an incident report would not preclude an employee from later filing a worker's compensation claim.

23) The incident reports filed by employees are logged with Ms. Anthony. She compiles a monthly statistical report, which is submitted to the medical director of the nursing home for review and which is also reviewed by the safety committee. The safety committee reviews these reports for the purpose of improving safety.

24) When Ms. Anthony made the decision on Sunday, September 20th, to instruct Ms. Ogan to fire Complainant the next day, she did not know that

Complainant intended to file a worker's compensation claim.

25) Complainant had a previous on-the-job injury while working for Respondent. On that occasion Complainant had completed an incident report but the injury did not require Complainant to miss work.

26) After his termination, Complainant attempted to secure employment at other nursing homes in the Eugene/Springfield area but was unsuccessful.

27) At the time Complainant was terminated and at the time he requested reinstatement after receiving the doctor's release, he was earning $3.80 an hour. From September 1981 until January 1, 1983, Complainant would have received no more than $.15 an hour increase in his wages, in $.05 increments every six months. From January 1, 1983, to present, Complainant would have received no more than an additional $.15 an hour. However, any such raise was solely at the discretion of the administrator of the nursing home and depended on, among other factors, the individual employee's punctuality, regular attendance, dependability, and reliability. Additionally, Complainant would have been eligible to take one week's vacation after one year employment (after October 30, 1981) and would have been eligible to take two weeks vacation after October 30, 1983. Vacation compensation is determined by the average number of hours worked during the previous year and divided by 52 weeks.

28) If Complainant had remained employed with Respondent until October 30, 1983, he would have been eligible for a bonus payment of 30 percent of 1/12th of his annual salary and each year thereafter the bonus percentage would have increased by 10 percent until the payment equaled 100 percent of 1/12th of annual salary after ten years. After 15 years, the percentage would be 115 percent and 125 percent after 20 years.

29) From September 24, 1981, to November 7, 1983, Complainant earned $4223.00 performing music and earned $275.41 in other wages.

ULTIMATE FINDINGS OF FACT

1) Complainant was employed as a nurse's aide by Respondent and began work on October 30, 1980. Complainant worked the 11:00 p.m. to 7:00 a.m. shift. He worked four days on and had two days off on a rotating schedule.

2) Complainant missed a total of five days work in January and February 1981, when he was otherwise scheduled for work. Some of these days included Friday and Saturday nights when he was scheduled to work. As a result of this record of absenteeism, Complainant was warned in writing on March 16, 1981, that his absences from the job were excessive. Complainant signed and acknowledged receipt of this warning. Complainant had been missing work in order to play in a band. After the warning in March of 1981, he quit his job with that band.

3) In July of 1981, Complainant began playing with another band. In August Complainant missed six days of work, when he was otherwise scheduled to work. He also failed to work a complete shift on a 7th day. At least one of the absences in August was due to Complainant playing with his band.

4) Sometime in late August or early September, Complainant was warned verbally on at least two occasions by Ms. Jenson about his excessive absenteeism. On September 10th, 1981, Complainant received another written employee warning record advising him again that his absenteeism was excessive. This employee warning record indicated that any further excessive absenteeism would result in dismissal.

5) Immediately after receiving this warning on September 10th, Complainant worked only two hours of an 8-hour shift on Friday, September 11th, and missed work entirely on September 12th. On September 12th Complainant was playing with a band in Malheur County. On September 16th, Ms. Anthony warned Complainant verbally that his absenteeism was excessive. However, she did not fire him on this occasion.

6) In the early morning hours of Saturday, September 19th, Complainant sustained an on-the-job injury when he pulled his back lifting a patient. After sustaining this injury Complainant filed an incident report with Respondent. Complainant worked the remainder of his shift until 7:00 a.m. Saturday morning. On the night of September 19th, Saturday night, when Complainant was again scheduled to report for work at 11:00 p.m., he called in and said he was not able to work because his back hurt.

8) On Sunday, September 20th, Ms. Anthony learned that Complainant had missed work again the previous night, September 19th. As a result Ms. Anthony gave instructions to Ms. Ogan to terminate Complainant the next day.

9) On Monday, September 21st, Ms. Ogan talked with Complainant at approximately 2:30 in the afternoon, at which time she informed him that he was terminated for excessive absenteeism.

10) That same day, September 21st, Complainant saw a doctor at approximately 4:00 p.m. in the afternoon regarding his back injury. The doctor's findings were that Complainant had suffered a lumbar strain. Later that same night, Complainant had a conversation with a patient and another employee of Respondent at the nursing home during which he stated that he had been fired that day for absenteeism.

11) Complainant received a back-to-work release slip from his doctor indicating that he could return to work on September 24th. Complainant presented this work release slip on September 24th to Respondent and requested reinstatement to his position. Respondent refused to reinstate Complainant. On that same day Complainant completed a form 801 for worker's compensation benefits.

12) As a result of his injury, Complainant received worker's compensation benefits from September 19th to September 24th, 1981. At the time that Complainant filled out the initial incident report in the early morning hours of Saturday, September 19th, he did not know that his injury would later result in a compensable worker's compensation claim. Nor did Ms. Anthony know on Sunday, September 20th, that the incident report, filed the

previous evening by Complainant, would in fact result in any compensable worker's compensation claim.

13) Complainant had not been truthful with Ms. Anthony regarding the reason for at least one absence in August of 1981. As a result, Ms. Anthony felt that she could not believe the Complainant when he stated that he missed work on Saturday night the 19th for medical reasons.

14) Complainant had previously sustained an on-the-job injury while working for Respondent and had completed the required incident report. This injury did not result in any time off of work. Complainant was not fired after sustaining this earlier injury.

15) Respondent terminated Complainant and later denied reinstatement to Complainant for the separate nondiscriminatory reason that Complainant had been absent excessively from his job even after repeated warnings. Complainant was not terminated either for filing a worker's compensation claim or because he sustained an on-the-job injury which, after his firing, resulted in a compensable claim.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 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 the subject matter relating to the alleged violation of ORS 659.410 and 659.415 herein.

3) Respondent did not terminate Complainant or deny Complainant reinstatement to his job because Complainant had sustained a compensable injury, but for the separate, nondiscriminatory reason of Complainant's excessive absenteeism. Respondent did not violate the provisions of ORS 659.410 or 659.415.

OPINION

The issue presented in this matter is whether Respondent fired Complainant and later denied him reinstatement to his position because Complainant sustained a compensable on-the-job injury or for the separate, nondiscriminatory reason of excess absenteeism.

The Agency specifically charged Respondent with violation of both ORS 659.410 and 659.415. In a contested case proceeding brought under ORS 659.410 the Agency has the burden of proving that Respondent discriminated against Complainant in the "terms or conditions" of employment because Complainant "applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794..." (the worker's compensation statutes). (Emphasis supplied). Respondent raised the affirmative defense in its answer that Complainant was not protected by ORS 659.410 on the grounds that

> "Complainant had not applied for benefits or invoked or utilized the procedures provided concerning the Worker's Compensation Act."

While it is true that Complainant had not seen a doctor or filled out the form 801 at the time Respondent made the decision to terminate Complainant and that decision was communicated to Complainant, Respondent is wrong in its assertion that Complainant had not

"invoked" the worker's compensation procedures. The evidence is undisputed that Complainant filed an incident report with Respondent reporting his on-the-job injury shortly after it happened in the early morning hours of September 19, 1981. Under Bureau policy, for purposes of ORS 659.410 the term "invoke" includes giving a report of an on-the-job injury to the employer. This policy is set out in OAR 839-06-105(2). While that administrative rule cannot be applied directly to this matter because it was not filed and effective until January 26, 1983, and, under OAR 839-06-100, applies to complaints received after that date, it is nonetheless instructive of what the Bureau policy is and has been on the question of what is included within the term "invoke" in ORS 659.410.

If Respondent's line of reasoning were adopted here, that is, that the protections of ORS 659.410 do not apply to workers who sustain an on-the-job injury until they have made formal application on the proper worker's compensation form, the result would be that employers could avoid the proscriptions of the law simply by terminating injured workers immediately after they learn of the injury and before there is a formal application for worker's compensation benefits. It cannot reasonably be argued that the legislature intended such a practice to be permissible under ORS 659.410.

However, although this matter does come under the provisions of ORS 659.410, because Complainant invoked the worker's compensation procedures by reporting his on-the-job injury to Respondent, the Agency has failed to prove that Respondent terminated Complainant because Complainant invoked those procedures.

No evidence of any kind was presented that Respondent ever fired an employee for an on-the-job injury. Respondent regularly compiled the incident reports showing significant numbers of injuries to staff. There was no comparison of these injury incident reports with employee termination records to determine if there was any correlation. Absent any showing of such a pattern, it seems unlikely that, given the large number of persons employed by Respondent and the large number of on-the-job injuries, Respondent would single out Complainant to be fired for invoking the worker's compensation procedures.

There was no evidence of any statements made by any supervisory employee to the effect that employees who filed worker's compensation claims would be fired. In fact Respondent required that all injuries, however minor, be reported. Employees would not report these if the employer fired people who sustained injuries.

It is also significant that although Complainant reported an on-the-job injury while working for Respondent prior to the injury of September 19th, he was not terminated. This may be attributable to the fact that this prior injury did not cause him to miss work, but it is more likely attributable to the fact that Complainant had not yet compiled a record of excess absenteeism.

Complainant knew that his absenteeism was unacceptable and was jeopardizing his job with Respondent. Yet despite two verbal warnings prior to September 10th, a written warning

on September 10th, and another verbal warning on the 16th, Complainant continued to miss work. A key question is why Complainant missed work on the 19th when he knew, after having been warned as recently as the 16th, that any further absence would likely result in termination.

Although Complainant cannot remember where he was or what he was doing on the night of September 19th, he denies having played with the Smokey Valley Band that night. The affidavit of Pam Baron, a member of the band, to the effect that the band played a job on the night of the 19th and that Complainant was a member of the band at the time was not sufficient evidence to support a finding of fact that Complainant actually played with the band that night. However, Complainant's testimony that he cannot remember what he was doing on the night of the 19th was less than entirely credible given that he was fired less than 48 hours after that night, specifically for being absent that night, and he knew he was going to have to make a case, at least to Ms. Anthony, that he was medically disabled.

Complainant filed his verified complaint with the Bureau within one month of his firing and it seems unlikely that he would not recall for purposes of his case whether he was home resting his injured back on Saturday night, September 19th, when his contention was that he should not have been fired for being absent that night since the absence was caused by a disabling injury.

Under the alleged violation of ORS 659.415, failure to reinstate a worker who has sustained a compensable injury, the Agency met its burden of proof by presenting a prima facie case that Complainant sustained a compensable injury, and when he presented his back-to-work doctor's release and requested his job back Respondent denied him reinstatement. Respondent did not dispute these basic facts but asserted the affirmative defense that Complainant was denied reinstatement, not for the impermissible reason that Complainant had availed himself of rights under the worker's compensation statutes, but for the separate nondiscriminatory reason that Complainant had a record of excess absenteeism.

As noted in the Order issued *In the Matter of Northwest Tank Repair*, 3 BOLI 205 (1982), although the language of ORS 659.415 appears to impose an absolute duty on an employer to reinstate an injured worker, the employer may defend a complaint brought under ORS 659.415 on the grounds that an employee was denied reinstatement for just cause. The employer's assertion of just cause, however, is an affirmative defense and as such the employer has the burden of proving the defense by a preponderance of the evidence.

Respondent has met its burden in this matter by proving that Complainant was excessively absent from his job, and that on several occasions within a seven month period from March to September of 1981 he was warned, both verbally and in writing, that his job attendance was unsatisfactory and would result in termination unless it improved. Respondent did not mention the problem of Complainant's excess absenteeism for the first time after Complainant sustained his on-the-job injury, but had been telling Complainant all along, before the injury, that his job was in jeopardy. There was no dispute about Complainant's record of excessive absenteeism – nor can it be said that Respondent was in any way unreasonable in its attitude toward the problem. The agency cites the fact that Respondent did not terminate Complainant when he missed work on part of September 11 and all of September 12 after having given him a warning on September 10, as evidence that Complainant's absenteeism was not excessive enough prior to the injury-related absence on September 19 to justify termination. However, an employer should not be penalized and required to retain a problem employee because the employer had in the past shown leniency or an inclination to grant "one more chance."

In conclusion, I find that the evidence clearly shows that Respondent terminated Complainant and later denied his reinstatement for the separate, non-discriminatory reason that Complainant had an unacceptable record of absenteeism and not because he had sustained a compensable injury.

ORDER

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

In the Matter of
HIGHLAND REFORESTATION, INC.,
Respondent.

Case Number 03-83
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 8, 1984.

SYNOPSIS

The Commissioner refused to renew Respondent's farm labor contractor license with forestation indorsement because (1) Respondent corporation, its principal owner, its supervisor, and foremen made only cursory inquiries as to the legal employability of reforestation crews, and accepted the workers' unsupported and undocumented representations as proof of legal employability in the United States; (2) at least 90 workers were apprehended by the Immigration and Naturalization Service on eleven occasions between February 1979 and January 1983, were determined to be illegally working in the U.S., and were deported; some were later reemployed by Respondent; and (3) Respondent and/or its owner or agents failed to provide any workers with written statements of working conditions, financial arrangements, and pay as required by Oregon statute. ORS 658.405; 658.410; 658.440(1)(f) and (2)(d); 658.445; 659.030.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing

was conducted on October 20 and 21, 1983, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Betty Smith, Assistant Attorney General for the Department of Justice of the State of Oregon. Highland Reforestation, Inc. (hereinafter the Contractor) was represented by Joseph A. Yazbeck, Jr., Attorney at Law. James Holt, owner and president of the Contractor, was present throughout the hearing.

The Agency called as witnesses Mr. Holt; Ronald D. Kimmons, Compliance Specialist for the Wage and Hour Division of the Agency; Antonio Avila, the Contractor's supervisor during all times material herein; Jesus Ledesma, a foreman for the Contractor during times material herein; and Ed Fisher, Charles Woods, James Murray, and William Clausen, Criminal Investigators for the US Immigration and Naturalization Service during times material herein.

Jim Work was translator for Mr. Ledesma. The Contractor called as witnesses Robert W. Donaldson, Attorney at Law; Susan P. Graber, Attorney at Law; Steve Bauman and Dan Schreindorfer, US Bureau of Land Management Project Inspectors at the Contractor's 1983 Salem Mill Creek job; Mr. Avila; Mr. Holt; and Mr. Fisher.

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, Rulings – Procedural, Findings of Fact – the Merits, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) By a notice dated March 4, 1983, the Agency informed the Contractor that the Agency proposed to refuse to renew the Contractor's farm labor contractor's license. This notice cited as the basis for that proposal the Contractor's having knowingly employed alien workers not legally present or employable in the United States during January 1983, June 1982, February 1981, and on numerous other occasions in 1980 and 1979, in violation of ORS 658.440(2)(d); and the Contractor's having failed to furnish workers hired in January 1983 to work in Oregon with a written statement in conformance with ORS 658.440(1)(f).

2) By a letter dated March 17, 1983, the Contractor through its attorney requested a hearing on the Agency's proposed action.

3) By a notice dated August 18, 1983, this forum notified the Contractor and the Agency of the time and place set for the hearing. In response to the Contractor's request for a setover, the forum postponed the hearing. By a notice dated September 9, 1983, the forum notified the Contractor and the Agency of the second time and place set for the hearing.

4) Before the commencement of the hearing, the Contractor through both Mr. Holt and the Contractor's attorney received from this forum and read a copy of "Contested Case Rights and Procedures" and stated that it understood and had no questions about it.

5) At the hearing, Agency witness Ledesma could not readily understand and communicate in the English language, but he could do so in the Spanish language. Because Jim Work, a professional translator, was readily able to communicate with Mr. Ledesma in Spanish, translate the proceedings for him, and accurately repeat and translate his statements to the forum, Mr. Work was a "qualified interpreter" under ORS 183.418(3)(b). Accordingly, this forum appointed Mr. Work to act in this capacity during the hearing, and he did.

RULINGS – PROCEDURAL

1) At the commencement of the hearing, the Agency moved to correct an error in the Notice of Proposed Refusal to Renew License by changing the "June, 1982" violation date specified in that exhibit to "January, 1982." The Contractor objected to this amendment, stating that in its "factual research, ... (it) to an extent (had) tended to focus" upon the violation time periods listed in the Notice. However, the Contractor admitted that it had attempted to "look through" the entire February 1981 through January 1983 time period embraced in the language of the Notice. The Contractor did not seek a postponement or continuance of the hearing in order to prepare its defense concerning a January 1982 allegation.

Because the Contractor did not show, or really even argue, that it would be prejudiced by this amendment, and because this amendment would serve the presentation of the merits of this action, the Presiding Officer granted the motion to amend. At the same time, she made it clear that, at the end of the hearing, the Contractor would have another opportunity to show the forum how, if at all, it was prejudiced by this amendment and to move for a continuance of the hearing to cure any such prejudice (by giving the Contractor more time to prepare a defense to the January 1982 allegation). The Contractor did not make any such argument or any motion for continuance at the end of the hearing, and the Presiding Officer's initial ruling stands. However, for reasons explained in Finding of Fact 35 below, this forum has not found it necessary to consider the January 1982 allegation for any purpose herein.

2) An exhibit contains, in pertinent part, affidavits of persons who were not available for cross-examination at the hearing. The Contractor has objected to the (provisional) admission of these affidavits, arguing that the Agency failed to give the pre-hearing notice of them described in OAR 137-03-050(5) and (6), and that the Contractor will be unduly prejudiced and injured by the lack of opportunity to cross-examine the affiants.

In response, the Agency has offered, in its written closing argument, to withdraw the affidavits in question, which appear at certain pages of the exhibit. Given this offer by the party which introduced the affidavits and the Contractor's objection to them, the forum withdraws from the record the affidavits appearing at those pages of the exhibit.

The only remaining affidavit in the exhibit was given by Jesus Ledesma, who was available for cross-examination at the hearing. It is not clear whether the Contractor meant to

continue its initial objection to Mr. Ledesma's affidavit, arguing that it was given under "inherently unreliable circumstances." For the reasons described in Finding of Fact 54 below, this forum does not find the circumstances under which this affidavit was given unreliable and does find this affidavit evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. Accordingly, Mr. Ledesma's affidavit remains part of the record.

FINDINGS OF FACT -- THE MERITS

A. General.

1) During all times material herein, the Contractor was an Oregon corporation which hired, recruited, solicited, and employed workers* to perform labor in Oregon in the reforestation of lands, including but not limited to the planting and thinning of trees. The Contractor's workers performed this labor pursuant to the Contractor's contracts with the US Forest Service (hereinafter USFS) and the US Bureau of Land Management (hereinafter BLM). The Contractor performed these activities for remuneration or a rate of pay agreed upon in those contracts. Consequently, during all times material herein, the Contractor was a farm labor contractor, as defined in ORS 658.405, and was required by ORS 658.410 to have an Oregon farm labor contractor's license.

2) During all times material herein, James E. Holt was the owner and president of the Contractor, which came into existence in approximately 1977.

3) During all times material herein, the Contractor's office was located in Phoenix, Oregon. Phoenix is a small suburb of Medford, Oregon, which is located next to another small Medford suburb called Talent, Oregon.

4) Mr. Holt has been in the reforestation business since approximately 1968. On behalf of the Contractor, Mr. Holt applied for and was granted an Oregon farm labor contractor's license by the Agency for each licensing year material herein.

5) During all times material herein, the Contractor employed workers to do reforestation labor on a bid job to bid job basis. Each job took from two weeks to sixty days to complete, often at multiple work sites.

6) During all times material herein, the number of reforestation workers employed by the Contractor varied, with the largest number being employed from March through May of each year. At the time of hearing, the Contractor employed approximately fifteen workers in Oregon. The Contractor did not employ more than thirty workers in Oregon at any one time in 1983, up to the time of hearing.

7) During all times material herein, the Contractor's reforestation workers were organized into crews of about nine to twelve workers, each of which was supervised by a foreman. Antonio Avila, the Contractor's supervisor, supervised all the Contractor's foremen.

* All the reforestation workers the Contractor employed in Oregon about which there is evidence on the record are male persons. Accordingly, this Order uses masculine pronouns in referring to the Contractor's reforestation workers.

8) During all times material herein, the majority of the Contractor's reforestation workers have been Spanish-speaking and not English-speaking.

B. Concerning the Charge that: the Contractor failed to furnish workers hired in January 1983 to work at the Salem Mill Creek Campground with a written statement in conformance with ORS 658.440(1)(f).

9) During all times material herein, the Contractor required, "as strictly as (it deemed) possible," each of its hirees to sign a Contractor's form at the time of hiring. By signing this form, the hiree verified, in pertinent part, that he was aware that he would be paid wages at the "contract required rate," that certain costs might be deducted from his wages, that he would pay any damages done by him, and that he had to get his paychecks from his foreman. This form is printed in both English and Spanish. The hirees did not retain the form after signing it; the Contractor had them return it to the Contractor.

10) During all times material herein, a project inspector from the BLM or USFS had to be present whenever and wherever the Contractor's reforestation workers were working on a BLM or USFS contract. The inspector tried to hand one copy of a federal form like an exhibit in the record to each worker at the Contractor's job site. The inspector attempted to do this when each worker started working on the job. The inspector usually did this himself or herself, but occasionally asked the Contractor's foreman to help.

The federal form shows tree planting workers, in English and Spanish, the minimum hourly rate which their employer is required by federal law to pay them, and shows what their minimum gross weekly pay must be for a given total hours of work in one week.

11) The BLM or USFS inspector for a job also gave to the Contractor's foreman copies of another form like another exhibit in the record, which the Contractor was required to post where the work was being done so that the Contractor's workers could see it. This form is an excerpt from the contract applicable to the job which cites the minimum hourly wage rates and fringe benefit payments established by the US Department of Labor for the work done under the contract. The Contractor did not give each (or any) worker a copy of this form.

12) The federal forms described refer to the minimum hourly rates under the contract as not including fringe benefits. In citing the "contract required rate" as including fringe benefits, an Agency exhibit is at least confusing and apparently erroneous.

13) A copy of the Agency exhibit and the federal forms comprise the only written information pertaining to work which is posted at the Contractor's work sites or given to each of its workers.

14) The record shows and this forum finds that during times material herein:

a) The Contractor made loans to its workers, in the form of paying for their raingear (including boots) and deducting the amount of such payments from the workers' wages. The Contractor apparently also was willing to make such loans for the cost of sleeping bags and room and board. In these

ways, the Contractor "made" loans to workers, according to the meaning of that term in ORS 658.440(1)(f)(C).

b) The Contractor's workers chose whether to stay in a tent camp near the work site or in a nearby motel, while working on a job. If they chose to stay in a motel, the Contractor made the necessary arrangements or made available its vehicle to take workers to look for a motel. The Contractor's workers were responsible for paying their motel accommodation's, either directly or through the loan process described in item (a) above. If a worker chose to stay in a camp, the Contractor allowed him to use one of the Contractor's tents if he wished. In these ways, the Contractor provided housing services to its workers under ORS 658.440(1)(f)(D).

The Contractor provided a physician and "industrial indemnity" insurance for any worker injured on-the-job, thereby providing health care services under ORS 658.440(1)(f)(D).

The Contractor did not provide any day care services for its workers.

c) Either the Contractor's workers purchased their clothing and equipment themselves or the Contractor's foreman bought it in the workers' presence and the Contractor deducted the cost from the workers' wages. In the latter way, the Contractor furnished its workers with clothing and equipment.

Although the Contractor did not know in advance the exact periods, or starting or ending dates, of the jobs on which its workers were employed, there is no evidence that the Contractor could not have approximated those periods or dates.

15) Even considered together, a copy of the Agency exhibit and the federal forms do not provide the information required by ORS 658.440(1)(f)(B), all of (D), (E), (G) or (H). The information they do provide concerning the remaining subsections of ORS 658.440 (1)(f) is not necessarily complete or correct.

C. Concerning the Charge that: the Contractor knowingly employed alien workers not legally present or legally employable in the United States during January 1983, January 1982, February 1981, and numerous other occasions in 1980 and 1979 in violation of ORS 658.440(2)(d)

1. Did the Contractor employ alien workers not legally present or legally employable in the United States during times material?

16) The US Immigration and Naturalization Service (hereinafter INS) enforces the Immigration and Naturalization Act (hereinafter INA), 66 Stat. 163, as amended, 8 USC 1101 *et seq.*, the federal law regulating immigration and naturalization into the United States. The INS's purpose herein material was to control the use of illegal aliens in reforestation-related jobs in Oregon.*

17) On February 1, 1979, INS apprehended a citizen of Mexico in Oregon as an illegal alien. This person stated that he was employed by Mr. Holt to plant trees. INS determined that he was an illegal alien, he requested a voluntary return to Mexico, and he was returned to Mexico.

18) There are two ways a person apprehended as, and determined by INS to be, an illegal alien may be returned to his or her country of citizenship.

a) The person signs INS Form I-274 and is thereafter "voluntarily returned" to his or her country of citizenship. By signing this form, the person confesses to being in the United States illegally, acknowledges having asked to be allowed to return to his or her country of citizenship, and acknowledges having been informed that this request has been granted. About 98 percent of the people INS apprehends as illegal aliens utilize this process.

b) The person requests an administrative hearing. If, pursuant to the hearing, an immigration judge makes a finding that the person is deportable, the judge either orders deportation or offers the person a voluntary return. Once a person is deported (as opposed to voluntarily returned), it is a felony if he or she returns to the United States.

19) On February 15, 1979, INS apprehended eleven citizens of Mexico in Oregon as illegal aliens. Each of these people told INS that he was employed in reforestation (or agriculture) by Holt Reforestation or James Holt, of Phoenix/Medford, Oregon. INS determined that each of these people was an illegal alien, each requested a voluntary return to Mexico, and each was returned to Mexico.

20) On March 4, 1979, INS apprehended ten citizens of Mexico in Oregon as illegal aliens. Each of these people told INS that he was employed by Highland Reforestation as a tree planter. INS determined that each of these people was an illegal alien, each requested a voluntary return to Mexico, and each was returned to Mexico.

21) On April 2, 1979, INS apprehended seven citizens of Mexico in Oregon as illegal aliens. Each of these people told INS that he was employed by Highland Reforestation as a tree planter. INS determined that each of these people was an illegal alien, each requested a voluntary return to Mexico, and each was returned to Mexico.

22) On June 27, 1979, INS apprehended a citizen of Mexico in Oregon as an illegal alien. This person told INS that he was employed by Jim Holt of Medford in reforestation. INS determined that he was an illegal alien, he requested a voluntary return to Mexico, and he was returned to Mexico.

23) On August 1, 1979, INS apprehended a citizen of Mexico in Oregon as an illegal alien. This person told INS that he was employed by Jim Holt of Medford in tree planting. INS determined that he was an illegal alien, he requested a voluntary return to Mexico, and he was returned to Mexico.

24) On November 6, 1979, INS apprehended eight citizens of Mexico in Oregon as illegal aliens. Each of these people told INS that he was employed by Highland Reforestation or Jim Holt, of Phoenix/Talent, as a tree thinner. INS determined that each of these people was an illegal alien, each requested a voluntary return to Mexico, and each was returned to Mexico.

25) On February 5, 1980, INS apprehended six citizens of Mexico in

* By "illegal alien" this forum means an alien not legally present or legally employable in the United States.

Oregon as illegal aliens. Each of these people told INS that he was employed by Highland Reforestation as a tree planter. INS determined that each was an illegal alien, each requested a voluntary return to Mexico, and each was returned to Mexico.

26) On February 27, 1980, INS apprehended a citizen of Mexico in Oregon as an illegal alien. This person told INS that he was employed by Highland Reforestation as a tree planter. INS determined that he was an illegal alien, he requested a voluntary return to Mexico, and he was returned to Mexico.

27) On March 11, 1980, INS apprehended sixteen citizens of Mexico in Oregon as illegal aliens. Each told INS that he was employed by Highland Reforestation of Medford as a tree planter. INS determined that each was an illegal alien, each requested a voluntary return to Mexico, and each was returned to Mexico.

28) On March 31, 1980, INS apprehended nine citizens of Mexico in Oregon as illegal aliens. Each told INS that he was employed by "Holt" and reported "trees" or "laborer" as his occupation. INS determined that each was an illegal alien, each requested a voluntary return to Mexico, and each was returned to Mexico.

29) On April 26, 1980, INS apprehended six citizens of Mexico in Oregon as illegal aliens. Five told INS that they were employed by "Holt" and reported "trees" as their type of employment. The sixth said his employer was "Highland Reforestation of Medford." INS determined that each of these people was an illegal alien, each requested voluntary return to Mexico, and each was returned to Mexico.

30) On February 20, 1981, INS apprehended a citizen of Mexico in Oregon as an illegal alien. This person told INS that his employer was "Holt/Gonzalez" and that his type of employment was "reforestation." He was apprehended while driving one of the Contractor's vans. INS determined that he was an illegal alien, he requested a voluntary return to Mexico, and he was returned to Mexico.

31) On March 7, 1981, INS apprehended five citizens of Mexico in Oregon as illegal aliens. At the same time, INS apprehended a sixth citizen of Mexico, Jesus "Ledesma-Galicia" (elsewhere in this Order referred to as Jesus Ledesma). Mr. Ledesma carried a permit to work in the United States. INS apprehended him in order to check the validity of his permit and to explore the possibility of having him prosecuted criminally for transporting illegal aliens. At the time of his apprehension, all six of the people apprehended told INS that their employer was "Highland" and that their employment was "reforestation." Mr. Ledesma was a foreman for the Contractor. These six people were apprehended in a van belonging to the Contractor and driven by Mr. Ledesma.

INS determined that all of these people except Mr. Ledesma were illegal aliens; each except Mr. Ledesma requested a voluntary return to Mexico, and each except Mr. Ledesma was returned to Mexico. The US Attorney declined to prosecute Mr. Ledesma, and his permit was found to be valid.

One of the five illegal aliens apprehended by INS on March 7, 1981, also had been apprehended by INS at the March 11, 1980, occurrence described in Finding of Fact 27 above.

32) On January 10, 1983, INS apprehended eleven citizens of Mexico as illegal aliens at the Contractor's Salem, Oregon, Mill Creek Campground worker campsite. Each of those people told INS he was employed by Highland Reforestation in tree planting or agriculture. Mr. Holt acknowledges that these people were the Contractor's employees when they were apprehended. INS determined that all eleven were illegal aliens, at least nine of them requested a voluntary return to Mexico, and all eleven were returned to Mexico. These eleven workers constituted at least half of the Contractor's Oregon workers at the time

33) There is no evidence or allegation that, outside of Mr. Ledesma, any of the above-mentioned persons apprehended between February 1, 1979, and January 10, 1983, were legally present or legally employable in the United States. Accordingly, based upon the INS determination that they were illegal aliens and upon their subsequent returns to their country of citizenship, this forum finds that all of these persons (except Mr. Ledesma) were not legally present or legally employable in the United States when INS apprehended them at the above-cited times.

34) During all times material herein, Ed Fisher was the team leader of the INS criminal investigators assigned to the Oregon reforestation industry, and he was present at all but possibly one of the INS operations at which the apprehensions described in Findings of Fact 17 through 33 and 35 occurred. Mr. Fisher maintained a file of the Forms I-213 ("Record of Deportable Alien") INS completed concerning (the persons Mr. Fisher believes to have been) Mr. Holt's employees whom INS apprehended in or near Oregon from 1979 through 1983 and determined to be illegal aliens. The Forms I-213 in this record are from Mr. Fisher's file. Mr. Fisher is "certain" that all of the subjects of those forms were employed by Mr. Holt when INS apprehended them.

The information on the Forms I-213 in this record specifying the name of the subject's employer and his type of employment at the time of apprehension was provided by the subjects of those forms. As explained in Findings of Fact 17 through 33, each person apprehended on the occasions described in those Findings named Highland Reforestation or Mr. Holt as his employer and tree planting/thinning, reforestation, agriculture or "trees," as his employment. Some apprehendees gave the name of their "boss," Mr. Holt, because they did not know the name of the company which employed them. Aside from that noted in Finding of Fact 35, there is no evidence or allegation that, at any time material herein, Mr. Holt owned or operated any company other than the Contractor. Each except one of the ninety people apprehended in eleven of the occasions described in Findings of Fact 17 through 33 was apprehended because he was with, and therefore apparently was part of, the crew of the Contractor which INS was checking. All of those ninety people were apprehended while in a camp, or while being transported to or from a work or camp site, at which a

crew was working or living while performing one of the Contractor's jobs. Whenever one of the people apprehended on the occasions noted in Findings of Fact 17 through 33 and determined to be an illegal alien told INS he had not been paid yet for all the work he had done, the Agency made a wage claim to the Contractor on that person's behalf. It is logical, and so this forum finds, that wages were owed any worker who did not happen to be apprehended between the time he received a paycheck (once every two weeks from the Contractor) and his next workday. From the testimony of the Agency's Medford Wage and Hour Division Compliance Officer that he has not found any wage payment problem concerning the Contractor since at least 1980, this forum has deduced that the Contractor paid all of the wage claims made on behalf of the above-described 90 apprehendees.

Mr. Holt specifically admitted that the eleven people apprehended on January 10, 1983, were employed by the Contractor at that time. In fact, he did not assert that any of the aliens apprehended on the occasions described in Findings of Fact 17 through 33 were not the Contractor's employees when apprehended. He did testify that he was not "sure" that all of the persons apprehended on the occasions described in Findings of Fact 17 through 33 and 35 were his employees, but his reservations apparently related just to those people apprehended on January 12, 1982, as noted in Finding of Fact 35. These people were employed by "Aspen Reforestation" and may or may not have been Mr. Holt's employees in fact. As noted in Finding of Fact 35 below, this forum need not determine herein whether they were or not. Accordingly, this forum has not counted the persons apprehended by INS on January 12, 1982, as Mr. Holt's or the Contractor's employees for any purpose herein.

For all of the above-cited reasons, this forum has concluded that at the time they were apprehended, the Contractor employed, at the very least, all of the above-described ninety workers INS apprehended on February 15, 1979; March 4, 1979; April 2, 1979; November 6, 1979; February 5, 1980; March 11, 1980; March 31, 1980; April 26, 1980; February 20, 1981; March 7, 1981; and January 10, 1983.

35) On January 12, 1982, INS apprehended twenty citizens of Mexico in Oregon as illegal aliens. INS determined that each of these people was an illegal alien, each requested a voluntary return to Mexico, and each was returned to Mexico. All twenty of these people told INS that they were employed as tree planters by "Aspen Reforestation." Mr. Avila appears to have been the owner of that company. There was detailed evidence and argument at hearing as to whether Mr. Holt was closely enough affiliated with Aspen Reforestation to be considered the employer of the twenty aliens apprehended on January 12, 1982. However, given the above-cited numerous instances during times material in which Mr. Holt, through the Contractor, was employing illegal aliens, this forum finds it unnecessary to determine whether under the law Mr. Holt was employing the aliens apprehended on January 12, 1982, or, therefore, to consider those apprehensions for any purpose herein.

2. Did the Contractor employ the above-described ninety illegal aliens knowing that they were not legally present or legally employable in the United States?

36) During all times material herein, the Contractor, through Mr. Holt, knew that Oregon law prohibited it from knowingly employing an alien not legally present or legally employable in the United States.

In February 1978, the Agency notified "James E. Holt of Highland Reforestation, Inc." that it proposed to deny his application for a farm labor contractor's license, because the Agency had concluded, upon investigating Mr. Holt's activities, that during the 1977 licensing year, Mr. Holt knowingly employed aliens in Oregon who were not legally present or legally employable in the United States, in violation of ORS 658.440(2)(d). Mr. Holt denied these conclusions and requested a contested case hearing on the proposed denial. On September 6, 1978, this matter was closed when, with Mr. Holt's consent, this forum issued a Consent Order concerning the proposed denial which recited the above facts and suspended Mr. Holt's farm labor contractor's license for fifteen days.

Through these events, Mr. Holt knew, as early as 1978, that the Agency had determined that in his capacity as owner and president of the Contractor, he was not complying with ORS 658.440(2)(d).

37) A minority of workers in the reforestation industry in Oregon is Hispanic. The majority of that minority is not legally employable in the United States. Most of that majority are citizens of Mexico.

38) Many of the Contractor's workers are not US citizens, and the majority of its workers are Hispanic.

39) During all times material herein, the Contractor was notified that INS has apprehended its employee(s) in Oregon shortly after any such apprehension. This notice has come from INS, from the federal agency upon whose contract the apprehendees were working for the Contractor, and/or from the Agency when it asserted wage claims on behalf of the apprehendees. Accordingly, the Contractor was aware of the apprehensions described in Findings of Fact 17 through 33 shortly after each took place.

40) A farm labor contractor should assume that employees apprehended by INS as illegal aliens are not legally present or legally employable in the United States. (This does not include an employee who is taken to a processing point such as a local police station by INS so that INS can check his or her identification, and who shortly thereafter is released by INS and returns to work.)

41) It is extremely easy for an illegal alien in the United States to obtain counterfeit identification or identification which is not his or hers, often in the form of an INS permanent alien registration ("green") card and a social security card. Some of the counterfeits are excellent.

42) There are some Hispanic persons with false identification working in Oregon's reforestation industry.

43) During all times material herein, Messrs. Holt and Avila and the Contractor's foremen had the authority to, and did, hire the Contractor's workers. Mr. Avila hired most of the workers (including foremen) for the Contractor during times material herein. Mr. Avila did not have to seek Mr. Holt's approval of, and Mr. Holt did not review, Mr. Avila's hiring decisions.

44) During times material herein, the Contractor's sources of workers were people who had worked for it in the past, from the State Employment Division, and people who asked it for work after hearing by word of mouth that work was available. Because of the remoteness and changing locations of its work sites, as well as the existence of the Contractor's vehicles for transporting workers to and from its work and camp sites, this forum infers that the Contractor hired at least most of its workers at places away from its work sites.

45) During all times material herein, Mr. Holt's hiring directions to Mr. Avila were to hire the most productive workers and not to hire "illegal" workers. Mr. Holt did not tell Mr. Avila how to accomplish the latter.

46) During all times material herein, Mr. Avila gave the Contractor's foremen their directions as to who to hire. His directions were the same as Mr. Holt's above-cited directions. Mr. Avila did not tell the foremen how to avoid hiring aliens not legally present or legally employable in the United States.

47) The Contractor required new workers to complete a federal form W-4 ("Employee's Withholding Allowance Certificate") which asked, in pertinent part, for the worker's social security number. After the worker completed this form, it was returned to the Contractor.

48) As noted above, the Contractor required, as strictly as it considered possible, its workers to complete page two of the Agency exhibit before starting to work. This form, in pertinent part, contains a statement that the worker certifies that he is not in violation of law by being in the United States, that he has been in the United States for at least three years since his last entry, that his entrance in the United States was not encouraged or induced by the Contractor or any of its employees, and that he is the legal holder of a social security card and number. This statement is written in English and Spanish. By signing this form, the worker verified that he fully understood the latter statement and that it was true.

49) During all times material herein, when the Contractor gave its workers page two to complete, it did not ask them if they could read it. Mr. Holt thinks most of the Contractor's workers can read it.

50) During all times material herein, after a worker completed page two, the Contractor did not ask him for documentation of the statements the worker had thereby verified or documentation that the worker was legally present or legally employable in the United States.

51) During all times material herein, once a worker signed page two, that form was returned to the Contractor's office. The Contractor did not review the completed page two, other than to make sure the name thereon matched the name on that worker's Form W-4.

Mr. Holt has seen some completed pages two. Even when he saw a page on which the worker gave as his address a location in Mexico, Mr. Holt did not question whether that worker really had been in the United States for at least the previous three years or question the veracity of the other representations the worker had made by signing the page.

52) During all times material herein, the Contractor's foremen were under orders not to rehire any employee who had been "picked up" by INS while on one of the Contractor's job sites, at least if such a person had been returned to his country of citizenship thereafter. However, the Contractor kept no record of employees who had been apprehended by INS and returned to their countries of citizenship. The Contractor's foremen (and Mr. Avila) were expected to keep track of such people by talking among themselves, even though the foremen sometimes did not see each other for one-two months, during which times they were out of telephone contact with each other for long periods of time.

53) At the hearing, Mr. Holt testified that, by the actions described in Findings of Fact 45 through 52, the Contractor "has done what ... (it) could do, ... (he's) sure," to comply with the mandate of ORS 658.440(2)(d), and that there is no more he could do to avoid hiring illegal aliens except not hire Mexican or Hispanic persons. Mr. Holt further testified that he cannot tell if someone is legally in the United States or not or make a "sincere attempt" to do so.

Messrs. Avila and Ledesma testified that to comply with ORS 658.440(2)(d) they had their hirees sign page two of the Agency exhibit. Mr. Avila further testified that he does not know of any way he could stop hiring illegal aliens without discontinuing the hiring of Hispanic persons from Mexico. Mr. Avila also testified that a few times each year, he has asked some hirees for identification or warned them not to be surprised if INS apprehended them if they did not have valid identification. Mr. Avila testified that he had done this mainly because INS had put pressure on the Contractor to avoid hiring illegal aliens. From the latter testimony, this forum concludes that although he testified that he did not do it often, Mr. Avila believes that inspecting hirees' identification or warning them that they must have such identification could help the Contractor avoid hiring, or knowingly hiring, illegal aliens. Furthermore, because of conflicts in his testimony on point, this forum concludes that Mr. Avila did not ask any hiree for identification during times material, and this forum cannot find that Mr. Avila gave any hiree the above-cited warning during times material.

54) Mr. Ledesma was the foreman of the Contractor's crew which INS apprehended on March 7, 1981. As described in Finding of Fact 31, INS apprehended Mr. Ledesma with his crew, in order to check the validity of a permit Mr. Ledesma carried and to consider prosecuting him on a criminal charge. After taking Mr. Ledesma and his crew to the nearest police station for processing, INS questioned Mr. Ledesma for about fifteen minutes. Two hours later, an INS officer spent about thirty minutes taking a statement from

Mr. Ledesma. Because Mr. Ledesma did not speak English, the INS officer questioned Mr. Ledesma and elicited certain information in Spanish, paraphrased this information and put it in affidavit form in English, read it back to Mr. Ledesma in Spanish, made whatever corrections Mr. Ledesma requested, read the statement back to Mr. Ledesma in Spanish, and asked Mr. Ledesma to sign the statement under oath, which Mr. Ledesma did.

Two of the five aliens apprehended on March 7, 1981, were Mr. Ledesma's brother Demecio and Mr. Ledesma's cousin. Mr. Ledesma had hired Demecio and his cousin when they had appeared in Medford and asked him for work. Mr. Ledesma claimed at hearing that he did not know that they were illegal aliens. He stated that he had no contact with his family since he had left it in Mexico in approximately 1972, and that when he hired Demecio, he did not ask where he had been since 1972 or if he were legally entitled to work in the United States. Mr. Ledesma also testified that he did not ask his cousin if he were legally entitled to work in the United States. His brother and his cousin each signed page two of the Agency exhibit.

According to the statement he gave on March 7, 1981, Mr. Ledesma said,

> "I always knew that ... (my brother and cousin) had no immigration papers and that they had entered the US illegally within the last three years. I did not know for sure that the other people in the truck with me were illegally in the US."

Mr. Ledesma testified at hearing that he did not tell INS that he always knew his brother and cousin had no immigration papers. Based upon Mr. Ledesma's testimony at hearing that when he gave this statement he was incarcerated and nervous; that, allegedly, INS would not let him call his wife; and that no one told him of his right to an attorney or exactly how long he would be incarcerated, the Contractor has challenged the "reliability" of the circumstances under which this statement was taken. However, the procedure used to take Mr. Ledesma's affidavit is a standard INS procedure, and affidavits generated by it have been accepted into evidence by the judicial forum for years. The officer who took Mr. Ledesma's statement was conversant in Spanish and had taken 1000 to 1200 affidavits using this procedure. Furthermore, immediately before giving his statement, Mr. Ledesma signed a statement which gave him, in Spanish, notice of his legal rights and notice that by signing it, he would waive asserting these rights. Before signing this statement, which he could read, Mr. Ledesma told the INS officer that he understood it and did not want an attorney.

Given the fact that this forum finds it difficult to believe that Mr. Ledesma did not actually know or have reason to know that his own brother or cousin were in the United States illegally, and given the existence of Mr. Ledesma's signed statement that he did know that they were, this forum finds that Mr. Ledesma did know that his brother Demecio and cousin were illegal aliens when he hired them to work for the Contractor.

Mr. Ledesma was also the foreman of the eleven worker crew of the Contractor which INS apprehended on January 10, 1983. One of these crew members was the same Demecio Ledesma who had been arrested while in the Contractor's employ on March 7, 1981, and voluntarily returned to Mexico.

Mr. Ledesma testified that when he rehired Demecio after his 1981 arrest and return to Mexico, Mr. Ledesma thought Demecio had a permit to work in the United States because Demecio was living with a pregnant US citizen. Because Mr. Ledesma did not ask to see Demecio's permit, because Mr. Ledesma failed to give any explanation as to why he thought living with a pregnant US citizen would entitle Demecio to a US work permit, and because Mr. Ledesma's credibility has been impeached by his prevarication as to whether he knew Demecio was not in the United States legally when he originally hired him to work for the Contractor, this forum does not believe Mr. Ledesma's assertion that he did not know Demecio was illegally in the United States when he rehired him after his March 7, 1981, arrest as an illegal alien.

55)At hearing, Mr. Holt stated that the fact that so many of the Contractor's employees have been apprehended by INS since 1979 suggests to him, and he admits, that the Contractor has "a problem." Given the context of this testimony, this forum infers that Mr. Holt meant that the Contractor has a problem because it has been employing illegal aliens.

56)Mr. Holt testified that he consulted with INS several times between 1971 and 1974 as to how to comply with ORS 658.440(2)(d). He testified that INS's advice to him was to tell the Contractor's foremen, "Don't hire illegals." ORS 658.440(2)(d) was not enacted until mid-1975. Since at least 1974, Mr. Holt has not attempted to ascertain whether INS could help him comply with that statute or actually enlisted INS's aid on any aspect of this subject, including how to detect false identification.

57)Federal law requires all aliens in the United States to carry proof of alien registration with them at all times.

58)One form of proof of alien registration is what has commonly been called a "green card." It is a permanent alien registration card, issued by INS. It entitles its subject to be and work in the United States. Another form of alien registration is an INS permit. If the subject of this permit (a letter or a form) is legally employable in the United States, the permit will be stamped "Employment Authorized."

59)When INS investigator Fisher advises employers as to how to detect applicants for work who are not legally present or legally employable in the United States, he tells them to take the following steps:

a) On the initial application, ask if the applicant is a citizen of the United States.

b) If the applicant says "yes," end the inquiry. (If you are suspicious that the applicant is not telling the truth, ask INS to check the applicant's claim.)

c) If the applicant answers "no," go no further at that time. However, include on your application the statement that if the applicant is not a US citizen, he or she will be required to

furnish proof of alien registration at the time he or she is hired.

d) If you decide to hire an applicant who has answered "no" to the above-cited question, require him or her to produce proof of alien registration before you put him or her to work. If the hiree produces an INS permit, be sure it is stamped "Employment Authorized."

INS investigator Woods also advises employers on how to detect illegal aliens among their applicants. He suggests substantially the same procedure as Mr. Fisher. However, he advises employers to ask all applicants if they are legally able to accept employment in Oregon and to hire only those applicants who answer affirmatively and produce documentation of that answer. A citizen of the United States can do this by producing, for example, a birth certificate showing US birth. An alien can do so with a "green card" or an INS permit stamped "Employment Authorized."

60) If an employer is suspicious that the documentation of status in the United States produced by an applicant is counterfeit or being used fraudulently, the employer can ask INS to check it.

61) At least two Oregon employers have used one of the processes described in Finding of Fact 59 and otherwise cooperated with INS. Each has experienced a significant reduction in the number of illegal aliens it employs.

62) Social security cards should be legally issued only to persons legally employable in the United States. However, because of the ease with which these cards have been forged, INS has not gone as far as taking the position that a social security card is evidence of being legally employable in the United States upon which an employer can rely.

63) A person under deportation proceedings and awaiting a determination by an immigration judge of his or her status in the United States is not entitled to work in the United States without special authorization by INS, as evidenced by "Employment Authorized" stamped on an INS permit. Because subjecting a person to deportation proceedings is the ultimate sanction INS can impose (unless it can pursue criminal prosecution), there is no (further) penalty against a person who works without INS authorization while under deportation proceedings.

64) The Contractor's expert witness on immigration law is an attorney whose immigration law practice consists of counseling or representing aliens wanting to enter, remain, or work in the United States, or their employer.

ULTIMATE FINDINGS OF FACT

1) The Contractor acted as a farm labor contractor, as defined by ORS 658.405, and was licensed as such, during all times material herein.

2) The Contractor did not furnish to any of the workers it hired in January 1983 to work at the Salem Mill Creek Campground, at the time it hired, recruited, or solicited them, whichever occurred first, a written statement complying or substantially complying with the requirements of ORS 658.440(1)(f). The written information concerning the Contractor's work which was made available to those workers did not supply much of the information required by ORS 658.440(1)(f). The one written statement which was given to each of the Contractor's workers for each worker to retain was not given to them at the time required by ORS 658.440(1)(f).

3) During times material herein, the Contractor employed at least ninety aliens not legally present or legally employable in the United States.

4) During all times material herein, the Contractor knew it was a violation of law to knowingly employ an alien not legally present or legally employable in the United States. The Contractor also knew that immediately before times material herein, the Agency had determined that the Contractor was knowingly employing aliens not legally employable or legally present in the United States, in violation of ORS 658.440(2)(d).

5) The ninety illegal aliens whom the Contractor employed during times material herein were apprehended as illegal aliens by INS on eleven different occasions between January 15, 1979, and January 10, 1983. On each of these occasions, INS checked a crew working for the Contractor or a person riding in one of its work vehicles. Every person apprehended as an illegal alien on these occasions was subsequently determined to be an illegal alien by INS and returned to Mexico, his country of citizenship.

6) There is no evidence on the record that any of the Contractor's workers during times material, except Foreman Ledesma and supervisor Avila, were legally present and legally employable in the United States.

7) Either the Contractor's president /owner, its Supervisor, or one of its foremen hired each of the above-mentioned ninety illegal aliens. At the time each was hired, he signed a form certifying in pertinent part that he was not violating the law by being in the United States and that he was a legal holder of a social security card and number. Requiring this as strictly as it deemed possible was the Contractor's only effort to comply with ORS 658.440(2)(d) during times material herein. The Contractor did not ask or require any applicant, hiree, or worker to produce documentation of either of the representations on the above-mentioned form or documentation that he was legally present or legally employable in the United States. The Contractor did not check suspiciously contradictory information given on the above-cited form or otherwise seek to determine whether the workers it employed were in fact legally present or employable in the United States. The Contractor did not otherwise attempt to discourage illegal aliens from entering its employ.

8) Although the Contractor's hiring agents were directed not to hire illegal aliens, the Contractor gave them no instructions as to how to accomplish this, beyond having hirees sign the form cited in Ultimate Finding of Fact 7.

9) Although the Contractor's hiring agents were not supposed to rehire anyone who had been apprehended by INS while employed by the Contractor and returned to his country of citizenship, the Contractor gave these agents no means reasonably calculated to allow them to accomplish this. The Contractor failed to even keep a

record of employees who had been apprehended by INS and who had not returned to work shortly thereafter.

10) In two instances during times material herein, the Contractor re-employed workers after they had been apprehended by INS while in the Contractor's employ in Oregon and returned to Mexico as illegal aliens. In one of those instances, the same person, using the same name, was apprehended twice while in the Contractor's employ in one year. In the other instance, the same person, using the same name, was apprehended while in the Contractor's employ on March 7, 1981, and January 10, 1983. He had been hired twice by the same person, the Contractor's foreman and his brother. In each of these two instances, the Contractor knew that INS had apprehended these people as illegal aliens when it re-employed them.

11) In at least three instances during times material herein, one of the Contractor's foremen hired people he knew were not legally present or legally employable in the United States. He hired one brother twice, knowing both times that he was not legally present or legally employable in the United States. He also hired his cousin knowing that he was not legally present or legally employable in the United States.

12) Shortly after their apprehensions, the Contractor knew that each of the ninety workers cited in Ultimate Finding of Fact 5 had been apprehended by INS as illegal aliens. From their failure to return to work shortly after being apprehended, the Contractor should have deduced that they were returned to their country of citizenship as illegal aliens. A contractor should assume that an employee apprehended by INS as an illegal alien who does not return to work shortly thereafter is not legally present or legally employable in the United States.

13) INS advises employers trying to comply with ORS 658.440(2)(d) to require any non-citizen hiree to produce proof of alien registration before employment, or to ask all hirees to produce documentation of being legally employable in the United States before employment. All aliens in the United States must carry proof of alien registration, and this proof should indicate to the employer whether the alien is or is not legally employable in the United States. A permanent alien registration card or an INS permit stamped "Employment Authorized" suffices as documentation of legal employability in the United States for an alien; a birth certificate showing US birth suffices for US citizens. A social security number or card by itself (or together) should not be relied upon as evidence that the bearer is legally employable in the United States.

14) An illegal alien can easily obtain false identification (i.e., identification which is counterfeit or which does not belong to the alien using it) in the United States, including a permanent alien registration card and a social security card. There are Hispanic aliens with false identification working in the reforestation industry in Oregon. INS suggests that if an employer is suspicious that the documentation of being legally employable in the United States which a worker or applicant has produced is false, that employer ask INS to check the documentation.

15) At no time material herein did the Contractor attempt to ascertain whether INS could help it, or seek INS advice or other aid, as to how the Contractor could better detect illegal aliens among its hirees and workers. During times material herein, INS had at least two agents who provided such advice and aid in Oregon.

16) In Oregon, at least two employers who have followed the INS advice described in Ultimate Finding of Fact 13 and otherwise cooperated with INS have substantially reduced the number of illegal aliens in their employ.

17) The Contractor has not demonstrated to this forum, and therefore this forum cannot find, that under the federal Immigration and Naturalization Act, it is possible for an alien to be legally employable, and at the same time not legally present, in the United States.

CONCLUSIONS OF LAW

1) At all times material herein, the Contractor was a farm labor contractor subject to the provisions of ORS 658.405 to 658.475 and ORS 658.991 (2) and (3).

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

3) The actions and knowledge of Messrs. Holt, Avila, and Ledesma and the Contractor's other foremen described herein are properly imputed to the Contractor.

4) During all times material herein, the Contractor failed to comply with ORS 658.440(1)(f) in that it did not furnish to any of its workers, at the time it hired, recruited, or solicited them, whichever occurred first, a written statement that met the requirements of ORS 658.440(1)(f). "Furnish to each worker," as it is used in ORS 658.440 (1)(f), means physically give to each worker for that worker to retain.

5) The Contractor's employment during times material herein of at least ninety aliens not legally present or legally employable in the United States; its failure to require or even request, during times material herein, documentation from any of its hirees or workers that showed that they were legally present and legally employable in the United States; its failure to take any step at any time material to detect or discourage illegal aliens among its hirees and workers, other than trying to have each hiree sign a form stating that he was not violating the law by being in the United States and that he had a social security card and number; its failure, at any time during the nearly four years encompassed by the eleven occasions on which INS apprehended the above-mentioned ninety employees, to make any additional effort to detect or discourage hirees or workers not legally present or legally employable in the United States (including its failure to ask the aid or advice of the appropriate federal agency); its rehiring during times material herein persons whom it knew had been apprehended as illegal aliens while in the Contractor's employ and whom it should have assumed were not legally present or legally employable in the United States; and its hiring in at least three instances during times material persons whom it actually knew were not legally present or legally employable in

the United States together constitute, as a matter of law, the Contractor's knowledge that it was employing alien workers not legally present or legally employable in the United States, within the meaning of the word "knowingly" as it is used in ORS 658.440(2)(d).

6) During times material herein, the Contractor failed to comply with ORS 658.440(2)(d) in that between February 15, 1979, and January 10, 1983, it knowingly employed aliens not legally present or legally employable in the United States.

7) Because this forum cannot conclude that ORS 658.440(2)(d) conflicts with the Immigration and Naturalization Act by prohibiting a contractor from knowingly employing a person whom the contractor may legally employ under the INA, this forum cannot conclude that ORS 658.440(2)(d) is preempted by the INA.

8) ORS 658.440(2)(d) does not put an unreasonable burden on a contractor.

9) Because a contractor can comply with both ORS 658.440(2)(d) and Title VII of the Civil Rights Act of 1964, as amended, 42 USC. 2000e *et seq.*, at the same time, ORS 658.440(2)(d) is not preempted by Title VII by virtue of any conflict with Title VII.

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 refuse to renew the Contractor's license to act as a farm labor contractor.

OPINION

A. Conflict Preemption by the Immigration and Naturalization Act.

The Contractor argues that ORS 658.440(2)(d) conflicts with the Immigration and Naturalization Act, the federal statutory scheme for comprehensively regulating immigration and naturalization into the United States. Because of this conflict, the Contractor's argument continues, ORS 658.440(2)(d) is preempted by the INA under the Supremacy Clause of Article VI of Clause 2 of the United States Constitution.

The merit of this argument turns on whether ORS 658.440(2)(d) "can be enforced without impairing the federal superintendence of the field" covered by the INA. *Florida Lime & Avocado Growers v. Paul,* 373 US 132, 142 (1963).

The Contractor points to *De Canas v. Bica,* 424 US 933 (1976) (hereinafter *De Canas*), in which the US Supreme Court acknowledged that a California statute (2805(a) of the California Labor Code) prohibiting an employer from knowingly employing an alien "not entitled to lawful residence in the United States" conceivably could unconstitutionally conflict with the INA. As its only example or explanation of such a conflict, the court cited the possibility that the California statute might prevent employment of aliens who, although not entitled to lawful residence in the United States, might be permitted under federal law to work in the United States. The court remanded the case to the California Court of Appeal to construe the California statute. The California Court of Appeal never did so.

In *De Canas,* the US Supreme Court did not explain how one could be lawfully permitted to work in the United States without being entitled to lawful residence in the United States. However, by citing it as the source of the court's knowledge of some California regulations, the court did acknowledge its awareness of *Dolores Canning Co. v. Howard,* 40 CA3d 673, 115 Cal Rptr 435 (1974) (hereinafter *Dolores Canning*). In *Dolores Canning,* the California Court of Appeal gave the example of a situation in which the federal government might authorize daytime work in California by Mexican nationals who were required to return to their homes in Mexico each night and therefore were not lawful residents of the United States. *Dolores Canning* also cited "diplomats, officers and employees of foreign governments, business visitors and tourists, naval and aircraft crewmen, investors, students, media representatives, professors and research assistants, a fiance(e) of a US citizen, and executive employees" as aliens who, under the INA, are authorized to work although they are not entitled to legal residence in the United States because they are legally in the United States on a temporary basis only and have not abandoned their residence in their home country.

ORS 658.440(2)(d) differs materially from California 2805(a) concerning the *Dolores Canning* examples. Because Oregon is not a state bordering on Mexico or any other country, it would not be subject, in any currently imaginable situation, of a federal regulation authorizing daytime work of reforestation or agriculture workers who would return to their home country each night. Furthermore, ORS 658.440(2)(d) does not require, as does California 2805(a), that an employee be entitled to lawful residence in the United States; ORS 658.440(2)(d) requires that an employee be "legally present" and "legally employable" in the United States. (Emphasis added.) The *Dolores Canning* examples of persons who are legally employable but not legal residents in the United States are inapplicable to this matter, because those persons were legally present in the United States (on a temporary basis) even though they were not legally residents in the United States.

The Contractor points out that ORS 658.440(2)(d) prohibits the employment of a hypothetical alien who is not legally present, but is legally employable, in the United States. The Contractor argues that ORS 658.440(2)(d) conflicts with the federal legislative scheme because under the INA, it is possible to be legally employable, but not legally present, in the United States. The Contractor produced an expert witness to provide examples of such a situation. This expert is an attorney whose immigration law practice consists of counseling or representing aliens who wish to enter, stay, and/or be employed in the United States, or their employers. A careful analysis of all the testimony of the Contractor's expert reveals that he argued in pertinent part only that there could be instances in which an alien was legally employed in the United States before the alien had established through the appropriate bureaucratic or adjudicative mechanism that she or he was legally in the United States. For instance, an alien under deportation proceedings

who has applied for suspension of deportation because of alleged entitlement to be in the United States is not removed from the United States unless/until she or he is found to be deportable as a result of the proceeding. The alien must have INS authorization in order to legally work in the United States while awaiting the resolution of the application for suspension of deportation. However, INS will not penalize the alien for working without such authorization, because INS has no further sanction to impose on a person who is already under deportation proceedings and who is not subject to criminal charges. It is obvious to this forum that INS agents Woods and Fisher are correct in asserting that the fact that INS cannot further penalize such a person for working does not mean that the person is legally employable under ORS 658.440(2)(d) or any other law. Moreover, the Contractor's expert argued that such a person is legally present in the United States, if INS allows him or her to remain here. Accordingly, the Contractor's own expert argued that a person under deportation proceedings who has applied for suspension of deportation is not only legally employable in the United States (whether or not he or she has received authorization to work from INS), but also legally present in the United States.

Taken as a whole, the testimony of the Contractor's immigration law expert did not point out any situation in which the expert believed that a person would be not legally present in the United States while being legally employable in the United States. Furthermore, the expert did not testify that in his opinion ORS 658.440(2)(d) conflicts with the INA by preventing the employment of an alien not legally present but legally employable in the United States.

In sum, the Contractor offered no examples of how or when an alien could be legally employable but not legally present in the United States beyond the above-discussed reference to that situation in *De Canas* and its expert's testimony. Neither source demonstrated to this forum a circumstance in which ORS 658.440(2)(d) would conflict with the INA by proscribing the knowing employment by a farm labor contractor of a person who is legally employable in the United States even though not legally present here under federal law. This forum cannot conclude therefore that it is possible under federal law to be legally employable but not legally present in Oregon (and in fact this forum has assumed that an alien legally employable in the United States is also legally present here). Accordingly, this forum rejects the Contractor's contention that ORS 658.440(2)(d) is preempted by the INA because it conflicts with the INA.

B. ORS 658.440(2)(d).

1. Did the Contractor knowingly employ aliens not legally present or legally employable in the United States during times material?

According to *In the Matter of Alfonso Gonzales,* 1 BOLI 121, 128 (1978), *aff'd without opinion, Gonzales v. Bureau of Labor,* 39 Or App 407, 593 P2d 532 (1979), a contractor who employs an illegal alien does so knowingly if the contractor actually knows that the alien is not legally present or legally employable in the United States, or if the contractor would know this fact if he or she made efforts to ascertain the alien's status which were reasonably diligent under the circumstances as he knew them. Nothing in the language of ORS 658.440(2)(d) or in its existing legislative history indicates that a contractor who merely requires, or tries to require, its hirees to sign a form which says, in pertinent part, that the hiree is legally in the United States and that the hiree holds a social security number and card, has made a reasonably diligent inquiry into its hirees' status in the United States. This forum has no doubt that a contractor who does no more than this, particularly under the aggravating circumstances in the instant matter, has failed to use reasonable diligence to ascertain whether it is employing aliens not legally present or legally employable in the United States.

When ORS 658.440(2)(d) was enacted, as Senate Bill 404 in 1975, the word "knowingly" was added to it by the House Committee on Labor and Business Affairs, the last committee to act on SB 404 before the Legislature completed its enactment. Furthermore, this amendment was considered only during the final two meetings at which this Committee considered SB 404. Although the record reveals that this amendment was discussed by the Committee at its May 13, 1975, hearing and its June 3, 1975, work session, the indefinite language of those discussions and the indecipherability of pertinent parts of the tape-recorded record of those discussions make it impossible to ascertain their thrust or import at crucial times. Only two conclusions emerge from a careful evaluation of the legislative record of SB 404, particularly that which concerns the addition of "knowingly:"

a) The two committees which acted on SB 404 did contemplate requiring farm labor contractors to make reasonably diligent efforts to ascertain whether their workers were legally present and employable in the United States, by whatever mechanisms might be available, including requiring some sort of documentation of that status.

b) The committee which considered and approved the addition of "knowingly" gave discretion to the administrator of the Agency to make judgments as to whether a particular combination of circumstances constitute the knowing employment of aliens not legally present or legally employable in the United States.

In this matter, the Agency has exercised that discretion in determining that the Contractor has not exercised reasonable diligence under the circumstances to avoid employing illegal aliens, and therefore has knowingly employed aliens not legally present or legally employable in the United States. Given the Contractor's failure to require or even request any documentation of its workers' legal presence or employability in the United States, much less to make any other reasonable effort to respond to its continuing employment of illegal aliens (of which it was aware through the INS apprehensions), this forum is well within the directive it has received from the Legislature in concluding that, as a matter of law, the Contractor knowingly employed aliens not legally present or

employable in the United States during times material.

2. Does ORS 658.440(2)(d) put an unreasonable burden on a farm labor contractor?

The Contractor contends that ORS 658.440(2)(d) puts an unreasonable burden on farm labor contractors. The Contractor used an expert witness to illustrate how complex can be the determination, in conceivable instances, of whether a person is entitled to be present in the United States. This forum agrees that it is possible that not even a person himself or herself may know whether she or he is entitled to be legally in the United States. However, ORS 658.440(2)(d) does not hold a contractor absolutely liable for employing any person who is ultimately determined to not be legally present and employable in the United States. It holds a contractor culpable only if the Contractor employs a person who is not legally present and legally employable in the United States when the contractor actually knows of, or would discover with reasonable diligence, that person's illegal status. Certainly, the more debatable a person's status, the less likely it would be that this forum would find that a contractor actually knew or should have known that the person was (or ultimately would be found to be) not legally present and legally employable in the United States. In this matter, however, there is absolutely no evidence that the status of even one of the at least ninety illegal aliens the Contractor employed during times material was questionable or that even one of those aliens fell into any category the Contractor's expert described which would have rendered the determination of the alien's status complex. All of those aliens were determined to be illegal by INS. Virtually all of them admitted this status and asked to be returned to their country of citizenship. All were returned to that country as illegal aliens.

The responsibility ORS 658.440 (2)(d) puts on farm labor contractors is not an unreasonable burden for farm labor contractors in general, and was not an unreasonable burden for the Contractor herein.

3. Is ORS 658.440(2)(d) unconstitutionally vague?

This forum has not considered the Contractor's assertion in its Memo in Opposition to Commissioner's Refusal to Renew License that ORS 658.440 (2)(d) is unconstitutionally vague, because the Contractor made no explanation or argument in favor of that assertion other than citing the unreasonable burden argument this forum has discounted above.

C. Conflict Preemption: Title VII of the Civil Rights Act of 1964, as Amended.

The Contractor argues that ORS 658.440(2)(d) conflicts with Title VII by requiring an employer to do more than inquire whether a person is legally employable in the United States.

As discussed in Section B of this Opinion, INS advises that, as one step toward avoiding the knowing employment of illegal aliens, a farm labor contractor should:

> 1) inquire as to whether its applicants are citizens of the United States, and hire only those who answer affirmatively or who answer negatively and produce documentation of their legal employability in the United States before starting work; or,
>
> 2) require all of its hirees to produce documentation of their legal employability in the United States before starting work.

The Contractor asserts that a contractor using the first procedure would violate Title VII (assuming the contractor was subject to Title VII's jurisdiction).

Under Title VII, it is unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, because of that individual's national origin. Title VII also provides that it is unlawful for any employer to limit, segregate or classify its employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee, because of his or her national origin.

According to the Contractor's expert on employment discrimination law, Title VII's national origin discrimination prohibition does not protect aliens as a class, but does protect US citizens who are of a particular national origin. Accordingly, the Contractor may not treat citizen applicants and employees who belong to one class protected by Title VII (for example, US citizens of Mexican origin) differently than its other applicants and employees. However, the Contractor will not violate Title VII by uniformly applying the same procedures concerning legal status in the United States to all citizen applicants or hirees or to those who contend that they are citizens. Therefore, by following the procedure to which the Contractor objects and asking all its applicants for employment if they are citizens and hiring only those who answer affirmatively or who answer negatively and produce verification of their legal employability in the United States before beginning work, a contractor will not violate Title VII's prohibition against national origin discrimination. Every citizen applicant and hiree would be treated the same by this procedure, and since any legally employable alien is required to carry proof of that status, the only group adversely affected would be illegal aliens who are detected by this procedure and denied employment.

INS suggests that if a contractor finds the information or documentation which an applicant or hiree gives the contractor suspicious, the contractor ask INS to verify it. Obviously, a contractor could violate Title VII if it considered this information or documentation suspicious because it was offered by a person of a particular national origin. However, a contractor would not violate Title VII by considering a person's information or documentation concerning his or her status in the United States suspicious because, for example:

> 1) the documentation on its face appears to be counterfeit,
>
> 2) information on the documentation does not match the person offering it,
>
> 3) the person has given the contractor contradictory information relating to his or her status in the United States,

4) the contractor knows that the person has been apprehended by INS as an illegal alien and/or returned to his or her country of citizenship, or

5) the contractor actually knows or has heard information indicating that the person is an illegal alien.

If a contractor decides to assure compliance with ORS 658.440(2)(d) by refusing to hire, for example, any Hispanic person or person of Mexican origin, that contractor risks violating not only Title VII, but also its Oregon counterpart, ORS 659.030. However, compliance with ORS 658.440(2)(d) does not require this action or any action adversely affecting any group of people of a particular national origin, because of that national origin. Any contractor who responds to the provisions of ORS 658.440(2)(d) by refusing to hire any Hispanic person or person of Mexican national origin may, incidentally, avoid violating ORS 658.440 (2)(d) with respect to Hispanic or Mexican aliens, but that contractor will be subjected to the Agency's strict enforcement of ORS 659.030.

D. ORS 658.440(1)(f).

ORS 658.440(1)(f) imposes an absolute duty on a farm labor contractor to furnish to each of its workers a written statement containing certain information. The legislative history of this provision clearly indicates that by enacting that statute, the Legislature intended to require a written agreement between the contractor and the worker, which would make it clear, to the contractor and the worker, what the conditions of employment would be. The purpose of this requirement was to protect the workers by clearly defining and making known to them the terms under which they would be working and by giving them an enforceable agreement concerning those terms. Accordingly, this forum concludes that ORS 658.440(1)(f) requires that a farm labor contractor physically give the requisite written statement to each worker for the worker to retain. Posting a notice giving the required information will not suffice.

The addition of the phrase "recruiting, soliciting or supplying, whichever occurs first," to ORS 658.440(1)(f) in 1981 changed the statute to require a contractor to give the required information to not only its workers, but to its potential workers. That is, the written statement clearly must be furnished not just by the time a person starts working for the contractor, but when the work relationship is initiated. In other words, a contractor must give a person the required written statement as soon as that person and the contractor make contact for employment-related purposes.

The Contractor produced three forms which it alleges contain the information required by ORS 658.440(1)(f). The Contractor maintains that the information in each of these forms was supplied to each of its workers during all times material herein. However, the only one of these forms which was physically given to each worker for that worker to retain was a form which only provides information relating to ORS 658.440(1)(f)(A). It was not provided to workers at the time they were hired, recruited or solicited, whichever occurred first. It was not provided until, at the earliest, the worker had been hired and transported to the job site. This form was not necessarily even provided before the commencement of work. It was generated and in most cases distributed to the Contractor's workers by the BLM or USFS, not the Contractor.

A form which the worker signed was not given to each of the Contractor's workers for the worker to retain. Once a worker signed it, it was returned to the Contractor. It provided information only relating to ORS 658.440(1)(f)(A), (C), (D) and (F), and what it provided was not necessarily correct and did not necessarily contain all the information required by any one of those subsections.

A third form was only posted at the Contractor's job sites. It provided only information relating to ORS 658.440 (1)(f)(A).

None of the above-mentioned three forms supplied any information concerning ORS 658.440(1)(f)(B), (E), (G), (H), or parts of (D). The information they provided concerning the other provisions of ORS 658.440(1)(f) was not necessarily complete or correct. The one form which was given to each worker for the worker to retain was not given to the worker by the time required in ORS 658.440(1)(f).

For all the above reasons, this forum has concluded that, as alleged by the Agency, the Contractor failed to furnish to each worker it hired in January 1983 to work at its Salem Mill Creek Campground a written statement which contained all (or even much) of the information required by ORS 658.440(1)(f), at the time required by that provision. Accordingly, the Contractor did not comply, or substantially comply, with ORS 658.440(1)(f) with regard to those workers.

ORDER

NOW, THEREFORE, as authorized by ORS 658.445, the Commissioner of the Bureau of Labor and Industries hereby refuses to renew the Contractor's license to act as a farm labor contractor for the 1983 licensing year, which ran from February 1, 1983, through January 31, 1984.

In the Matter of

JEFFREY BRADY,

Dentist, Respondent.

Case Number 02-79

On Remand from the Oregon Court of Appeals, Amended Final Order of the Commissioner

Mary Wendy Roberts

Issued May 11, 1984.

SYNOPSIS

Respondent rejected Complainant for employment as a dental technician when she applied and was qualified. Respondent kept the position open, offered it to a male former employee who turned it down, and eventually hired another male. Finding that Respondent maintained an all male work force during times material, and offered no legitimate, non-discriminatory reason for not attempting to contact Complainant, the Commissioner ruled that Respondent discriminated against Complainant based on her sex,

awarded her $741 for lost wages, and found no evidence of mental suffering. ORS 659.030(1)(a).

The above entitled matter came on regularly for hearing before Neil H. Running, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was convened at 9:30 a.m. on April 11, 1979, in the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented at the hearing by Randolph B. Harris, Assistant Attorney General. On appeal to the Oregon Court of Appeals the Agency was represented by Solicitor General William F. Gary. On remand to the Commissioner, the Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Respondent was represented at the hearing by Burton J. Fallgren, Attorney at Law. On appeal to the Oregon Court of Appeals, Respondent was represented by Alan Viewig.

The Proposed Order of the Presiding Officer was issued on December 7, 1979. The Final Order of the Commissioner of the Bureau of Labor and Industries was issued on December 23, 1980. [*In the Matter of Jeffrey Brady,* 2 BOLI 58 (1980).] On January 25, 1982, the Oregon Court of Appeals reversed and remanded for further consideration the Final Order of the Commissioner of Labor. Having fully considered the Order in the matter of *Brady v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982), and the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make upon remand the following Ruling on Motion, Findings of Fact, Amended Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order. [Ed: The Final Order on Remand was issued on September 9, 1983. The Amended Final Order on Remand, correcting a word in the Ultimate Findings of Fact, was issued on May 11, 1984.]

RULING ON MOTION

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

FINDINGS OF FACT – PROCEDURAL

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

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations

contained therein and determined that substantial evidence existed in support of Complainant's allegations.

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

FINDINGS OF FACT – THE MERITS

1) Respondent is a Doctor of Dental Medicine engaged in the practice of dentistry and operates a dental laboratory in the State of Oregon. Respondent utilizes the services on one or more employees in this business.

2) Complainant is a female person.

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

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

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

6) It was standard procedure for Respondent to advertise in The Oregonian and other newspapers for qualified dental technicians when an opening existed.

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

8) In June 1976, Allen Alcock, a male person, applied for employment as a dental technician in Respondent's dental laboratory. He worked from the week of July 8, 1976, through the week of August 6, 1976, for a weekly salary of $168.50. He was laid off due to lack of work.

9) Soon thereafter, during the late summer or early fall of 1976, Mr. Schmeer telephoned Mr. Alcock and asked him to return to work at Respondent's dental laboratory. Mr. Schmeer stated he could only guarantee Mr.

Alcock 30 (calendar) days employment at that time. Further employment would depend on the number of cases that came into the laboratory.

10) At the time he asked Mr. Alcock to return to work for Respondent, Mr. Schmeer was seeking to fill a position then available in Respondent's Portland dental laboratory. The offer to Mr. Alcock and his subsequent refusal establishes that a position was available in Respondent's dental laboratory after Complainant had submitted her application.

11) Subsequent to her second application for employment at Respondent's dental laboratory, Complainant continued to look for employment as a dental technician at other dental laboratories without success. She also went to Respondent's dental office at least twice every month to seek employment and to visit Mr. Delorme.

12) On or about December 10, 1976, during one of her visits to Respondent's office, Complainant confronted Respondent directly and requested consideration for employment. She was told, in response, to return at 9:00 the following morning for what would apparently be a test or tryout. Complainant understood Respondent to indicate she would be expected to "set up" dentures in one half hour. Comments made by Mr. Schmeer and her own knowledge led Complainant to conclude such an undertaking was impossible.

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

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

ULTIMATE FINDINGS OF FACT

1) From about July 10, 1976, to December 10, 1976, Complainant, a female, applied, and was qualified, to work as a dental technician in the dental laboratory of Respondent's Portland dental office. When there was a verified opening for a dental technician in Respondent's Portland dental laboratory during the late summer or early fall of 1976, Respondent's foreman Schmeer offered this work to a male person who had previously worked for Respondent for 30 calendar days. When that person turned down the offer Mr. Schmeer made no attempt to contact Complainant, who was qualified, had applied, and had made known to Respondent that she still desired to work as a dental technician in Respondent's dental laboratory. Respondent did not come forward with evidence that showed Mr. Schmeer had a legitimate, nondiscriminatory reason for failing to either employ or offer employment to Complainant.

During 1976, Respondent, through foreman Schmeer, hired approximately fourteen persons, and employed nineteen persons, as dental technicians in his dental laboratory, all of whom were male. Respondent's maintenance of a male only dental technician work force in his dental laboratory, his failure to offer available dental technician employment to Complainant, who was qualified to perform and had applied, and Respondent's failure to present legitimate non-discriminate reasons for not hiring Complainant, lead to the conclusion that Respondent failed to employ Complainant due to her sex.

2) Respondent's failure to employ Complainant because of her sex resulted in damages to Complainant in the amount of $741.40. This amount was determined by multiplying $33.70, the daily salary paid Allen Alcock, who worked for Respondent as an apprentice dental technician (the position sought by Complainant), by 22 work days, the period of employment which was offered to Mr. Alcock that represents a verified opening. The offer of employment to Mr. Alcock in late summer or early fall is the only verified opening established in the record that was available after the date of Complainant's application.

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

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

CONCLUSIONS OF LAW

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

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

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

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

5) Complainant is entitled to damages in the amount of one month's work, which represents the time period supported by the record herein that a verified opening was available. No specific evidence of other openings after July 10, 1976, was presented.

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

OPINION

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

1) Respondent alleges that between July and December 1976, Complainant and other persons filed complaints with the Equal Employment Opportunity Commission and the Bureau of Labor and Industries which charged Respondent with discrimination, and which were subsequently dismissed. The alleged existence of these complaints and the various grounds for their dismissal are not relevant to the determination of the validity of allegations contained in the complaint herein. The same conclusion applies to Respondent's allegations that Complainant filed an "unjust" complaint with the Bureau of Labor and Industries against Pacific Dental Laboratory.

2) Respondent alleges that he employed a female lab technician on occasion before 1976 and another female after 1976. This allegation is irrelevant because it does not pertain to 1976, the year during which Respondent failed to employ Complainant, and the evidence of such employment showed Respondent employed the female lab technician as only a temporary employee.

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

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

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

6) Respondent's allegation that in October 1976 Complainant was unable to do satisfactory work in the dental laboratory of Dr. Lawrence Bernard and was terminated after one week is not by itself relevant to any fact herein at issue. This event occurred after Mr. Schmeer failed to offer to Complainant the short term position Mr. Alcock had refused. Respondent introduced no evidence to relate this allegation to any fact at issue. No evidence was introduced that showed Respondent's and Dr. Bernard's laboratories were comparable. There was a conflict at hearing as to whether Complainant asked Mr. Schmeer directly for a job. However, this conflict is moot because Mr. Schmeer admitted at hearing that as of July 10, 1976, he knew Complainant was looking for work as a dental technician and had advised her that there were no openings.

The Oregon Court of Appeals remanded this case and requested that I more fully explain the conclusion found. In reviewing Complainant's claim of sex-based discrimination, the standards articulated by the United States Supreme Court in *McDonnell-Douglas Corp. v. Green,* 41 US 792 (1973) were followed. These standards require Complainant to establish a prima facie case by showing:

1) Complainant belongs to a protected class;

2) Complainant applied for and was qualified for the position for which the employer was seeking application;

3) Complainant was rejected despite her qualifications; and,

4) After the rejection of Complainant, the position remained open and the employer continued to seek applications from persons with Complainant's qualifications.

Ms. Lehde, a female, applied for a position with Respondent for which she was qualified, a position as a dental technician; there were no openings at the time she applied. However, in late summer or early fall a position became vacant. One vacancy was offered to a man who had previously been employed by Respondent as a temporary employee. When that male turned down the offer, Respondent made no effort to contact Complainant and eventually hired a male. The record does not disclose and Respondent did not come forward with evidence to meet his burden regarding the qualifications of the men hired subsequent to Complainant's application. Certainly, Respondent had the right to offer a position to a former employee. But when faced with a rejection by the former employee, it is then incumbent on the employer to consider a qualified applicant such as Complainant, who had made numerous inquiries concerning employment. A review of the record indicates Complainant had better educational qualifications than Mr. Alcock had presented when he initially applied, and Respondent and Mr. Schmeer were both aware she was actively seeking employment. This offer of reemployment to Mr. Alcock established an opening after the date Complainant applied for employment for which she was qualified.

It was Respondent's burden to produce evidence that Complainant was rejected or another applicant preferred for a legitimate, non-discriminatory reason. *Texas Department of Community Affairs v. Burdine,* 450 US 248 (1981). Respondent's duty does not extend to persuading this forum that it was actually motivated by reasons offered to show the legitimate, nondiscriminatory preference for another applicant over Complainant. Respondent did not come forward with reasons to meet this burden.

In the absence of Respondent offering such reasons, Complainant, having established a prima facie case, is entitled to the award of damages as set forth in the Order below.

ORDER

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

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within thirty (30) days of the execution of this Final Order, a certified check payable to the Bureau of Labor and Industries in trust for Charlotte I. Lehde in the gross amount of SEVEN HUNDRED FORTY-ONE DOLLARS AND FORTY CENTS (741.40).

2) Cease and desist from discriminating on the basis of sex against any applicants for employment at the

dental laboratory of Respondent's Portland dental office.

In the Matter of
RICHARD J. CHAPMAN PANEK,
dba Rainbow Vending,
Respondent.

Case Number 10-83
Final Order of the Commissioner
Mary Wendy Roberts
Issued November 23, 1984.

SYNOPSIS

Where Wage Claimant worked for Respondent driving a truck at an agreed rate of $100 per week plus truck expenses, the Commissioner found that this was below the minimum wage of $3.10 an hour, and found wages due, owing, and unpaid of $156, plus expenses of $49. Respondent did not attend the hearing and presented no evidence. The Commissioner ordered Respondent to pay the wages due, plus penalty wages of $744 based on $3.10 an hour for eight hours per day for 30 days, plus interest. ORS 652.140; 652.150; 653.025.

The above entitled matter came on for contested case hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 21, 1984, in Room 122 of the Transportation Building, East Summer Street, Salem, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Employer Richard J. Chapman Panek was not present nor was he represented by counsel. Employer had been served with a copy of the Order of Determination in this matter on July 11, 1983. Employer subsequently retained Roger K. Evans, Attorney at Law, Salem, Oregon, to enter an appearance on his behalf. Employer through his attorney filed an answer dated July 18, 1983, and on that same date filed a "Notice of Hearing," which requested a contested case hearing in connection with the Order of Determination filed in this matter. Claimant Edwin James Williams was present and testified. Also present and testifying as witnesses were David Luttrell, former assistant manager for Employer, and Fay S. Williams, wife of Claimant.

Having fully considered the entire record in this matter, the Commissioner of the Bureau of Labor and Industries makes the following Rulings, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS

On February 22, 1984, the Agency submitted a motion to amend the original Order of Determination to include an allegation that the Wage Claimant was not and should have been paid the minimum wage while employed by the Employer. The motion was to amend the original Order of Determination to reflect the claim for minimum wages and to indicate the increased

average daily wage and resulting penalties. The Employer filed no response to the motion. The motion was granted in a ruling dated March 12, 1984.

On March 13, 1984, the Agency submitted a second motion to amend the Order of Determination to include an allegation that the Wage Claimant was not and should have been paid the minimum wage while employed by Employer from November 5 through 20, 1981, as well as during the period of the original wage claim. The Employer filed no response to this second motion to amend, and the motion was granted in a ruling dated March 16, 1984.

As a result of the two motions and rulings thereon the Agency has submitted a Second Amended Order of Determination.

FINDINGS OF FACT – PROCEDURAL

1) On November 21, 1981, Claimant Edwin James Williams filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries alleging that the Employer, Richard J. Chapman Panek, dba Rainbow Vending, was his former employer and that the Employer had failed to pay wages due to him.

2) On November 31, 1981, Claimant assigned all wages due him under his claim to the Commissioner of the Bureau of Labor and Industries in trust for Claimant.

3) On June 22, 1983, the Administrator of the Wage and Hour Division issued an Order of Determination which found that the Employer owed the Claimant $206.50 in unpaid wages and expenses, plus interest thereon at the legal rate per annum from December 1, 1981, until paid. In addition, the Order of Determination found that the Employer owed Claimant $744.00 in penalty wages plus interest thereon at the legal rate per annum from January 1, 1982, until paid. This Order of Determination was served upon the Claimant and upon the Employer.

4) Thereafter, the Employer filed with the Wage and Hour Division a request for an administrative hearing in this matter, although that request was entitled "Notice of Hearing," and an answer to the above-mentioned Order of Determination denying that Claimant was an employee of Employer, and denying that Employer owed any wages or penalty wages to Claimant. Employer's answer also alleged as a first affirmative defense that Employer had agreed to pay Claimant some money for firewood to be delivered to Employer and alleged that Claimant was using Employer's truck to haul this wood. Employer alleged that a check for $100 payable to Claimant was written in payment for this wood, and that when the wood was not delivered the Employer stopped payment on the check. As a second affirmative defense Employer alleged that Claimant has never worked for any of the businesses of Employer.

5) The Bureau of Labor and Industries duly served Employer and Claimant with Amended Notice of Time and Place of Hearing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein Employer owned and operated a wholesale fish business in the Salem area. In this business the Employer

employed one or more persons in the State of Oregon.

2) Claimant worked for Employer as a truck driver from November 5, 1981, to November 25, 1981. His job was to pick up deliveries of fish at various places, particularly along the Oregon coast, and deliver them to restaurants and other outlets. Employer agreed to pay Claimant $100.00 per week flat wages plus expenses for operation of the truck.

3) Claimant got his job with Employer after being recommended by David Luttrell, assistant manager of Employer. Mr. Luttrell worked with Claimant and rode on the pick up and delivery runs with him. Occasionally Claimant's wife would ride with him.

4) Claimant had no particular set work hours, but worked everyday from sometime in the morning until evening. He often worked more than eight hours a day. Claimant did not keep a written record of his hours, but at the end of each day or the next morning he would tell Employer how many hours he had worked the previous day and the Employer would write these down. These records were not available from the Employer.

5) Employer was to pay Claimant once a week on Friday. The first check which Employer paid Claimant could not be cashed initially because Employer was overdrawn at his bank. During the period Claimant worked for Employer he received only $240.00 in wages. Employer did not deduct any payroll taxes or social security from Claimant's wages.

6) Claimant worked only four days for a total of 32 hours, from November 21 through November 25, 1981. Claimant quit employment with the Employer at the end of the day on November 25th because the working hours were inconvenient, because the truck was often not ready for Claimant and he would have to wait around, he was not getting paid when paychecks were promised to him, and the Employer had not been truthful with Claimant about whether or not there were sufficient funds in Employer's account to cover the paychecks.

7) On his last day of employment Claimant was given a final check in the amount of $129.70. Eighty dollars of this check was for wages for four days, and $49.70 was for expenses connected with operating the truck, such as gas and oil. Claimant cashed this final check at a local market in Salem. Approximately one week after he had cashed the check Claimant received notice from the market that Employer had stopped payment on the check. The market has requested that Claimant repay the amount of the check and Claimant has agreed to do so when he is paid by Employer for the check.

8) Prior to quitting Claimant had borrowed Employer's truck over a weekend to move some household goods. In exchange for the use of the truck Claimant told Employer he would pay for the gas and would provide some wood to the Employer. However, because of wet weather, Claimant was unable to get the truck in where the wood was stacked and therefore never did deliver any wood to Employer. Claimant returned the truck Sunday morning of the same weekend he borrowed it. Claimant's last paycheck was issued to him after he had returned the truck.

9) Employer agreed to pay Claimant $100.00 per week. Based on a 40-hour work week, Claimant's hourly wage was only $2.50. At the time of Claimant's employment in November of 1981, the minimum hourly wage required to be paid by Employer was $3.10. Claimant worked a total of 16 days from November 5 through November 25th at 8 hours per day, and at the rate of $3.10 an hour he should have been paid $396.80. However, he received only $240.00, leaving an amount owing of $156.80 for wages. Additionally Claimant incurred $49.70 for reimbursable expenses which Employer has not paid, for a total amount owing of $206.50.

ULTIMATE FINDINGS OF FACT

1) Claimant worked as a truck driver for Employer from November 5, 1981, to November 25, 1981, at a flat wage of $100.00 per week.

2) Claimant worked a total of 128 hours from November 5, 1981, through November 25, 1981. Claimant received payment at the rate of $2.50 an hour for only 96 of these hours. Claimant received no payment whatever for the 32 hours he worked from November 21 to November 25. All 128 hours which Claimant worked should have been paid at the rate of $3.10 an hour. Additionally, Claimant incurred $49.70 in reimbursable expenses which Employer has not paid.

3) The final check which Employer issued to Claimant in the amount of $129.70 was for $80.00 in wages owing and $49.70 in reimbursable expenses.

4) Employer willfully failed to pay Claimant wages owed to him in the amount of $156.80 and reimbursable expenses owed to him in the amount of $49.70. Employer did not plead or show financial inability to pay the wages at the time they accrued.

5) Because the Employer failed to appear at the hearing, either in person or through counsel, after having been served with a copy of the Order of Determination, the testimony of Claimant and witnesses on Claimant's behalf is accepted.

6) Employer is liable for penalty wages. They total $744.00, a sum computed by multiplying Claimant's average daily wage at termination of $24.80, which daily wage is calculated by multiplying eight hours per day by $3.10 an hour, the minimum wage, by 30 days, the maximum period during which penalty wages accrue.

CONCLUSIONS OF LAW

1) At all times material, the Employer was an employer subject to the provisions of ORS 652.110 to 652.220 and ORS 652.310 to 652.405.

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

3) The Employer's failure to pay the Claimant $206.50 in earned and unpaid wages and reimbursable expenses within 48 hours after the termination of Claimant's employment constitutes a violation of ORS 652.140.

4) Because the Employer willfully failed to pay the Claimant $206.50 in earned and unpaid wages and reimbursable expenses, the Claimant's wages continued from the due date

thereof at the same rate at his average daily wage of $24.80 for 30 days, pursuant to ORS 652.150.

5) The Commissioner of the Bureau of Labor and Industries has the authority to order the Employer to pay the Claimant $206.50 in earned and unpaid wages and reimbursable expenses, and $744.00 in penalty wages, plus interest on both sums, under the facts and circumstances of this record.

OPINION

The Employer in this matter failed to appear at the contested case hearing after being served with the Order of Determination and Notice of Hearing after having filed an answer and a request for hearing. The testimony of Claimant and witnesses in Claimant's behalf was thus unrefuted and is accepted.

The Employer asserted two affirmative defenses in this answer: first, that a check in the amount of $100.00 which Claimant alleged was issued to him by Employer for wages, was in fact intended to pay Claimant for some firewood which Claimant was to deliver to Employer; and second, that Claimant was never an employee of Employer. As to the first defense, Employer asserted in his answer that he stopped payment on the check because Claimant failed to deliver any wood. The check, which appears to be dated November 29, 1981, was for the amount of $129.70, not $100.00, and in the bottom left-hand corner of the check there is a notation in the same handwriting as the rest of the check, indicating that the check was for "trucking fees." This evidence supports Claimant's testimony that he was owed $80.00 in wages for driving Employer's truck for the period of November 21-25, and $49.70 for expenses incurred in operating the truck. Claimant was also questioned at the hearing about Employer's affirmative defense and effectively refuted it.

As to employer's second affirmative defense, that Claimant was never an employee, even though Employer did not deduct income or social security taxes from the wages which he did pay to Claimant, there was other testimony from both Claimant and his wife and from Mr. Luttrell to establish that Claimant was hired as an employee. There was no indication that Claimant was working as an outside trucking contractor – he did not provide the truck or control the schedule or fees.

ORS 653.025 provides that for each hour worked no employer shall employ an employee at wages computed at a rate lower than $3.10 an hour for the calendar years after December 31, 1980. In this matter the Employer was paying Claimant flat wages of $100.00 per week for an eight-hour a day, five-day work week. Claimant should have received $3.10 an hour, or $.60 an hour more than he actually received. Although Claimant testified that he sometimes worked in excess of 40 hours a week, he could not provide any basis for calculating that overtime, and his wage claim has thus been limited to compensation for regular hours worked at the minimum legal wage rate.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Employer is hereby ordered to pay to the Bureau of Labor and Industries, in trust for Claimant EDWIN JAMES WILLIAMS, the amount of Nine Hundred Fifty Dollars and Fifty Cents ($950.50), which amount represents $206.50 in earned and unpaid wages and reimbursable expenses, and $744.00 in penalty wages; plus interest thereon at nine percent per annum, for the period of December 1, 1981, until paid on $206.50, and for the period from January 1, 1982, until paid, on $744.00. This payment must be delivered to the Hearings Unit of the Bureau of Labor and Industries, 1400 S.W. Fifth Avenue, Room 309, Portland, Oregon 97201.

In the Matter of
SUPERIOR FOREST PRODUCTS,
Respondent.

Case Number 05-83
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 12, 1984.

SYNOPSIS

Respondent corporation, which was not dissolved and was the employer, employed three claimants as skidder operators or loggers, and failed to pay them wages due, owing, and unpaid at the time of their terminations. The Commissioner found that two Claimants claiming overtime pay were exempt under section 213 of the Fair Labor Standards Act regarding logging operations, and rejected Respondent's claim that two of the wage claimants modified their wage agreement into a percentage partnership. The Commissioner held that, once a Claimant assigned his wage claim, including his claim for penalty wages, it survived his death and could be enforced and collected upon by the Bureau of Labor and Industries for the benefit of his estate and the heirs thereto. The Commissioner awarded the Claimants, respectively, $2,210 in wages and 30 days penalty wages of $2,056; $1,750 in wages and 30 days penalty wages of $2,400; and 15 days penalty wages of $1,017, all amounts to bear appropriate interest until paid. ORS 57.585; 652.130; 652.140; 652.150; 652.332; 653.010(7).

The above-entitled matter came on for contested case hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 7, 1983, in Room 300 of the State Office Building, 700 S.E. Emigrant Street, Pendleton, Oregon. The Bureau of Labor and Industries was represented by John L. Lessel and June Miller, authorized representatives of the Bureau. Employer was represented by Richard O. Maze, Jr., the president and owner of Superior Forest Products, and not represented by counsel. Two of the three Claimants, Keith Jolliff and Randy D. Muller, were present and testified. The original named Claimant, Leland George Carroll, was deceased at the time of the hearing.

RULINGS

At the beginning of the hearing the Agency requested a ruling on whether the Agency could pursue the wage claim of deceased Claimant Leland George Carroll on behalf of Claimant's mother. The ruling at the hearing was that under ORS 652.190 wages due to a deceased employee are due and payable only to the employee's surviving spouse, or if no surviving spouse, then to the dependent children. Since Claimant Carroll left no surviving spouse or dependent children, the ruling at the hearing was that Claimant Carroll's mother had no wage claim that could be enforced by the Bureau, because a parent is not entitled by statute to receive wages due. That ruling was based on an erroneous interpretation of law, and the ruling in this Final Order is that once Claimant Carroll assigned his wage claim, including his claim for penalty wages, it survived his death and could be enforced and collected upon by the Bureau of Labor and Industries for the benefit of his estate and the heirs thereto.

During the course of the hearing the Agency presented evidence that Employer was delinquent in its registration with the Oregon Corporation Commissioner's office during 1982, and the Agency therefore requested that any Order entered in this wage claim matter be entered against Mr. Maze personally. Ruling on this request was reserved for this Order.

The Corporations Commissioner issued a certificate of incorporation to Employer at the time of its incorporation in 1981, which certificate is conclusive evidence that the corporation has been incorporated under the Oregon Business Corporation Act. ORS 57.321. However, because Employer failed to file its required annual report and failed to pay fees when due, the corporation was delinquent for a period of time during 1982, but was never involuntarily dissolved because of such delinquency.

Delinquency does not affect the existence of the corporation. Only if the corporation had been involuntarily dissolved during 1982 would it have ceased to exist. ORS 57.585. And even in the event of involuntary dissolution, a corporation can be fully reinstated when it cures whatever defect caused the dissolution. The reinstatement relates back to the date of dissolution such that the existence of the corporation is deemed to have continued without interruption from that date.

The Employer in this matter was Superior Forest Products and any recovery for unpaid wages must be against that entity and not against Mr. Maze personally.

FINDINGS OF FACT – PROCEDURAL

1) On September 21, 1982, Claimant Carroll filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries, alleging that he was formerly employed by the Employer and that Employer had failed to pay wages due him.

2) On September 21, 1982, Claimant Carroll assigned all wages due him under his claim to the Commissioner of the Bureau of Labor and Industries in trust for Claimant.

3) On December 29, 1982, Claimant Jolliff filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries, alleging that he was formerly employed by the Employer and that Employer had failed to pay wages due him.

4) On December 29, 1982, Claimant Jolliff assigned all wages due him under his claim to the Commissioner of the Bureau of Labor and Industries in trust for Claimant.

5) On December 30, 1982, Claimant Muller filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries, alleging that he was formerly employed by the Employer and that Employer had failed to pay wages due to him.

6) On December 30, 1982, Claimant Muller assigned all wages due him under his claim to the Commissioner of the Bureau of Labor and Industries in trust for Claimant.

7) On March 14, 1983, the Administrator of the Wage and Hour Division issued an Order of Determination which found that Employer owed Claimant Carroll $431.00 in unpaid wages, plus interest thereon at the legal rate per annum, from October 1, 1982, until paid. In addition, the Order of Determination found that Employer owed Claimant Carroll $2,153.00 in penalty wages, plus interest at the legal rate per annum from November 1, 1982, until paid. This Order of Determination was served upon Claimant Carroll and upon Employer.

8) On March 14, 1983, the Administrator of the Wage and Hour Division issued an Order of Determination which found that Employer owed Claimant Jolliff $2,390.00 in unpaid wages, plus interest thereon at the legal rate per annum, from February 1, 1983, until paid. In addition, the Order of Determination found that Employer owed Claimant Jolliff $2,187.00 in penalty wages, plus interest thereon at the legal rate per annum from March 1, 1983, until paid. This Order of Determination was served upon Claimant Jolliff and upon Employer.

9) On March 14, 1983, the Administrator of the Wage and Hour Division issued an Order of Determination which found that Employer owed Claimant Muller $2,165.00 in unpaid wages, plus interest thereon at the legal rate per annum, from February 1, 1983, until paid. In addition, the Order of Determination found that Employer owed Claimant Muller $2,400.00 in penalty wages, plus interest thereon at the legal rate per annum from March 1, 1983, until paid. This Order of Determination was served upon Claimant Muller and upon Employer.

10) Thereafter, Employer filed with the Wage and Hour Division a Request for an Administrative Hearing in the matter, and an answer to the above-mentioned Order of Determination admitting that Employer owed some back wages to Claimant Jolliff but alleging as an affirmative defense that Claimant Jolliff had agreed to work with Employer not for an hourly wage but for a percentage of the income from a certain logging job. Employer also alleged that some monies had been paid to Claimant Jolliff and that Claimant Jolliff had a saw and miscellaneous tools which still belonged to Employer.

11) In the same answer, Employer alleged that Claimant Muller had agreed to work on a certain logging job for a percentage of the income from

that job instead of working at an hourly rate. The answer also alleged that while some hourly wages were due to Claimant Muller, the figure was $918.00 instead of the figure alleged by the Bureau.

12) As to both Claimant Muller and Claimant Jolliff, Employer alleged in its answer that Claimants had agreed to waive any claim for overtime in exchange for a higher regular hourly wage.

13) Employer also denied in his answer that any wages were owing to Claimant Carroll. Employer alleged that it had paid Claimant Carroll in full, that Claimant Carroll had not in fact received the raise from $8.00 to $9.00 per hour which he claimed and, further, that Claimant Carroll had agreed to forego any overtime wages rather than be restricted to only 40 hours per week.

13) The Bureau of Labor and Industries duly served Employer and Claimants with Notice of Time and Place of Hearing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein Employer owned and operated a logging, milling, and trucking business in the Pendleton area. In this business Employer employed one or more persons in the State of Oregon. Employer did not employ more than eight persons in its logging business.

2) Claimant Jolliff worked for Employer as a logger and as a skidder operator. Prior to July 1982, Claimant Jolliff earned $9.00 an hour for regular hours worked and $13.50 for overtime. At the request of Employer, in July of 1982 he agreed to forego receiving overtime wages in exchange for receiving a wage of $10.00 an hour for all regular and overtime hours worked. Claimant Jolliff worked for Employer at $10.00 an hour up to October 1, 1982. Claimant Jolliff was responsible for maintaining a daily record of hours worked. Claimant Jolliff was paid for these hours by check signed by Mr. Maze, Employer's president.

3) During October of 1982, Claimant Jolliff worked a total of 131 hours for Employer. Claimant Jolliff received a total of $600.00 in payment toward these hours. In November of 1982, Claimant Jolliff worked a total of 150 hours. Employer did not pay Claimant Jolliff for these hours. In December of 1982, Claimant Jolliff worked 89.5 hours. Employer paid Claimant Jolliff $400 toward the hours in December and Claimant Jolliff filed a logger's lien for the remainder of what was owed for the hours worked in December. Claimant Jolliff left employment with Employer on December 29, 1982, because he was not receiving any wages.

4) After subtracting the amounts already paid by Employer from October 1, 1982, to December 29, 1982, Employer owes Claimant Jolliff a total of $2,210.00 for all hours worked at $10.00 an hour.

5) Sometime between October 1st and December 29th, 1982, there was a discussion between Mr. Maze and Claimant Jolliff about a change in the way in which Claimant Jolliff would be compensated for his work. There was a discussion about whether Claimant Jolliff would work for a percentage of income derived from certain logging jobs instead of for an hourly wage.

There was no actual agreement reached between Employer and Claimant Jolliff as to this new compensation arrangement and there is no written record of any agreement having been entered into.

6) Claimant Muller worked for Employer as a rubber tire skidder operator and logger. Prior to May of 1982, Claimant Muller was paid $9.00 an hour for regular hours worked and $13.50 for overtime hours worked. At the request of Employer in May of 1982, Claimant Muller agreed to forego receiving overtime wages in exchange for receiving a wage of $10.00 an hour for all regular and overtime hours worked. Claimant Muller kept a record of his daily hours worked and turned in these hours to Employer. Employer paid some wages to Claimant Muller on the basis of Claimant Muller's record of hours worked.

7) Claimant Muller was paid every two weeks by check signed by Mr. Maze. Those checks were frequently short of all monies owed and Employer was always running behind on wages owed and trying to catch up. Claimant Muller worked a total of 846 regular hours from May 1982 until December 16, 1982, with no overtime. For these hours worked he received a total of $6,710.00. Total wages earned, however, were $8,460.00, leaving wages owed of $1,750.00. Unlike Claimant Jolliff, Claimant Muller did not file any liens on any of the logs he had worked on.

8) Sometime in the fall of 1982 there was a discussion between Mr. Maze and Claimant Muller about Claimant Muller also working on a percentage basis on a certain logging job rather than working on an hourly basis. The discussion was to the effect that 50 percent of the gross received from the sale of logs would be split four ways between Employer and a Mr. Farley, Claimant Jolliff and Claimant Muller. Claimant Muller agreed to work on a percentage basis after December 16, 1982, when Employer's operations moved to the so-called Deadman Pass sale area. From December 16th to December 27th, which was the last day on which Claimant Muller worked, Claimant Muller worked 41.5 hours. Claimant Muller never received any money for these hours, although Employer admits that $178.00 is due to Claimant Muller for his percentage of the sale proceeds.

9) From October 15th to November 22nd, Claimant Muller was drawing unemployment. When he went back to work after November 22nd he continued to receive unemployment until December 15th. During this time, between November 22nd and December 15th, he worked a total of 66.5 hours.

10) Claimant Carroll worked for Employer as a chaser on the landing from July 27, 1982, to August 25, 1982, and as a skidder operator from August 26, 1982, until he was laid off on September 10, 1982.

11) Claimant Carroll earned $8.00 per hour for all hours worked. During the period of July 27 to September 10, 1982, he worked a total of 246 hours for total gross wages due of $1,968.00. Claimant Carroll was supposed to be paid every two weeks, but Employer was periodically late in making wage payments.

ULTIMATE FINDINGS OF FACT

1) Claimant Jolliff worked for Employer doing logging during the summer and fall of 1982 at an agreed upon regular hourly wage of $10.00 per hour.

2) From October 1, 1982, to and including December 29, 1982, Claimant Jolliff worked 281 hours. Other hours worked in December of 1982 were compensated by partial payment by Employer and through the filing and satisfaction of a logger's lien and are not included in Claimant Jolliff's wage claim.

3) Wages due for those hours claimed were $2,810.00 for all hours worked. Employer paid $600 toward these wages and willfully failed to pay Claimant Jolliff $2,210.00. Employer did not prove financial inability to pay these wages at the time they accrued.

4) If Employer is liable for penalty wages, they total $2,056.09, a sum computed by multiplying Claimant Jolliff's average daily wage at termination of $68.54 by 30 days, the maximum period during which penalty wages accrue.

5) Claimant Muller worked for Employer doing logging from May of 1982 to the end of December of 1982 at a regular hourly wage of $10.00 per hour and an overtime hourly wage of $15.00 per hour, notwithstanding the purported agreement between Claimant Muller and Employer that Claimant would be paid $10.00 an hour for all hours worked.

6) From May 1982 to and including December 15, 1982, Claimant Muller worked 846 regular hours.

7) Wages due for those hours were $8,460.00. Employer paid $6,710.00 toward these wages and willfully failed to pay Claimant Muller $1,750.00. Employer did not prove financial inability to pay these wages at the time they accrued.

8) If Employer is liable for penalty wages, they total $2,400.00, a sum computed by multiplying Claimant Muller's average daily wage at termination of $80.00 by 30 days, the maximum period during which penalty wages accrue.

9) Claimant Carroll worked for Employer doing logging from July 27 to September 10, 1982, at an agreed upon hourly rate of $8.00 per hour. During this period Claimant Carroll worked 246 hours.

10) Wages due to Claimant Carroll for all hours worked were $1,968.00. Employer has paid all of these wages but willfully failed to pay all wages then owing on the date Claimant Carroll was terminated. Final payment for all wages was not made until September 25, 1982. Employer did not prove financial inability to pay all wages due at the time they accrued.

11) If Employer is liable for penalty wages, they total $1,017.90, a sum computed by multiplying Claimant Carroll's average daily wage at termination of $67.86 by 15 days, the period between the due date of the wages and the date they were actually paid.

CONCLUSIONS OF LAW

1) At all times material, Employer was subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

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

3) All Claimants in this matter are persons regulated under the Federal Fair Labor Standards Act; therefore the provisions of ORS 653.010 to 653.261 do not apply and Claimants are not entitled to overtime compensation.

4) Employer's failure to pay Claimant Jolliff $2,210.00 earned and unpaid hourly wages within 48 hours after Claimant quit his employment constitutes a violation of ORS 652.140.

5) Because Employer willfully failed to pay Claimant Jolliff $2,210.00 in earned and unpaid hourly wages, Claimant's wages continued from the due date thereof at the same rate as his average daily wage for 30 days pursuant to ORS 652.150.

6) The Commissioner of the Bureau of Labor and Industries has the authority to order Employer to pay Claimant Jolliff $2,210.00 in earned and unpaid hourly wages and $2,056.20 in penalty wages, plus interest on both sums, under the facts and circumstances of this record.

7) Employer's failure to pay the Claimant Muller $1,750.00 in earned and unpaid hourly wages within 48 hours after the termination of Claimant's employment constitutes a violation of ORS 652.140.

8) Because Employer willfully failed to pay Claimant Muller $1,750.00 in earned and unpaid hourly wages, Claimant's wages continued from the due date thereof at the same rate as his average daily wage for 30 days pursuant to ORS 652.150.

9) The Commissioner of the Bureau of Labor and Industries has the authority to order Employer to pay Claimant Muller $1,750.00 in earned and unpaid regular hourly wages, and $2,400.00 in penalty wages, plus interest on both sums, under the facts and circumstances of this record.

10) Employer's failure to pay Claimant Carroll all wages earned and unpaid on the date Claimant Carroll was terminated constitutes a violation of ORS 652.140.

11) Because Employer willfully failed to pay Claimant Carroll all wages owing on the date of termination, the Claimant's wages continued from September 10 to September 25, 1982, at the same rate as his average daily wage for 15 days pursuant to ORS 652.150.

12) The Commissioner of the Bureau of Labor and Industries has the authority to order Employer to pay Claimant Carroll $1,017.90 in penalty wages, plus interest on that sum under the facts and circumstances of this record.

OPINION

The awards for unpaid wages and for penalty wages in this matter did not include any amount for overtime compensation because the wage claimants are exempt from Oregon's statutes on overtime compensation, ORS 653.010 to 653.261. ORS 653.010(7) specifically provides that the minimum wage law and the rules adopted by the Wage and Hour Commission on payment of overtime "do not apply to any of the following employees: * * * (7) Any person regulated under the Federal Fair Labor Standards Act * * *."

Persons employed in logging operations are regulated by that Act. Section 213 of the Act (Exemptions) provides in paragraph (b)(28) that Section 207 (Maximum Hours) does not apply to:

> "any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight."

The testimony at the hearing was that Employer did not employ more than eight persons.

Therefore, since Claimants were employed in logging operations, their claim for overtime must be decided under the Federal Fair Labor Standards Act, and under that Act Claimants' claims must be denied because of the provisions of Section 213(b)(28).

Claimant Carroll's wages due were calculated by using the hourly rate of $8.00 per hour for all hours worked. The evidence presented by both the Bureau and Employer showed that Claimant Carroll had worked a total of 246 hours. There was no evidence beyond a notation on Claimant Carroll's wage claim form to support a finding that he received a raise during the less than two month period that he was employed by Employer. Also accepted were Employer's calculations in its answer which showed that Employer had actually paid $1,968.00 to Claimant Carroll in wages, which amount represents all wages due. I found no evidence to explain the Bureau's calculation that only $1,650.00 had been paid. By Employer's own admission, however, Claimant Carroll was laid off from his job but Employer did not pay wages due at the time of termination until 15 days after the termination. ORS 652.140(1) provides in relevant part that

> "Whenever an employer discharges an employe * * * all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

ORS 652.150 provides as a penalty for violation of ORS 652.140 that the wages of the employee shall continue from the due date thereof, in this instance September 10th, until paid. Employer paid all wages due on September 25th, 1982, therefore the penalty wages are assessed for only 15 days.

Employer here asserts that at one point during their employment, both Claimant Jolliff and Claimant Muller agreed to change the nature of their working relationship with Employer from hourly employees to "partners" sharing a set percentage of gross income derived from certain logging jobs. However, such a relationship was not established.

Claimant Muller testified that he did agree to such a compensation arrangement for the logging job on which he worked from December 16th until he quit on December 27th. Thus the $178.00 which Employer admits owing to Claimant Muller for his percentage share of this logging job is not included in the amount of wages owed by Employer because after December 16th, Claimant Muller was working on a percentage basis with Employer.

Claimant Jolliff, however, denies that he agreed to a change in his status from employee to percentage "partner" and the finding of fact in this Order is that he remained an hourly employee until he quit on December 29, 1982. Where a wage claimant has been a regular, hourly employee, and an employer seeks to deny liability for wages by asserting that at a certain point during employment the claimant's status changed from employee to either independent contractor or partner, and the claimant disputes this, the employer has the burden of proving such change in status. Here, Employer had nothing to offer by way of evidence except the testimony of Mr. Maze and the fact that Claimant Muller testified that he had agreed to a new percentage compensation scheme for one logging project. The fact that Claimant Muller did agree to a percentage agreement on a specific logging job undertaken after December 15th is not evidence in any way that Claimant Jolliff entered into such an agreement, either for that same logging job or for any other.

Claimant Jolliff's original time records were used to compute the hours worked in October and November of 1982, rather than the Agency's wage transcription and computation sheet, which was prepared from Claimant Jolliff's original records, because there was a disparity of five hours between the two exhibits. The wage transcription sheet contains an error in addition in the hours for the week of November 6th.

Also, the hours recorded by the Claimants in notebooks were relied upon to calculate actual hours worked because Employer had no records of the hours its employees worked, notwithstanding that it was required to keep such records under ORS 653.045.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, Employer is hereby ordered to:

1) Pay to the Bureau of Labor and Industries, in trust for Claimant KEITH JOLLIFF, the amount of $4,266.20, which amount represents $2,210.00 in unpaid and earned wages, and $2,056.20 in penalty wages; plus interest thereon computed at nine percent per annum for the period from February 1, 1983, on $2,210.00 until paid and for the period from March 1, 1983, on $2,056.20 until paid.

2) Pay to the Bureau of Labor and Industries, in trust for Claimant RANDY D. MULLER, the amount of $4,150.00, which amount represents $1,750.00 in unpaid and earned wages, and $2,400.00 in penalty wages; plus interest thereon computed at nine percent per annum for the period from February 1, 1983, on $1,750.00, until paid and for the period from March 1, 1983, until paid on $2,400.00.

3) Pay to the Bureau of Labor and Industries in trust for the estate of Claimant LELAND GEORGE CARROLL, the amount of $1,017.90 in penalty wages; plus interest thereon at nine percent per annum for the period from November 1, 1982, until paid.

In the Matter of
SAPP'S REALTY, INC.,
Gloria Sapp and Bob Sapp,
Respondents.

Case Number 11-83
Final Order of the Commissioner
Mary Wendy Roberts
Issued January 31, 1985.

SYNOPSIS

Respondent corporation -- through its principle owner and her husband, who worked for the corporation -- made the 19-year-old Complainant's submission to unwelcome religious advances, proselytizing, and other verbal conduct of a religious nature a term or condition of Complainant's employment, used her rejection of that conduct as the basis for an employment decision affecting her, and created an intimidating and offensive work environment. Respondents subjected Complainant to an intolerable atmosphere of religious harassment and intimidation, causing her to refuse to continue working, and thus constructively discharged her. Finding that unwelcome religious harassment by an employer agent or owner within the employment context is not protected by the First Amendment, the Commissioner awarded Complainant $4,477 in lost wages and $6,000 for mental suffering. ORS 174.120; 659.010(11); 659.020(2); 659.030(1)(a) and *former* (1)(e); 659.050; 659.095(1) and (2); OAR 137-03-001; 839-03-080.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on April 6 and 9, 1984, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, and Room 229 of the Edith Green-Wendall Wyatt Federal Office Building at 1220 S.W. Third Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Betty Smith, Assistant Attorney General. Respondents Sapp's Realty, Inc. (hereinafter Respondent Sapp's), Gloria Sapp and Bob Sapp (hereinafter individually Respondent G. [or Mrs.] Sapp and Respondent B. [or Mr.] Sapp, together Respondents Sapp), were represented by Herald M. Follett, Attorney at Law. Complainant Caroline L. (Wilburn) Armon was present throughout the hearing.

The Agency presented its case in chief on April 6, 1984, and Respondents presented their case in chief on April 9, 1984. The Agency called as witnesses Complainant; her friend Krista Reaves; Virgil Meads, Janet Lund, and Catherine Cormack, former salespeople for Respondent Sapp's; Russ Wilburn, Complainant's father; Joseph Armon, Complainant's husband; and Warren Albright, Agency Field Representative. Respondents called as witnesses Ms. Lund; Respondent G. Sapp; Phyllis Medearis, Ann Nelson, Eleanor Luhaorg, Monetta Dial, Mileva McQueary, Kathy Ramsten, Wes Harryman, Willie Harper and Sally Schenk, former salespeople for Respondent Sapp's; Jean Meyers, former bookkeeper for Respondent Sapp's; and Linda (Brandt) Friedrich, former secretary-receptionist for Respondent Sapp's.

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, Ruling on Motion and on Affirmative Defenses, Findings of Fact -- The Merits, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT -- PROCEDURAL

1) On September 16, 1980, Caroline L. (Wilburn) Armon filed a verified complaint with the Civil Rights Division of the Agency alleging that Respondent Sapp's, her employer, had discriminated and continued to discriminate against her in her employment because of her religion.

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated its allegations and determined that substantial evidence existed supporting them. This determination was articulated in an initial Administrative Determination dated September 15, 1981, and transmitted by mail to Respondent Sapp's on September 16, 1981, and an Amended Administrative Determination dated October 18, 1983, and transmitted by mail to all Respondents. By the latter, Bob and Gloria Sapp received notice that they had been added as individual named Respondents in this matter.

3) There is no evidence on the record as to whether the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, or persuasion.

4) The Agency caused to be prepared and duly served on Respondents Specific Charges dated January 16, 1984, and the forum duly served on the parties notices of the time and place of this hearing.

5) At the Agency's request, and with no objection by Respondents, the forum has excised, as an editing error, the words "and conditioning" from the Specific Charges.

6) By letter dated March 6, 1984, Respondents' first attorney of record requested a postponement of the hearing, citing a need to research "the many legal questions involved" in this matter and to arrange for the appearance of witnesses. On March 9, 1984, the Presiding Officer denied this request, stating that given the nearly two months Respondents already had (since notice of the time of hearing), and the nearly three weeks Respondents still had, to prepare for hearing, and the absence of any explanation as to why this long period of time was insufficient, Respondents had not shown good cause for postponement. To give Respondents the earliest possible notice of this ruling, it was conveyed orally on March 9, 1984, by administrative staff of the forum's Hearings Unit.

By letter dated March 20, 1984, Respondents' second attorney of record, Mr. Follett, requested a postponement of the hearing because he had just become "involved" in this matter. Mr. Follett did not state how long a postponement he was requesting, but he did ask for an immediate decision on his request. Upon receipt of this request, the Presiding Officer granted a postponement of no more than approximately[1] one week. To give

Respondents immediate notice of this ruling, it was conveyed orally to Mr. Follett by administrative staff of the forum's Hearings Unit, and the hearing was reset for April 6 and 9, 1984.

In their Exceptions to the Proposed Order, Respondents allege (for the first time) that the Presiding Officer "pressured" Respondents into accepting a hearing date which was too early to allow adequate preparation for the hearing. There is no evidence at all concerning this allegation on the record. In fact, the Presiding Officer had no contact with Respondents or their counsel before the hearing. When it informed Mr. Follett of the Presiding Officer's ruling on Respondent's second request for postponement, the forum's Hearings Unit merely conveyed that ruling to Mr. Follett and did not engage in "pressuring" or any sort of negotiating over hearing dates. Furthermore, at no time before the Exceptions to the Proposed Order did Respondents or their counsel indicate to this forum that the eight day postponement granted was insufficient to allow Respondents to adequately prepare for hearing. Indeed, Respondents had over two months to prepare for hearing before Mr. Follett requested a postponement and, overall, had two months and three weeks to prepare for hearing. Therefore, this forum deems Respondents' allegation that they lacked sufficient time to prepare for hearing both untimely raised and unfounded.

7) Before the commencement of the hearing in this matter, Complainant received from this forum a copy of "Contested Case Rights and Procedures" and stated that she had read this exhibit, had no questions about it and felt she fully understood the procedures by which the hearing would take place.

Before the commencement of the hearing, Respondents also received from this forum a copy of "Contested Case Rights and Procedures" and Respondents Sapp stated that they had both read this exhibit, had no questions about it, and felt they understood the procedures by which the hearing would take place.

The Presiding Officer instructed Complainant and Respondents to inform the Presiding Officer if at any time during the hearing they had any questions about the procedures by which this case was being adjudicated.

8) For the reasons stated in the Ruling below, Respondents' Motion to Dismiss is denied.

9) At the Agency's request, and with no objection by Respondents, the forum deleted from the record the copy of the October 18, 1983, Amended Administrative Determination which Respondents submitted, and substituted therefor the copy of the same Amended Administrative Determination which the Agency submitted. The copy of this Amended Determination which Respondents submitted was marred by interlineation's which were not part of the original document.

10) At hearing, a written exhibit was admitted with the stipulation by the parties that it would substitute for the oral testimony of its subject, Vern S. Hutchison.

11) In accordance with the agreement of the parties at hearing, the forum has admitted the following two documents into the record since the hearing:

a) as part of an exhibit, a typewritten transcript of six handwritten pages of that exhibit; and

b) as an additional exhibit, information from Robert Brown Office Services, Inc. concerning Linda (Brandt) Friedrich's employment at Respondent Sapp's through that service.

Both of these documents were submitted by the Agency with its Reply Closing Argument.

[1] The specific hearing dates were to depend on availability of counsel and hearing space.

RULING ON MOTION AND ON AFFIRMATIVE DEFENSES

The forum reserved ruling on Respondents' Motion to Dismiss until the issuance of this Order. In support of their motion, Respondents offered four arguments:

1. The Agency's initial Administrative Determination was not timely issued.

2. The Specific Charges upon which the Agency is proceeding are based upon an Amended Administrative Determination which was not timely issued, because it cannot relate back to the initial Administrative Determination.

3. The Amended Administrative Determination does not relate back to the initial Determination as to Respondents B. and G. Sapp, who were not named in the initial Determination.

4. The Agency is barred by laches from proceeding on Complainant's complaint.

The parties' arguments concerning this motion are part of the written record, as are their Closing Arguments and Reply/Rebuttal Closing Arguments.

1. Was the Agency's Initial Administrative Determination Timely Issued?

During all times material herein, ORS 659.095 has provided, in pertinent part, that:

> "(1) * * * Within one year following the filing of * * * (a) complaint, the commissioner may issue, or cause to be issued, an administrative determination. If no administrative determination has been issued at the end of the one-year period, the commissioner has no further authority to continue proceedings to resolve the complaint, except as provided in ORS 659.070 (enforcement of conciliation agreements) and 659.085 (judicial review of orders) * * *.
>
> "(2) * * * As used in this section, 'administrative determination' means a written notice to the respondent * * *."

In this matter, Complainant filed her complaint on September 16, 1980. In response, the Agency issued an initial Administrative Determination, which is in the record, dated "September 15, 1980." (Neither party disputes that "1980" is an error; the actual date was September 15, 1981.) The parties have stipulated that this initial Administrative Determination was sent to Respondent Sapp's (the only named

Respondent at that point) with a cover letter dated September 16, 1981, and this forum so finds.

Respondents argue that since this Determination was not sent to Respondent Sapp's until September 16, 1981, Respondent Sapp's must have received it after that date. (Respondents do not specify on what date Respondent Sapp's received it.[2]) Since the transmission was by mail, the forum agrees with this contention. However, ORS 659.095 requires the issuance of a Determination, i.e., the issuance of a written notice to the respondent, within one year, not the receipt by the respondent of that written notice within one year. Consequently, although this forum need not determine in this matter the further question of whether a Determination is deemed issued when it is completed or when it is actually transmitted to a respondent, this forum does determine that the latest time the Determination herein could be considered issued, for purposes of ORS 659.095, is September 16, 1981.

This forum further concludes that even if the initial Administrative Determination is considered issued on the latest possible date, September 16, 1981, it was timely issued. During 1980 and through September 1981, ORS 174.120 provided that:

> "The time within which an act is to be done, as provided in the civil procedure statutes but except as otherwise provided in ORCP 10, is computed by excluding the first day and including the last unless the last day falls upon any legal holiday or on Saturday, in which case the last day is also excluded."

This basic principle has long been the law in Oregon. *See Lord's Oregon Laws* §531 and annotations (1910), and *Rynearson v. Union County,* 54 Or 181, 183, 102 P 785 (1909). Although the Agency did not have an administrative rule in effect on this point during the period at issue herein, it promulgated such a rule effective May 4, 1982, and that rule incarnates the above-cited principle. Accordingly, although ORS 174.120 does not directly govern the Agency's administrative procedures, this forum deems the principle articulated therein the test to be employed to ascertain whether the initial Administrative Determination herein was timely issued. By this test, the "...one year (period) following the filing of the complaint" began the day after the complaint herein was filed (i.e., on September 17, 1980) and

[2] In their Rebuttal Closing Argument, Respondents appear to also argue that since the Agency did not serve Respondent Sapp's with the Determination personally or by registered or certified mail, Respondent Sapp's never was properly served with, and therefore could not under the law be deemed ever to have received, this Determination. However, the Attorney General's Model Rule of Procedure, which Respondents cite as authority for this conclusion, OAR 137-03-001, specifically pertains to a notice by an agency that a person has a right to a hearing to contest an agency action. The Agency's Administrative Determinations are not such notices. (*See* ORS 659.095(2)) Furthermore, in its OAR 839-02-005, effective August 4, 1980, the Agency made clear that it declined to adopt Division III of these Model Rules, of which OAR 137-03-001 is part.

ended when September 16, 1981, ended. Even if the Determination is considered issued on the latest possible date, September 16, 1981, it was issued by the ending time cited in the previous sentence. For that reason, the Determination must be considered timely issued under the requirements of ORS 659.095.

2. Is the Agency Proceeding upon Specific Charges Based on an Amended Administrative Determination, which was not Timely Issued?

Respondents argue that the Specific Charges which triggered this contested case hearing are based upon an Amended Administrative Determination which was not timely issued because (1) it was issued on October 18, 1983, more than one year after the instant complaint was filed; and (2) this untimely issuance cannot be cured by relating the Amended Determination back to the initial Determination discussed in the preceding section of this Ruling. Respondents argue that the Specific Charges could not have been made on the initial Determination and must have been made on the Amended Determination. This argument appears to be rooted in Respondents' contention that the Specific Charges solely allege actual or constructive discharge, of which no substantial evidence was found in the initial Determination and substantial evidence was found in the Amended Determination.

This contention is incorrect. The Specific Charges do not just allege actual or constructive discharge. They also allege that Respondent Sapp's subjected, and that Respondents B. and G. Sapp aided and abetted Respondent Sapp's in subjecting, Complainant to an atmosphere of religious intimidation during her employment at Respondent Sapp's. The latter allegation is supported by facts found in the initial Determination and in the conclusion of that Determination. Furthermore, the Specific Charges ask for damages beyond those resulting from an actual or constructive discharge of Complainant. Moreover, the basis for the charges of constructive discharge and conditioning continuing employment upon willingness to continue working in an atmosphere of religious intimidation exists in the initial (as well as the Amended) Determination: "In fact Mrs. Sapp asked Complainant to return if she would make her peace with Mr. Sapp." (Quoted from the initial Determination.) The Amended Determination sets forth more completely facts relating to Complainant's alleged actual or constructive discharge, and arrives at a different legal conclusion concerning those facts, than does the initial Determination. The Specific Charges do not relate only to the Amended Determination; they relate to both the initial and Amended Determinations.

This forum believes furthermore that the initial and Amended Determinations are sufficiently connected for the latter to properly be labeled an amendment relating back to the former. However, this forum need not elaborate on that point, because what is determinative in answering the above-posed question is not which Determination the Specific Charges are based upon, or whether the Amended Determination relates back to the initial Determination, but whether the

Specific Charges must be based upon a Determination in the first place. To answer, the forum must first state the respective functions of a Determination and Specific Charges. An Administrative Determination is written notice to the parties of the facts found by the Agency, during the course of any investigation, conference, or other information gathering function of the Agency carried out during the year following the filing of a complaint, relating to the allegations in the complaint; plus a statement of whether the investigation has disclosed any substantial evidence supporting those allegations. Issuance of a Determination (within the prescribed time period) allows the Agency to retain authority to proceed further to resolve the complaint and triggers the conciliation process to accomplish this. It is the failure of conciliation (unless the Agency has decided that the "interest of justice" requires proceeding without conciliation), rather than the issuance of an Administrative Determination, which triggers the preparation of Specific Charges. The Specific Charges articulate the allegations to be adjudicated through the contested case hearing process. Thus it is the filing of Specific Charges, not the issuance of an Administrative Determination, which triggers a contested case hearing. ORS 659.050, 659.060, and 659.095.

The Agency usually causes the Specific Charges to be prepared by the office of Oregon's Attorney General. In *School District No. 1 v. Nilsen,* 271 Or 461, 470, 534 P2d 1135 (1975), the Oregon Supreme Court stated:

> "Thus, the only limitations placed on the specific charges entered by the Attorney General are:
>
> "(a) the complainant must have had standing in the first instance to raise the issues which are first given explicit expression by the Attorney General; and
>
> "(b) the issues so raised may encompass discrimination only like or reasonably related to the allegations in the individual's complaint to the Commissioner * * *."

The statutory provisions concerning the Agency's issuance of Administrative Determinations had not been enacted when *Nilsen* was decided. The Supreme Court acknowledged, however, that

> "(t)he statutory scheme contemplates a subsequent investigation (after the filing of a complaint) by the Commissioner * * * and a referral of the matter, should conciliation efforts fail, to the Attorney General for the filing of a formal complaint upon which a hearing is held." 271 Or at 468

The court further observed,

> "(i)t is not reasonable to assume that the legislature intended to prevent the Attorney General from including in his formal charge other discriminatory practices found to exist which affect the complainant." *Id.* at 468-469.

It is the responsibility of the formulator of the Specific Charges, not the preparer of the Administrative Determination, ultimately to determine what laws have been violated by a respondent and to prepare the Specific Charges accordingly, and there is no indication in Oregon law that the formulator of the Specific Charges is bound by the Administrative Determination of the case.

Respondents herein seem to have equated an Administrative Determination by the Agency with a complaint in a civil lawsuit. It is the Specific Charges, rather than the Administrative Determination, which are comparable to a civil complaint. Although the Specific Charges herein did relate to both the initial and Amended Administrative Determinations, those Specific Charges need not have been based on either of those Determinations.

3. Does the Amended Administrative Determination Relate Back to the Initial Determination as to Respondents B. and G. Sapp?

The Amended Administrative Determination names as Respondents G. Sapp and B. Sapp individually, as well as Sapp's Realty, Inc. The initial Determination names as Respondent only Sapp's Realty, Inc. Since the only Determination naming B. or G. Sapp as individual Respondents was issued more than one year after the complaint was filed, Respondents allege that the Commissioner has no authority to continue proceedings herein as to Respondents B. and G. Sapp.

Again, Respondents incorrectly equate amendment of an Administrative Determination with amendment of a complaint in a civil lawsuit, erroneously assuming the case law concerning civil procedure binds this administrative forum.

According to statutory law addressed specifically to this forum, by issuing the initial Administrative Determination in this matter by at least September 16, 1981, the Commissioner retained authority to continue proceedings to resolve the instant complaint. There was no requirement that the Agency's investigative efforts end with the issuance of this Administrative Determination. The proceedings which the Commissioner retained authority to continue could well have required or otherwise included further investigation, which led to the discovery of additional persons to be named as Respondents.

ORS 659.050 specifically allows the Commissioner, during or upon the conclusion of investigation of the complaint, to add as respondents persons not originally named in the complaint. (No statute forbids the addition of respondents even later.)

In any case, the respondents named in the Specific Charges need not be just those named in the Administrative Determination(s), as long as the issues raised in the Specific Charges encompass discrimination only like or reasonably related to the allegations of the complaint. *Nilsen, supra.* In this matter, the complaint was in effect amended by the addition of Respondents G. and B. Sapp at the time the Amended Determination was issued, and there is no allegation that the issues raised in the Specific Charges do not relate directly to the allegations of the complaint.

For these reasons, this forum concludes that Bob and Gloria Sapp are properly named as individual Respondents in this matter, and that conclusion renders moot the exact question posed at the start of this section.

4. Is the Agency Barred by Laches from Proceeding on Complainant's Complaint?

Respondents ask that the forum apply the doctrine of laches to bar this proceeding, alleging that the Agency has long delayed and neglected this matter when the Agency could have been diligent, and that serious harm, detriment, or disadvantage to Respondents has occurred. Respondents point to the more than three years which elapsed between the filing of the complaint and the issuance of the Amended Administrative Determination, the more than two years which elapsed between the issuance of the initial and Amended Administrative Determinations, and the nearly 3½ years which elapsed between the filing of the complaint and the issuance of the Specific Charges and Notice of Hearing. Respondents allege that this "undue and unwarranted delay" placed Respondents at a great disadvantage both as to the proper defense of their case and as to unreasonable expense in locating crucial out-of-state witnesses and bringing them to Oregon.

Because Respondents are claiming the benefit of laches, Respondents have the burden of demonstrating the elements of that defense. *Warren and Joeckel*, 61 Or App 34, 38, 656 P2d 329 (1982). Those elements are stated in *Clackamas Fire Protection District No. 1 v. Oregon Bureau of Labor and Industries*, 50 Or App 337, 342, 624 P2d 141, *rev den* 291 Or 9 (1981):

> "The established rule is, in fact, that the plaintiff against whom the defense is asserted must have had full knowledge of all the facts during the period of delay, and that the delay must have resulted in prejudicing the defendant to the extent that it would be inequitable to afford the relief sought by the delaying party."

In *Clackamas County*, the appellant claimed that "the Commissioner erred in failing to sustain [appellant's] demurrer to the complaint on the grounds of laches or the equitable principle of unconscionable delay." 50 Or App at 341. The appellant based its claim on "the fact that the Bureau's investigation was not completed until three years after the private complaints were filed with the Bureau, and the formal complaint was not issued until 2 years after that." *Id.* at 341. The Court of Appeals rejected the laches defense, noting, "More than prolonged delay in initiating the litigation must be shown * * * before the doctrine of laches comes into play." *Id.* at 342.

In *Clackamas County*, the court stated that it did not appear that the Agency had full knowledge of the facts until its investigation was completed in January 1975. Also, the court found no prejudice to appellant as a result of the "prolonged delay," and that there was no claim "that any of petitioner's witnesses or any critical documentary evidence was unavailable as a result of the delay." *Id.* at 342.

Respondents herein claim that "(b)etween the first determination and the Amended Determination no investigative action appeared to take place." An Agency investigation of a discrimination complaint is confidential until the complaint is closed, unless the public interest requires disclosure. OAR 839-03-080. Given this fact, it is difficult to imagine what basis Respondents could have for making the above-quoted statement. Respondents have presented no evidence that the Agency had full knowledge of all the facts during the alleged period of delay.

From the time of the issuance of the initial Administrative Determination on September 16, 1981, Respondents Sapp presumably were aware, through the notice to Respondent Sapp's, that the Agency had found substantial evidence that Respondent Sapp's had discriminated against Complainant. Respondents presumably also were aware that an investigation of Complainant's charges had taken place, and by reading the Administrative Determination they could have inferred that a number of the workers of Respondent Sapp's had been interviewed. If, upon receipt of the Administrative Determination, they had inquired as to the possible consequences of that Determination, they would have learned that a contested case hearing could ensue.

Respondents do not allege that they were required to present different or additional evidence in response to the discriminatory discharge/ constructive discharge determination than what would have been required to refute the initial determination of discrimination in the terms and conditions of employment. Neither do they claim that naming G. and B. Sapp individually as Respondents changes in any way the relevant facts of the case or the defense required. By affidavit, Respondents G. and B. Sapp claim that they had great difficulty in locating witnesses due to the delay and that those they located were out-of-state. However, Respondents do not indicate when these witnesses left Oregon. There is no evidence they would have been in Oregon even if a hearing had been held in September 1981. Respondents also do not explain why the out-of-state witnesses were particularly necessary. If Respondents "sever(ed) ties with their employees" despite the issuance of the initial Administrative Determination in September 1981, they must accept responsibility for the consequences. Furthermore, this forum must assume that had Respondents acted diligently upon receipt of the Specific Charges in January 1984, they would have been able to depose out-of-state witnesses by telephone and offer transcripts of such depositions to this forum in lieu of live testimony by those out-of-state witnesses at hearing. All these points evidence that Respondents have not shown that any delay in proceeding in this matter resulted in prejudicing them to the extent that it would be inequitable to afford the relief sought by the Agency. Accordingly, this forum must conclude that Respondents have not stated facts amounting to a viable defense of laches.

As this forum has concluded that none of Respondents' four arguments in support of their Motion to Dismiss have merit, this forum denies that motion. As these arguments also were the sole basis for the Second and Third Affirmative Defenses raised by Respondents, this forum also finds that Respondents have not proved these affirmative defenses.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Sapp's was an Oregon corporation which operated as a real estate agency, providing the services of realtors in the buying and selling of real estate in the State of Oregon. In that business, Respondent Sapp's engaged or utilized the personal service of one or more employees, reserving the right to control the means by which such service was or would be performed.

At all times material herein, Respondent G. Sapp, an individual, was the broker of Respondent Sapp's, as well as the sole owner of that corporation's stock and its president. Her husband, Respondent B. Sapp, an individual, was a licensed real estate salesperson and listing appraiser for Respondent Sapp's. Although Respondent B. Sapp was also the only director of Respondent Sapp's at the time of its incorporation, the record fails to establish whether he held that position throughout times material herein.

2) Respondent Sapp's employed Complainant, an individual, from January 6 through August 25, 1980. Complainant was nineteen years old when she began working for Respondent Sapp's in what was her first full-time job. Before starting that job, Complainant had completed one year of college after graduating from high school. She also had some exposure to the real estate industry through her father's real estate practice.

3) Complainant was raised in the Lutheran Church, attending church services and Sunday school regularly, serving as a church acolyte and being involved in church youth groups. Before beginning her employment at Respondent Sapp's, Complainant had been confirmed as a Lutheran (accepted as an adult member of that church).

4) During the three to four years just before she began working for Respondent Sapp's, Complainant became less active in her church than before. For example, she attended church services just three or four times each year. This was caused by a change of minister and Complainant's increasingly active social life. However, at the time she began her employment with Respondent Sapp's, Complainant still considered herself a Lutheran and sincerely held basic Lutheran beliefs. She was open-minded about religion, respecting other persons' beliefs and religions, and she was willing to listen to others discuss their religious views.

5) When Complainant began working for Respondent Sapp's, she was an impressionable, intelligent, jovial, happy, independent, verbally forthright person who could express herself well. She was mature and "level-headed" for her age, although she could not have been termed "experienced" in the workplace.

6) At all times material herein, Respondents Sapp were Seventh Day Adventists, i.e., adherents to that religious faith. There is no question herein, and so this forum finds, that their religious beliefs were sincerely held.

7) During all times material herein, religion was a basic and focal part of the lives of Respondents Sapp. They (and Respondent B. Sapp in particular) took every opportunity to discuss religion. Respondent B. Sapp related

religion to everything in his daily life and wanted to share his religion with everyone. In fact, he wanted everyone to embrace his type of religion and exerted pressure to cause that to occur. Accordingly, this forum finds that Respondent B. Sapp was very zealous in discussing religion and extremely evangelistic in propounding his own religious beliefs.

8) At all times material herein, Respondent G. Sapp retained for herself the authority to do all the hiring and firing of those who worked for Respondent Sapp's. During her pre-employment interview of Complainant, Respondent G. Sapp explained that because she and B. Sapp were Seventh Day Adventists, Respondent Sapp's did not operate between sundown each Friday and sundown each Saturday. Complainant maintains that during this interview, before Respondent G. Sapp disclosed the religion of Respondents Sapp, she asked Complainant what her religion was. Respondent G. Sapp, while not disputing the timing involved, claims that Complainant "volunteered" information as to her religion. For reasons cited in Finding of Fact 71 below, this forum adopts Complainant's testimony on this point as fact.

Respondent G. Sapp learned from Complainant's answer that Complainant termed herself as a "non-practicing Lutheran." After hearing this, Respondent G. Sapp commented that Respondent B. Sapp might "come on a little strong" to Complainant "religiously," because he was concerned about Complainant's soul. Respondent G. Sapp also ascertained in this interview that working on Sundays would not conflict with Complainant's personal life.

9) Throughout her employment at Respondent Sapp's, Complainant worked as the secretary-receptionist for the office of Respondent Sapp's. Her duties included answering the telephone, taking and relaying messages, assigning advertising calls to the appropriate salesperson on duty, making listing appointments, receiving office visitors, telephoning Respondent B. Sapp at home each morning and giving him his appointment schedule, performing various typing functions, cutting out advertisements placed on properties, running the copying machine, and opening and closing the office. Complainant's immediate and ultimate supervisor was Respondent G. Sapp.

10) One bookkeeper, approximately fifteen active[3] real estate salespeople at a time, and Respondent G. Sapp also worked at Respondent Sapp's during Complainant's employment there. Complainant and the bookkeeper were considered employees, and the salespeople, including Respondent B. Sapp, were considered independent contractors and were paid on a sales commission basis. Because Respondent Sapp's treated its salespeople as independent contractors for all purposes, and because there is nothing on the record indicating that they were not independent

[3] Although approximately thirty salespeople at a time kept their real estate licenses at Respondent Sapp's, only fifteen of those people were "active," i.e., working floor shifts.

contractors, this forum finds that they were.

11) During times material herein, a number of "deeply religious" people (i.e., people concerned with their religious lives) worked at Respondent Sapp's. At the least, more than half of these people were not Seventh Day Adventists. Although most of the salespeople were church affiliated, at least two people not affiliated with any church also worked at Respondent Sapp's during parts of 1980.

12) During times material herein, many of the people working at Respondent Sapp's were a very close-knit group who enjoyed associating with each other at the office. One product of this "family atmosphere" was an office rife with rumors.

13) During her employment at Respondent Sapp's, Complainant's work hours were the same as the office hours of Respondent Sapp's: 9 a.m. to 6 p.m. Sunday through Thursday and 9 a.m. to 3 p.m. Friday. The only other person working full-time hours at the office was the bookkeeper of Respondent Sapp's. The bookkeeper's work schedule was similar to that of Complainant, but the bookkeeper worked primarily in a private office isolated from the work area of Complainant and the salespeople of Respondent Sapp's. From her office, the bookkeeper could not hear what went on in Complainant's work area.

14) During Complainant's employment, the office hours of Respondent Sapp's, were divided into "floor shifts" lasting three hours each. Each active salesperson at Respondent Sapp's worked three to five floor shifts in the office per week. During a floor shift, at least two or three salespeople on duty took turns answering telephone inquiries about Respondent's classified advertisements which Complainant referred to them. Outside of time spent in the office on floor duty and at a weekly sales meeting, the salespeople of Respondent Sapp's usually worked away from the office.

15) During approximately the first five months of Complainant's employment at Respondent Sapp's, Respondent B. Sapp handled the majority of the appointments to list properties for Respondent Sapp's. This kept him out of the office a great deal. During approximately the last 2½ months of Complainant's employment, Respondent B. Sapp functioned more as just a regular active salesperson, doing floor shifts, and he spent more time in the office than before. Overall, during Complainant's employment, Respondent B. Sapp spent between 10 and 23 hours per week in the office of Respondent Sapp's.

16) During Complainant's employment at Respondent Sapp's, Respondent G. Sapp spent at least as much time out of the office of Respondent Sapp's as in it; she frequently left the office to conduct real estate business.

17) Because of the nature of her work at Respondent Sapp's, Complainant could not leave her desk for any length of time during working hours. Her desk was located at the front and center of a big open room in which the salespeople of Respondent Sapp's usually worked when in the office. Hereinafter, the forum will refer to this room as the "main office." Most salespeople worked at places in the main office which were in view of

Complainant, so she could make eye contact with them when she had a telephone call for them.

In addition to the main office, the office of Respondent Sapp's had several other, separate rooms: a private office which Respondent G. Sapp shared with the bookkeeper, an audio-visual office, and at least one conference room. There was also a foyer entryway into the office and a kitchen in the back of the office.

18) Respondent G. Sapp worked in several locations in the office of Respondent Sapp's. As she conferred with clients and kept her files and records in the private office she shared with the bookkeeper, she was in that private office fairly often. One day each week she wrote advertisements at a desk in the main office, and she sometimes made or received telephone calls at a desk which abutted Complainant's desk, at right angles. During the time she spent in the office of Respondent Sapp's, Respondent G. Sapp worked with salespeople in the main office quite often.

19) When he was at the office of Respondent Sapp's, Respondent B. Sapp was usually in the main office. When he was in the main office, he often sat at the desk next to Complainant's desk.

20) Sound carried throughout the main office of Respondent Sapp's. Complainant could not avoid hearing conversations others were having in the main office unless she left it (except when Complainant was on the telephone, the conversation was just between two people who were far away from her desk, or the general noise level in the main office was unusually high).

21) During times material herein, Respondent B. Sapp was known to at least some workers at Respondent Sapp's as the office comedian, "always good for a laugh a day."

22) Respondent B. Sapp did not testify at hearing, although he was present throughout the hearing.

23) Throughout Complainant's employment at Respondent Sapp's, she was the youngest person working there. Most of the other workers for Respondent Sapp's who testified at hearing were significantly older than Complainant and, during times material herein, had been working for many years.

24) During Complainant's employment at Respondent Sapp's, its office was busy. Respondent G. Sapp was totally occupied with and stressed by the hectic pace of real estate transactions and the administration of the operation of Respondent Sapp's.

25) After Complainant started working for Respondent Sapp's, she told her father, Russ Wilburn, of her employment. Because he had heard in the real estate community that Respondent B. Sapp was in effect a religious fanatic, Mr. Wilburn advised Complainant to stay away from Respondent B. Sapp (without slighting him) and not to get into discussions with him.[4] Mr. Wilburn also advised Complainant to forget whatever real

[4] There is no evidence that Mr. Wilburn told Complainant that Mr. Sapp actually was, or had a reputation of being, a religious fanatic. There is no evidence to support Respondents' argument, raised in their Exceptions to the Pro-

estate practices she had learned at his office and learn the practices of Respondent Sapp's. He reminded Complainant that she was responsible to Respondent G. Sapp, as Respondent Sapp's broker, and admonished Complainant to do what Respondent G. Sapp told her and to pay attention to her work.

26) During times material herein, there was at least some resentment in the local real estate community against Respondent Sapp's, because it charged a five per cent commission while the prevailing real estate commission in the area was higher.

27) Complainant started her employment at Respondent Sapp's with no preconceptions about Seventh Day Adventism. She learned virtually all she knows about that religion from experiences with Respondents Sapp, which occurred in the course of her employment at Respondent Sapp's.

28) Throughout Complainant's employment at Respondent Sapp's, both discussions and comments about religion occurred very frequently in the main office of Respondent Sapp's when Complainant was there. Respondent B. Sapp initiated and participated in most of these discussions and made most of those comments, and religious discussions originating with people other than Respondent B. or G. Sapp were not frequent.

During Complainant's employment at Respondent Sapp's, Respondent B. or G. Sapp discussed religion at times with people in general, and other times with specific individuals in the main office. On many occasions, Respondent B. Sapp addressed the main office generally, standing in the middle of it and talking to whoever happened to be there. However, even when Respondent B. Sapp appeared to be speaking in general or to another person about religion, Complainant felt, and this forum finds, that Respondent B. Sapp was often directing his comments particularly to Complainant, because he often turned and tried to make eye contact with her or asked a question and looked at her for an answer.

Findings of Fact 29 through 37 below contain examples of the religious comments and discussions by Respondent B. and/or G. Sapp in the main office of Respondent Sapp's which Complainant heard during her employment there.

29) Respondents B. and G. Sapp frequently discussed biblical topics in the main office when Complainant was working there. This included reading and reciting biblical passages to Complainant personally.

Respondent B. Sapp did this much more than did Respondent G. Sapp; he made enough references to the Bible for at least one salesperson (Ms. Dial, who knew Respondent B. Sapp only at the office) to conclude that he was knowledgeable about the Bible. Respondents Sapp both related current events (such as changing weather conditions, volcanic eruptions, and earthquakes) to their religious views and specifically to Biblical matters such

posed Order, that Mr. Wilburn's above-cited advice predisposed Complainant to dislike Mr. Sapp or caused a personality conflict between Complainant and Mr. Sapp. *See* Finding of Fact 42 below.

as predetermination, prophecy, and how the world will end. For example, in bits and pieces on a daily basis, Respondents Sapp detailed their beliefs concerning Armageddon to Complainant.

30) Complainant heard Respondents Sapp refer fairly often to the teachings of Ellen White, founder of the Seventh Day Adventist Church, at the office.

31) Both Respondents Sapp, and particularly Respondent B. Sapp, voiced to Complainant their/his belief that there was only one group of people, Seventh Day Adventists, which was going to be "saved," and that all people practicing other religions were following the wrong teachings.

32) During Complainant's employment at Respondent Sapp's, Respondent B. Sapp, a former Catholic, made derogatory comments at the office about Protestants, Catholics, and Mormons, saying that those religions, and particularly the Catholic Church, were the actual devil. For example, Respondent B. Sapp told Complainant that Catholic teachers beat their students, that Catholic nuns were the harems of Catholic priests, and that any child of a nun was killed at birth. In Complainant's presence, Respondent B. Sapp told an eight-year-old Catholic child a story about a priest who had murdered, and asked the child if it was right that the priest had been absolved of the murder by ecclesiastical confession. Respondent B. Sapp told Complainant that Mormons still practiced bigamy and had many children in order to impress their religion on the world through numbers and give a place to the souls of dead ancestors. Respondent B. Sapp also told Complainant that Protestants, Mormons, and Catholics were "devil worshippers" because they did not observe the Sabbath on Saturday.

Respondent B. Sapp made negative comments about Complainant's Lutheran religion both directly to Complainant and in her presence. For example, he told Complainant that the Lutheran religion was not a true or the right religion and gave her several illustrations of the veracity of this assertion.

The above-cited comments concerning other religions apparently were aimed particularly at Complainant, for of the five salespeople of Respondent Sapp's who testified on this topic, two stated that they had not heard Respondent B. Sapp making negative comments about other religions; two stated that they had not heard him speak about the Catholic Church; two testified that they had not heard him refer to the Catholic or Lutheran Church as the devil; and one testified that she had not heard him say anything negative about Catholics or Mormons. In addition, Respondent G. Sapp did not recall Respondent B. Sapp stating that, according to Seventh Day Adventism, the Catholic and Lutheran Churches were the devil.

33) Respondents Sapp (Bob more frequently than Gloria) talked in the main office of Respondent Sapp's at least once a month during Complainant's employ about the importance of observing the Sabbath on Saturday. As evidenced in the previous Finding of Fact, Respondent B. Sapp's comments on this topic could be vehement. However, Respondent Sapp's let workers who observed the Sabbath on

Sunday take off Sunday mornings from work in order to worship.

34) Respondents Sapp criticized Complainant's life style in various ways, insofar as it deviated from what Respondents Sapp believed to be the teachings of Seventh Day Adventism. For example, when Complainant mentioned that she planned to attend a rock music concert, Respondent B. Sapp adamantly stated that she should not go, as rock music was devil music and had a bad effect on youth. On another occasion, when Complainant was showing salespeople a piece of jewelry she was wearing which her husband had made, Respondent G. Sapp commented that Seventh Day Adventists did not believe in wearing jewelry or makeup because it was vain to do so. (She did not require Complainant or other workers to abstain from wearing jewelry or makeup in the office of Respondent Sapp's.)

On a third occasion, Respondent G. Sapp commented to Complainant at the office that she hoped it would rain, after Complainant had told Respondent G. Sapp that she was going to the beach and hoped for sunshine. When Complainant returned to work after her trip to the beach, she found a copy of a religious tract equating sun worship with devil worship in a "copy" basket which Complainant used. Complainant believes, and this forum finds, that this tract was left for her by Respondent G. Sapp, because of Mrs. Sapp's above-cited remark, because Complainant was the first person who would find anything left in that basket, and because this was the first time a copy of material (as opposed to material to be copied) had ever been left in that basket.

35) During the daily telephone call Complainant had to make to Respondent B. Sapp to give him his appointment schedule, Respondent B. Sapp very often brought up religious topics.

36) Often when he returned from an appointment with a listing agreement, Respondent B. Sapp discussed with those present in the main office, including Complainant, the religion and life style of the client involved. After explaining how he felt about these topics, Respondent B. Sapp would ask those present for comments, and a discussion would follow.

37) While Complainant was working at Respondent Sapp's, Respondents Sapp invited Complainant to attend their church with them and join their Bible study groups and summer camps. Complainant declined.

38) Based upon all relevant evidence on the record, this forum concludes that Seventh Day Adventists believe in not consuming alcohol or coffee, and that many, but not all, Seventh Day Adventists are vegetarians. Respondents Sapp explained to Complainant during her employment at Respondent Sapp's what food one should eat and tried to influence her dietary habits. For example, once, when Complainant was preparing to eat a meat sandwich for lunch in the office's kitchen, Respondent B. Sapp told her that meat eaters had bad breath because they used their stomachs as graveyards for dead animals. (Even though Complainant understood Respondent B. Sapp's comments to be in jest on occasion, they seemed to her more in the nature of ridicule, as exemplified by the preceding comment.)

Respondent G. Sapp maintained at hearing and, since there is no evidence to the contrary, this forum finds, that her vegetarianism was based primarily upon health, as opposed to religious, concerns and that her comments concerning vegetarianism were made strictly from a health standpoint. As there was no specific first or even second-hand evidence that the comments of Respondent B. Sapp to Complainant about diet were based upon his religious beliefs or practices (rather than upon health considerations), this forum declines to find that they were.

39) Seventh Day Adventist literature was displayed in the waiting area of the office of Respondent Sapp's, and a shelf in the storage area of the office was used to store this literature. Respondents Sapp had Seventh Day Adventist literature sent to the homes of at least two salespeople of Respondent Sapp's without those salespeople asking for it, and they gave at least five salespeople religious literature at the office. Quite frequently, at the office, Respondent B. Sapp gave Complainant religious literature for which she had not asked. For example, after Complainant had returned from the funeral of a family member, Respondent B. Sapp gave her a copy of an article entitled "Are the Dead Really Dead?" from a Seventh Day Adventist periodical. This upset Complainant. Respondent B. Sapp also gave Complainant a book about a Seventh Day Adventist conscientious objector. (Although Respondents introduced lengthy testimony from former salesperson Phyllis Medearis that she in fact gave Complainant this book, this forum concludes that, even if it believed Ms. Medearis, her testimony would have no bearing upon whether or not Respondent B. Sapp (also) gave Complainant a copy of this book. In fact, Complainant maintained in uncontroverted testimony that Respondent B. Sapp did this after Ms. Medearis had left the employ of Respondent Sapp's.)

40) Complainant had not encountered anything like the exposure to religion and religious discussion described in Findings of Fact 29 to 37 and 39 before. At first, Complainant responded to it with curiosity, because she knew nothing about Seventh Day Adventist faith. Then, as Complainant learned more about this religion, she decided it was not for her and lost interest in it. She tried to be polite, listen to the religious remarks and conversations of Respondents Sapp without commenting, and go on about her work. However, persistent religious discussion began to upset her because the Seventh Day Adventist faith as described by Respondents Sapp seemed very depressing to her and was discussed far more often than she cared to hear. Complainant began to try (unsuccessfully, because her work and work location made her a captive audience) to ignore what Respondents Sapp were saying about religion at the office. Finally, Complainant started to make clear, especially to Respondent B. Sapp, and this forum finds, that she was not interested in hearing him talk about religion, and she did not want to hear him discuss religion, and that it upset her to hear him do so. Complainant let Respondent B. Sapp know that she did not find his religious

"jokes" amusing. When Respondent B. Sapp brought up religious topics in conversations with Complainant or asked her opinion on a religious subject, Complainant told him she had no response or was not interested in responding and that she did not want to discuss religion or hear him do so. When Respondent B. Sapp gave Complainant religious literature, she said nothing to him about it and threw most of it away.

41) Although in response to Complainant's lack of interest, Respondent B. Sapp sometimes refrained from talking about religion to her for the duration of the conversation at issue, he would start again within thirty minutes to one hour. As Complainant became less and less receptive to his religious conversation, Respondent B. Sapp became more and more adamant in trying to explain his religious beliefs to her. He seemed to "zero in on" Complainant, and when she finally responded by seeming to challenge or reject his statements about religion, Respondent B. Sapp did not like it and responded by angrily pursuing his point.

42) During Complainant's employment at Respondent Sapp's, she spoke about her reactions to the religious discussions, comments, and literature at her workplace with her husband, her father, her friend Krista Reaves, and some of the salespeople at work. These conversations grew more frequent during the course of Complainant's employment. Respondents allege in their Exceptions to the Proposed Order that these conversations with her father, Russ Wilburn, "traumatized" Complainant with fear of Respondent B. Sapp, causing all conflict between Complainant and Mr. Sapp by making Complainant unduly sensitive to anything of a religious nature and negative toward Mr. Sapp.

There are just two points of evidence as to what Mr. Wilburn told Complainant about Respondent B. Sapp or religion in her workplace in response to Complainant's comments about working at Respondent Sapp's. First, as recounted above in Finding of Fact 25, when Complainant first told her father that she was employed at Respondent Sapp's, he advised her to tactfully stay away from Respondent B. Sapp and avoid getting into discussions with him. Second, when Complainant told her father about the religious discourse to which she was being subjected, he advised her to look for other work, because she sounded so miserable and the discussions she described "were leading nowhere." Mr. Wilburn offered this advice within two months of the start of Complainant's employment and again a few months later.

The record contains no evidence as to how Complainant responded to her father's above-described advice, except that she did not start looking for work until approximately two months after the second time her father advised her to, and she did not leave her employment because of her father's advice. As noted in Finding of Fact 5 above, Complainant was independent: she developed her own opinions and made her own choices. For these reasons, this forum finds no support in the record for Respondent's above-cited contention.

43) By such actions as are described in Findings of Fact 29 to 37 and 39 above, Respondents Sapp made at least one of their salespeople feel that they tried to convert her and just about all of their other workers to Seventh Day Adventism at one time or another. Workers at Respondent Sapp's complained to each other about Respondents Sapp talking about religion in the office. Most, if not all, non-Seventh Day Adventist workers remarked at least once, when there were no Seventh Day Adventists present, that there was quite a lot of conversation about Seventh Day Adventism going on in the office. For one salesperson, the religious discussions in the office were half of the reason he terminated his affiliation with Respondent Sapp's, and for another, the "constant" talk about Seventh Day Adventism was at least part of the reason for his terminating his affiliation with Respondent Sapp's.

However, for many of the salespeople at Respondent Sapp's, religious conversation in the office was not a major or lingering problem, although it might have bothered them. The salespeople who worked at Respondent Sapp's over a long period of time either enjoyed talking about religion or ignored Respondent B. Sapp's religious discussions and comments.

44) On or about Friday, July 4, 1980, Complainant and Respondent B. Sapp had a disagreement in the office of Respondent Sapp's. Mr. Sapp had excitedly told those present in the main office that he was going to have a person removed from the Seventh Day Adventist Church because that person worked in a liquor store. Mr. Sapp had also asked those present how they felt about this intended action. The next day, the wife of the liquor store employee came to the office to see Mr. Sapp. Complainant tried to stop this woman so that Complainant could first inform Mr. Sapp that she was there, as Complainant was supposed to do, but the woman went by Complainant to see Mr. Sapp. A loud argument with Mr. Sapp ensued, from which the woman emerged crying. Complainant apologized to the woman, because Complainant felt she had been rude in trying to stop the woman and because Complainant felt Mr. Sapp was wrong. The woman hugged Complainant, thanked her for her support and left. Mr. Sapp became very angry with Complainant and told her she was never to say he was wrong or she would be fired. Complainant believed that Mr. Sapp had the power to fire her, because she felt he had a great deal of influence with Respondent G. Sapp.

After this incident, Complainant's relationship with Respondent B. Sapp became much more tense. Complainant considered leaving the employ of Respondent Sapp's because of this incident and the threat of being fired, but could not do so without another job. Accordingly, Complainant started looking for other employment, and this search continued unsuccessfully throughout the remainder of her employment at Respondent Sapp's. After the above-described incident, Complainant also tried even harder to "tune out" Respondent B. Sapp's religious discussions and remarks to her.

45) Right after the above-described incident, Complainant complained to Respondent G. Sapp that it upset and

bothered her when Respondent B. Sapp talked to her about religion, and that she did not want to hear about religion and wished Respondent B. Sapp would cease talking to her or in her presence[5] about religion. Complainant was the only person who had made this request to Respondent G. Sapp (although Virgil Meads, a salesperson at Respondent Sapp's during 1979-80, asked "the Sapps" not to talk to him about religion at work). Respondent G. Sapp said she would talk to Respondent B. Sapp about Complainant's complaint. Complainant did not complain to Respondent G. Sapp about religious discussions in the office which did not involve Respondent B. Sapp, and she did not complain about the religious literature in the office.

46) In response to Complainant's complaint to Respondent G. Sapp, Mrs. Sapp told Respondent B. Sapp how Complainant felt, and they agreed that Complainant "had personal conflict in her life and religious discussion might not be pleasing to her."

Respondent G. Sapp testified that afterward Respondent B. Sapp "walked on eggs" around Complainant to avoid saying anything to her about religion. However, because Respondent G. Sapp was not present at all times when Complainant and Respondent B. Sapp were together, and she did not hear both sides of their telephone conversations, she lacks personal knowledge of what Respondent B. Sapp said to Complainant at all times. Complainant did not complain to Respondent G. Sapp again about any further discussion of religion by Respondent B. Sapp before Complainant's employment at Respondent Sapp's ended. Respondent G. Sapp did not ask Complainant if Respondent B. Sapp had ceased talking about religion to Complainant or in her presence. Respondent G. Sapp thought Complainant would have complained to her if there had been a continuing problem with Mr. Sapp's discussion of religion, because Complainant had discussed other problems with Respondent G. Sapp on occasion.

47) Respondent G. Sapp testified that during all times material herein, she desired to maintain a positive atmosphere, free from coercive, stressful religious discussion, in the workplace of Respondent Sapp's.

48) In fact, for about one week after Complainant's complaint to Respondent G. Sapp, Respondent B. Sapp did not talk about religion with Complainant directly, but continued his religious discussions and comments with/to others in the office, in Complainant's presence. Thereafter, Respondent B. Sapp resumed talking about religion to Complainant directly.

49) On or about August 22, 1980, Respondent B. Sapp stood in the middle of the main office of Respondent

[5] Respondent G. Sapp indicated in an investigative interview that Complainant did complain about Respondent B. Sapp not only talking to her, but also talking in her presence, about religion. However, Mrs. Sapp denied at hearing that Complainant complained about Mr. Sapp's talking about religion in her presence. For reasons stated in Finding of Fact 70 below, this forum gives more weight to the interview than to Ms. Sapp's testimony at hearing and, therefore, includes "in her presence" in this finding.

Sapp's and related point by point to those present, including Complainant, how he had told two Mormon men who had come to his door why Seventh Day Adventism was the true religion. Mr. Sapp asked those in the office, including Complainant, if they ever had Mormons come to their doors. Complainant asked Mr. Sapp why he didn't "get off" their "backs" and leave them alone and said she was tired of hearing about religion. Respondent B. Sapp continued discussing his conversation with the Mormon men. The relationship between Respondent B. Sapp and Complainant became even more tense after this incident.

50) According to Respondent G. Sapp, shortly before August 25, 1980, Respondent B. Sapp told Respondent G. Sapp that he could not get Complainant to answer him when he asked her questions about his appointments or his work. Respondent G. Sapp maintains that she told Mr. Sapp to "let it ride -- these things will usually work themselves out."

Although she sometimes ignored Respondent B. Sapp's religious remarks, Complainant maintains that she did whatever was necessary to work with Respondent B. Sapp in her and his professional capacities, including responding to all his business questions. In the absence of firsthand testimony of Mr. Sapp disputing Complainant's latter statement, this forum finds it accurate generally, with the acknowledgment that Complainant could have inadvertently ignored a business question by Mr. Sapp in her effort to ignore his religious overtures.

51) On the morning of August 25, 1980, as Complainant walked past Respondent B. Sapp, he asked her if she had any "Negro friends." He had been talking about how an area of Portland known to have a large population of black people was a "lower class" area of "lower class people." Complainant replied that she did not have to answer that question and walked away. Respondent B. Sapp became visibly upset with Complainant. ("North Portland," Oregon is known to have a large black population.)

52) At or just after noon on the same day, August 25, 1980, Complainant and Respondent B. Sapp had a disagreement over the time. Complainant had directed an incoming telephone call concerning a real estate advertisement to the first salesperson on the noon until 3 p.m. floor shift, because Complainant thought it was noon and therefore that the latter shift had started. Mr. Sapp, who was on the 9 a.m. until noon shift, became very angry with Complainant because he felt it was not yet noon and that the call should have been directed to him. (It is important in real estate that the salesperson who is entitled to "work" such a call get it.) Mr. Sapp demanded that Complainant change her watch to the time on his watch. Mr. Sapp "was yelling" about the time to Complainant while she was busy with other incoming calls, and Complainant became more and more upset. The following interchange, or words to the same effect, ensued:

Complainant:

"Bob, this whole thing is ridiculous. It's noon, and I'm going to lunch."

Mr. Sapp:

"Why don't you take a long, long lunch?" (Complainant took this to mean "Don't come back to work; you're fired.")

Complainant:

"Fine, I quit."

Mr. Sapp:

"No, you can't because I fired you first."

Complainant:

"I quit -- Nobody can pay me enough to sit here and listen to you talk about religion eight hours a day, six days a week. I think you're sick. I think you need help."

Complainant then walked out of the office and into the parking lot. Mr. Sapp followed her, saying, "I'm crazy, I'm crazy, I'm crazy."

No witness at hearing except Complainant heard or observed all of this encounter between Complainant and Respondent B. Sapp.

53) Soon thereafter, Respondent B. Sapp located Respondent G. Sapp and told her he thought he had fired Complainant. (Complainant thought that she had quit first.)

54) Later on August 25, 1980, Complainant returned to the office of Respondent Sapp's to get her final paycheck and speak with Respondent G. Sapp. The renditions of this conversation which Complainant and Respondent G. Sapp offered at hearing differ markedly from each other.

Complainant maintains that during the conversation, she made clear the role that Respondent B. Sapp's religious discussions and comments played in her termination of employment. Complainant testified that when Respondent G. Sapp asked Complainant if she couldn't make her peace with Respondent B. Sapp, Complainant responded by asking if Mr. Sapp was going to continue talking about religion constantly. According to Complainant, Mrs. Sapp then explained that this was the way Mr. Sapp was, that he was exuberant and might be a bit eccentric, but that religion was his life. Complainant also testified that Mrs. Sapp said that most young people "went along with" Mr. Sapp, and she couldn't understand why Complainant and Mr. Sapp did not get along; Mrs. Sapp thought it was due more to a personality conflict (than to religion). Complainant testified that she then told Mrs. Sapp that no, it was because of Mr. Sapp's constant religious discussions. According to Complainant, Mrs. Sapp then asked again if Complainant might sit down and talk with Mr. Sapp about this point. Complainant testified that, in response, she asked if Mr. Sapp was going to continue discussing religion at the office, and Mrs. Sapp replied that yes, that was the way Mr. Sapp was. Complainant testified that she then said no, she could not tolerate any more of Mr. Sapp's continual discussion of religion. According to Complainant, Mrs. Sapp and she did not ever discuss the time dispute which had preceded her departure from work earlier that day. This fact, plus the above-cited conversation, left Complainant with the impression that she could continue working at Respondent Sapp's on the condition that she accept Mr. Sapp's behavior as it then was.

Respondent G. Sapp, on the other hand, testified that during this conversation neither she nor Complainant said anything about religion or religious discussions or issues. According to Mrs. Sapp, she told Complainant that she liked her work and was satisfied with it and wished Complainant would reconsider and continue her employment at Respondent Sapp's. Mrs. Sapp testified that she also explained to Complainant that Mr. Sapp was not that hard to get along with and that if she would care to get together with him, (Mrs. Sapp was sure) they could "make amends" and Complainant would find out that Mr. Sapp was not "that way," he did not hold grudges and would not be hard to work with. Mrs. Sapp testified that at that point Complainant said that she didn't want to ever have to talk with Mr. Sapp again, and Mrs. Sapp realized that they were at an impasse because Complainant was unwilling to work things out and determined to quit her employment. Mrs. Sapp's testimony was that Complainant's opportunity to continue her employment at Respondent Sapp's was conditioned simply on the feelings between her and Mr. Sapp being "ironed out;" they had to reach a friendly understanding, because Complainant's work was so important to Mr. Sapp's work.

For the reasons explained in Finding of Fact 71 below, this forum finds Complainant's testimony as to her August 25, 1980, discussion with Mrs. Sapp more credible that of Mrs. Sapp. Accordingly, this forum adopts Complainant's testimony as to that discussion as fact.

55) Outside of her feelings about the religious discussion and comments by Respondents Sapp in her workplace, Complainant liked her work at Respondent Sapp's. She enjoyed what she did, she enjoyed working with the salespeople other than Respondent B. Sapp, and she felt she was doing a very good job. But for her feeling about being enveloped by religious pressure by Respondents Sapp in her workplace, which Complainant found intolerable as of August 25, 1980, Complainant would have been happy to continue working at Respondent Sapp's after August 25, 1980.

56) Respondent G. Sapp testified, and this forum finds, that as of August 25, 1980, she liked and was satisfied with Complainant's work. She stated, and this forum finds, that Complainant was very punctual in handling her responsibilities, good at handling telephone stress, good at setting up appointments, and good at talking with irate people, and that she kept the necessary records in order. Respondents' witnesses who worked at Respondent Sapp's during Complainant's employment testified that Complainant was "really competent" in her job, did a good job even though she was young, was a "very efficient" employee, was "nice," appeared to do her work efficiently and handle her job "all right," and that her capabilities were impressive compared to those of the witness at the same age. One of these salespeople stated that Respondent G. Sapp had referred to Complainant as a good employee.

On the other hand, at various other times during the hearing than during her above-cited general testimony as

to the quality of Complainant's work, Respondent G. Sapp also testified that "a lot of times" Complainant came to the office very depressed and upset over personal incidents, that she was immature, and that she was absent from work quite often due to illness and one or two times because she was too emotionally upset to come to work. She also mentioned at another point that Complainant supplied incorrect information many times. Respondent G. Sapp stated that at the time of Complainant's termination, Mrs. Sapp had decided to have an employer/ employee conference with Complainant to deal with some personal conflicts between Complainant and others at the office, some long lunches and early departures from work which Complainant had taken without permission, and one instance of Complainant's perceived disloyalty to Respondent G. Sapp.

Having considered all the testimony (recounted in this and the preceding Finding of Fact) of Complainant and Respondent G. Sapp, as well as that of Respondents' other above-cited witnesses, as to the quality of Complainant's work, and particularly Respondent G. Sapp's testimony (and this forum's finding) that Respondent G. Sapp was satisfied with Complainant's work even as of August 25, 1980, as well as Respondent G. Sapp's offer to let Complainant continue working if she would accept Respondent B. Sapp as he was, this forum concludes that had it not been for Complainant's resistance to Mr. Sapp's persistent imposition of his religion on Complainant at her workplace, Respondent Sapp's would have continued employing Complainant as secretary-receptionist for an indefinite period of time (as long as that position existed).

57) During her employment at Respondent Sapp's, Complainant had no problems, other than the imposition of religion on her at work, which made her unhappy. Everything else in Complainant's life was going very well.

58) During the 7½ months Complainant worked at Respondent Sapp's, as a result of her very frequent unwanted exposure to religious discussion and comment by, and religious literature from, Respondents Sapp (as exemplified by the occurrences described in Findings of Fact 29 to 37 and 39 above), Complainant experienced a great deal of emotional strain and felt a lot of pressure from Respondent B. Sapp with regard to her religious beliefs and life style. She reasonably believed he was trying to convert her to Seventh Day Adventism. As a result of all this, Complainant became anxious, upset, very nervous, angry, depressed and, in general, very unhappy. For example, what Complainant characterizes as Seventh Day Adventism's "pessimistic doomsday" outlook (as explained to her by Respondents Sapp) depressed Complainant a great deal. Even more seriously to Complainant, during her employment at Respondent Sapp's, the religious harassment to which Respondents Sapp subjected Complainant caused her to question her own values and background and finally, not to believe in organized religion anymore. She became absolutely not interested in associating with "religious people", listening to or even hearing any discussion about religion, or

having anything to do with people who wanted to talk to her about religion. Because of her religious background as described in Findings of Fact number 3 and 4 above, these newly acquired hostile feelings toward religion created a great deal of turmoil and conflict within Complainant.

Because of Complainant's above-described anguish and conflict, she lost sleep, had nightmares about Respondents Sapp, cried many times at home and at work, and discussed her distress at length with those close to her. Her husband-to-be spent part of each workday evening calming and comforting her. She dreaded going to work. Also as a direct result of her above-described state of mind, Complainant began to gain weight, and three months after her employment at Respondent Sapp's began, Complainant started smoking (after having ceased smoking five months before her employment there began).

The above-described mental and physical effects of the religious harassment and intimidation to which Complainant was subjected by Respondents Sapp became increasingly severe and, as applicable, frequent as her employment at Respondent Sapp's continued. By August 25, 1980, when she ended her employment there, Complainant's mental anguish, and the physical and mental effects thereof, peaked and were intolerable. Complainant was experiencing each of these effects intensely every day and had gained 25 to 30 pounds since her employment began.

59) Upon the termination of her employment at Respondent Sapp's, Complainant first felt great relief. Her mental anguish steadily declined during the next six months and has since remained at the level to which it had dropped by the end of that six month period. For example, during those first six months, Complainant slowly "normalized" and became calmer and happier. She began to sleep better. Not thinking about Respondents Sapp, she began to feel better about herself. She stopped her weight gain, and within two years of her termination, she had lost the weight gained during her employment at Respondent Sapp's.

60) Complainant feels that she went through a "very, very disturbing experience" during her employment at Respondent Sapp's. She characterizes herself as happy now, except for the personal religious views with which she is not satisfied. At present, Complainant still does not believe in organized religion and reacts strongly against exposure to it. However, because intellectually, Complainant wishes she could believe in it again, she is still in conflict. As yet, Complainant does not feel willing to talk or think about organized religion or to have anything to do with it. She is not willing to listen to people's religious opinions, as she was before working for Respondent Sapp's. Complainant will not tolerate religious proselytism or solicitation (even including Christmas carolers). She becomes angry with her husband for listening to such religious presentations. She has not attended church (except for weddings) since her employment at Respondent Sapp's, even declining to go to holiday candlelight services that her family has traditionally attended together. Because she "wanted no part" of organized

religion, Complainant chose to be married, on June 12, 1982, in a church used only as a historical monument by a minister who had no congregation and who allowed her to avoid using the "Biblical" ceremony. Before her employment at Respondent Sapp's, Complainant had planned to be married in her childhood church by the minister who had confirmed her.

Complainant is concerned about how she will deal with religion with her (future) children. She wants them to be exposed to religion and gain some kind of religious background, as she appreciated having had before she worked for Respondent Sapp's. She does not want to impart to them the prejudice against organized religion she developed as a direct result of working at Respondent Sapp's. Although she wants her children to be open to learning about religion, she fears that she will not be able to teach them this or otherwise discuss religion with them. She is afraid she will be unable to communicate positively with them regarding religion, because of the scars she still has as a result of her experience at Respondent Sapp's.

Because of her experience at Respondent Sapp's, Complainant has become less willing to open up and discuss with others what is on her mind. She fears being rebuked, especially about religion and about her life style, because of the rebukes on those subjects she experienced at Respondent Sapp's.

Although the other physical effects of her emotional distress caused by her experience at Respondent Sapp's seem to have abated, Complainant still smokes.

61) Complainant did not consult a psychiatrist concerning her above-described mental anguish because she could not afford to, and because she did not realize the extent of her emotional scars until she had left the employ of Respondent Sapp's. She did not file a workers' compensation claim for her mental or physical suffering, because she did not know that she could have done so.

62) At the time her employment at Respondent Sapp's ended, Complainant was earning gross wages of $792.00 per month, plus employer-paid health insurance, eligibility for sick leave, and one week of paid vacation per year. Since her employment at Respondent Sapp's, Complainant has had no medical expenses exceeding the deductible for the employer-paid health insurance of Respondent Sapp's. Consequently, that insurance is immaterial to any damage calculations herein.

63) From the July 1980 incident described in Finding of Fact 44 above through her termination at Respondent Sapp's until she found other employment, and during each subsequent period of unemployment, Complainant has diligently sought work. During all such times of unemployment between the end of her employment at Respondent Sapp's and the expiration of her eligibility for unemployment compensation about one month before hearing, Complainant applied for and received unemployment compensation.

64) From August 25, 1980, to the dates of hearing, Complainant has had the following employment and has earned the following gross amounts in that employment:

A. Employment by Jonland Corporation - 9/1/81 to 7/7/82:

9/1/81-2/82 @ $700.00/Month = $4200.00
3/82-6/82 @ $737.50/Month = 2950.00
7/82 @ $737.50 per month = 168.41
$ 7318.41

B. Part-time Employment by Club 101 - 10/82 to 12/82:

$540.00

C. Part-time Employment by Old Town Chevron:

4/2/84 to present, 20 hrs/week at $6.00/hr

In the above-cited employment, Complainant has earned fringe benefits only from Jonland Corporation, where she accrued two weeks of paid vacation per year. There is no evidence on the record as to whether she was eligible for or whether she used sick leave while she worked at Jonland Corporation.

65) On August 27, 1980, Linda (Brandt) Friedrich began working in Complainant's place as the secretary-receptionist at Respondent Sapp's.

Between August 27 and December 31, 1980, Ms. Friedrich worked as a temporary employee at Respondent Sapp's through Russell Brown Office Service, Inc. (hereinafter the Brown agency). Because of fiscal strain caused by the declining real estate market, Respondent Sapp's used Ms. Friedrich on a less than full-time basis.

Respondent Sapp's paid the Brown agency $6.00 for every regular hour Ms. Friedrich worked at Respondent Sapp's, and in turn the Brown agency paid Ms. Friedrich $4.50 for every regular hour she worked. In 1980, the Brown Agency paid Ms. Friedrich a total of $1841.63 for 404 regular hours of work and 3.5 overtime hours of work at Respondent Sapp's. Respondent Sapp's, therefore, paid the Brown agency $2424.00 (404 x $6.00) for Ms. Friedrich's 1980 regular hours of work. Although the record does not specify what Respondent Sapp's paid the Brown agency for Ms. Friedrich's 3.5 1980 overtime hours of work, this forum has arithmetically deduced from the above figures that the Brown agency paid Ms. Friedrich $6.75 for each overtime hour she worked. The ratio of the regular hourly rate the Brown agency paid Ms. Friedrich ($4.50) to the overtime hourly rate it paid her ($6.75) is 3:4. The forum has applied this ratio to the $6.00 regular hourly rate Respondent Sapp's paid the Brown agency and approximated thereby that Respondent Sapp's paid the Brown agency $9.00 per overtime hour Ms. Friedrich worked. For Ms. Friedrich's work in 1980, therefore, Respondent Sapp's paid (the Brown agency) $2424.00 plus approximately $31.50 for 3.5 overtime hours, or a gross total of $2455.50.

During 1981, Ms. Friedrich worked directly as an employee of Respondent Sapp's. During that year, the amount of business activity at Respondent Sapp's plummeted. Because of dwindling resources for staff payroll and a correspondingly diminishing need for a secretary-receptionist, Respondent Sapp's continued employing Ms. Friedrich less than full-time for all but the last two months of 1981 (during which Ms. Friedrich worked full-time due to the bookkeeper's termination). During 1981, Respondent Sapp's paid Ms. Friedrich a gross total of $4,821.95 in wages.

Because Respondent Sapp's could no longer afford to employ a secretary-receptionist, Respondent Sapp's terminated Ms. Friedrich's employment just before Christmas 1981.

66) After Ms. Friedrich's termination and through 1982, the real estate activity at Respondent Sapp's hit an all-time low: a total of only four or five sales were closed. For one or two months after terminating Ms. Friedrich, Respondent Sapp's did not employ anyone to answer its telephones; Respondent G. Sapp or salespeople assumed this duty. There was not enough work to occupy, or money to pay, a full-time or substantially part-time secretary-receptionist. Thereafter, Respondent G. Sapp's main professional endeavor was her Cambridge Plan International business. From that business' account, Respondent G. Sapp paid one of Respondent Sapp's salespeople, Janet Lund, to do secretarial work for that business and take real estate calls for Respondent Sapp's. Ms. Lund also continued to function as a salesperson for Respondent Sapp's. If Ms. Lund had not been available to answer real estate calls, Respondent Sapp's probably would not have hired anyone else to do this, and its salespeople would have answered these calls.

67) By no later than January 1983, Respondent Sapp's had ceased operation, due to the drastic decline in its business. The corporation ceased to exist on March 18, 1983, when Respondent G. Sapp did not renew its corporate status with Oregon's Corporation Commissioner. Respondent G. Sapp has no plans to resume a real estate practice again.

68) If Complainant had continued working for Respondent Sapp's after August 25, 1980, Respondent Sapp's would not have employed her after the date it terminated her successor, Ms. Friedrich, i.e., after just before Christmas 1981, because Respondent could not afford to employ a secretary-receptionist after that time. If Complainant had continued working for Respondent Sapp's until late 1981, Respondent Sapp's would have reduced her work time and spent approximately the same amount of money compensating her as it spent compensating Ms. Friedrich (i.e., the amount Respondent Sapp's paid the Brown agency for Ms. Friedrich's services in 1980 and the amount it paid Ms. Friedrich directly in 1981). The forum bases this conclusion on the fact that money was the key factor determining how many hours per week and how long Respondent Sapp's employed a secretary-receptionist between August 26, 1980, and December 31, 1981.

69) An exhibit in the record is the cover form and summary of an investigative interview of Janet Lund conducted by telephone by Agency investigator Warren Albright in connection with this matter on August 14, 1981. The summary, in narrative format, recounts the questions Mr. Albright asked Ms. Lund and the answers she gave in response. Rather than being a verbatim transcript of this interview, the summary is Mr. Albright's statement of what was said during the interview, based upon Mr. Albright's notes of the interview (also in evidence) "fleshed out" by his recollection of all that was said during the interview. Mr. Albright produced this summary shortly after the interview.

At hearing, Ms. Lund intimated that she did not remember making some of the statements attributed to her in the exhibit. She stated that "several things" in the exhibit do not "have" what she was "trying to get across," so she does not feel the exhibit "will be accurate." Mr. Albright testified at hearing, and this forum finds, that he does not believe the summary differs from what was said during the interview.

For the following reasons, this forum has given more weight to the exhibit than to Ms. Lund's testimony at hearing, where they differ:

a) The interview summarized was conducted by an experienced attorney and interviewer who recalls no other instance in which one of his summaries of an interview has been challenged as to accuracy.

b) Overall, and as far as it goes, Mr. Albright's notes of the interview taken during the interview demonstrate the accuracy of the summary.

c) The interview was held much closer in time (2 2/3 years) to the events at issue than was the hearing. Even Ms. Lund admitted that perhaps, and this forum finds that, her memory of events at issue was better at the time of the interview than at the time of the hearing.

d) Ms. Lund's testimony at hearing differs from the exhibits mostly in degree, i.e., her comments at hearing which could be negative to Respondents were toned-down versions of what the exhibits say Ms. Lund said in the interview. This type of difference can be attributed to the passage of time since the events at issue and/or to Ms. Lund's obvious aversion to confrontation. During the interview, Ms. Lund asked for (and received) the protection of confidentiality. During the hearing, in contrast, Ms. Lund, a former salesperson for Respondent Sapp's, was forced to speak publicly, in the presence of many former colleagues and within a few feet of both Respondents Sapp. Her entire demeanor and references to herself at that hearing reflected her emphatic reluctance or inability to confront Respondents Sapp with information or opinion they might or would find unfavorable.

e) Ms. Lund failed to specify what parts of the summary were not accurate and how they were not accurate. Her complaint was very general, and it appeared that although parts of the summary had been read to her, she had not read this exhibit herself.

For all these reasons, this forum has concluded that the interview summary is likely to be much more accurate than Ms. Lund's statements at hearing, where they differ.

70) Another exhibit in the record is a letter concerning this case from Respondent G. Sapp to the Agency dated August 20, 1981. At hearing, Respondent G. Sapp attempted to disavow responsibility for some of the statements in this letter, alleging that she did not write it or read it all. Mrs. Sapp admitted that she signed it.

This forum concludes that the letter is correctly attributed to Mrs. Sapp and that it accurately reflected her views when she signed it. It was drafted by Mrs. Sapp's employee based upon

Mrs. Sapp's notes on what she wanted said and information in Mrs. Sapp's relevant files. Mrs. Sapp signed this letter, and there is no allegation or evidence that she did so involuntarily or without opportunity to review it. Because the letter accurately reflected her views when Mrs. Sapp signed it, and because she signed it within just one year of the events at issue herein, this forum has given more weight to the letter, where it differs from Mrs. Sapp's testimony at hearing, than to her testimony at hearing.

71) Overall, this forum found Complainant to be a much more credible witness than Respondent G. Sapp. The forum deemed Mrs. Sapp's testimony much less reliable than that of Complainant, because by Mrs. Sapp's own implicit admission, at least some parts, if not a great deal, of her testimony were/was based upon second- (or third) hand information or office gossip, both of which Mrs. Sapp seemed perfectly willing to assume were accurate. This forum cannot make that same assumption. In addition, the factual inconsistency between Mrs. Sapp's statements in the August 20, 1981, letter and her testimony at hearing, compared with Complainant's articulate, logical, precisely detailed and almost meticulously consistent testimony during two days of hearing, demonstrates the greater relative reliability of Complainant's testimony. Mrs. Sapp was simply too absorbed in her business and too often away from Complainant's specific work area to devote much attention to the day to day interpersonal occurrences in that work area, unless they involved a crisis with which Mrs. Sapp had to deal. She did not have a clear or accurate recollection at hearing of the events occurring in that area during Complainant's employment. Accordingly, this forum has viewed Mrs. Sapp's testimony with caution and given more weight to Complainant's testimony than to that of Mrs. Sapp, where they differ.

72) This forum found the testimony of Phyllis Medearis much less credible than that of Complainant, where they differ. In the instances where their testimony was in direct conflict, Complainant's testimony was far more persuasive, both because of the consistency of that testimony with the rest of the record, and Complainant's firm, steady demeanor, and because Ms. Medearis's testimony simply was much less plausible and credible in light of the rest of the record. On several points, Ms. Medearis's testimony contradicted not only that of Complainant, but that of Respondents' other witnesses.

For these reasons, this forum has not accorded Ms. Medearis's testimony much weight, where it differs from that of Complainant.

73) Respondents produced a series of witnesses to describe their experiences while working at Respondent Sapp's. Catherine Cormack testified under subpoena by the Agency for the same purpose. This forum notes five factors which diminished the weight accorded to the testimony of the below-specified such witnesses, who comprise all of Respondents' witnesses except Respondent G. Sapp, and Ms. Cormack:

a) At hearing, Respondents led many of their witnesses (particularly Luhaorg, Nelson, Meyers, Harper, and Friedrich) on direct and redirect examination. In many instances, Respondents not only phrased all of the witness's answer but "yes" or "no" and suggested whether the affirmative or negative response was appropriate (example: "Is it your testimony that ...?"), but obviously discouraged any effort by the witness to qualify his or her simple answer or modify the phrasing of the question. Although Respondents thereby merely may have been trying to expedite their presentation, their leading questions left the forum uncertain as to whether or not their witnesses would have answered in such terms had not those terms been suggested to them. This rendered the testimony of these witnesses less reliable, especially where the exact meaning of their answers was important.

b) The probative value of the testimony of several witnesses concerning events at Complainant's workplace, and particularly interactions between Complainant and Respondents Sapp, was significantly weakened by the fact that these witnesses were present in Complainant's workplace, the main office, while Complainant was there either (1) not at all (Harryman and Friedrich), (2) rarely if at all (Harper and Schenk), (3) not often (Cormack, Meyers and Ramsten), or (4) not much when Respondent B. Sapp was also there (Dial). In addition, of course, this forum has taken into account the fact that even the active salespeople of Respondent Sapp's were each usually present in Complainant's workplace only 9 to 15 hours each week, while Complainant was there approximately 45 hours each week. Furthermore, Respondents Sapp were in and out of the office, and the times either of them spent in the main office may have coincided infrequently with those of any particular witness other than Complainant. Moreover, no other witness shared Complainant's required daily telephone calls to Respondent B. Sapp. Finally, no other witness was singled out like Complainant as a target of Respondent B. Sapp's religious overtures. Accordingly, the testimony of other people who worked at Respondent Sapp's could not refute Complainant's testimony concerning her experiences with Respondents Sapp at the office of Respondent Sapp's. For example, the testimony of other workers as to how often if at all they noticed given events or conditions at the main office, or that they were not bothered by those events or conditions, does not effectively controvert Complainant's testimony that those events occurred or conditions existed, and how often, or that they were bothersome to Complainant.

Linda (Brandt) Friedrich, who replaced Complainant, worked just part-time for all but two months of her employment with Respondent Sapp's. Consequently, outside of those two months, she spent less time with Respondents Sapp at the workplace each day than had Complainant. Also, during Ms. Friedrich's employment, Respondents Sapp may have restrained their religious conversation due to the circumstances of Complainant's termination and her complaint against Respondent Sapp's. Ms. Friedrich was not singled out to be the object of religious discourses by Respondent B. Sapp. Moreover, the nature of the general intercourse in the main office

presumably changed during Ms. Friedrich's employment as, over the course of that employment, there were fewer and fewer active salespeople in the office with whom Respondents could converse. Accordingly, Ms. Friedrich's testimony concerning her experiences at Respondent Sapp's is not highly probative of what Complainant experienced there during her employment.

c) The testimony of witnesses Luhaorg, Nelson, Meyers, and McQueary was less probative on several issues because those witnesses shared the religious affiliation of Respondents Sapp. It is logical to assume, and this forum finds, that because of this shared affiliation, these witnesses were more comfortable than Complainant with the religious beliefs of Respondents Sapp, and were not themselves targets for proselytism by Respondents Sapp. Consequently, these witnesses were likely to be less disturbed, or sensitive to others being disturbed, by the injection of the religious beliefs of Respondents Sapp into these witnesses workplace.

d) Respondents' witnesses and Catherine Cormack, all former workers for Respondent Sapp's, displayed a marked reluctance to confront one or both of the Respondents Sapp at hearing. Most of them went to unusual and rather pointed lengths to minimize the potentially negative effect of their testimony on Respondents' case, carefully constructing their answers, qualifying testimony extensively and adding unsolicited information on cross-examination to create the best impression of Respondents. For example, witness Dial testified that Respondent B. Sapp never spoke about Seventh Day Adventist beliefs while she was in the office, but also testified that he talked about religion whenever[6] he felt like it and let her know he was "sold on his religion." Witness Ramsten split hairs as to what was religious, as opposed to moral, ethical, or philosophical, discussion. Witness Cormack termed a religious disagreement she had with Respondent B. Sapp an "unimportant little snipe" which did not change their relationship at all. However, Complainant's unrefuted testimony was, and this forum finds, that thereafter, for the rest of Complainant's employment at Respondent Sapp's, Ms. Cormack was sufficiently disturbed by Respondent B. Sapp's religious fervor and particularly by this disagreement that Ms. Cormack would telephone Complainant to ascertain if Mr. Sapp was at the office, in order to avoid coming to the office when he was there. Witness Harryman's comments about Respondent B. Sapp were quite evasive. See also Finding of Fact 69 above concerning witness Lund. Finally, by offering unsolicited information not related to the question asked, several of Respondents' witnesses, such as Ms. Nelson, gave the forum the impression that they were primed to say certain things while testifying.

Overall, Respondents' witnesses and Ms. Cormack impressed the forum as people actively attempting to

[6] These statements pertained just to when Respondent B. Sapp was in the office, as Ms. Dial did not see him elsewhere.

defend Respondents rather than helping the forum ascertain the facts herein. The very fact that Complainant had challenged Respondents in this public forum seemed to offend these witnesses as an affront to the appearance of amity they so value. In other words, the equivocations and unsolicited remarks in the testimony of these witnesses impressed this forum not as an effort to be absolutely accurate, but as an effort to protect Respondents from Complainant's open challenge, which some of them perhaps also view as an assault upon religion itself or upon their own religion.

For all the above-cited reasons, this forum has accorded the testimony of Catherine Cormack and all Respondents' witnesses except Respondent G. Sapp less weight than it would have if these reasons did not exist.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Sapp's was a corporation employing one or more persons in its real estate business in Oregon. Respondent G. Sapp was Respondent Sapp's president, sole owner, and broker. Respondent B. Sapp, Respondent G. Sapp's husband, worked, as an independent contractor, as a salesperson/listing appraiser for Respondent Sapp's.

2) From January 6, 1980, through August 25, 1980, Respondent Sapp's employed Complainant as its secretary-receptionist. In this capacity, Complainant performed a great deal of telephone reception work and various clerical duties.

3) When Complainant began working for Respondent Sapp's, she was a bright, verbally aggressive and open, mature nineteen-year-old who was inexperienced in the work world. Although less active in her church than she had been previously, Complainant also was a sincere adherent to basic Lutheran beliefs who was open-minded about religion. Complainant respected each person's right to hold and express his or her own religious beliefs, and was willing to listen to discussions of those beliefs.

4) During all times material herein, Respondents B. and G. Sapp were sincere adherents to the Seventh Day Adventist faith, which was a focal part of their lives. Respondent B. Sapp wanted everyone to become a Seventh Day Adventist, and was particularly zealous in advocating his religion through discussion and comment. Respondent G. Sapp was aware of this.

5) During all times material herein, Respondent G. Sapp retained for herself and exercised the authority to hire, fire, and supervise all persons working at Respondent Sapp's, including Complainant. During her pre-employment interview of Complainant, Respondent G. Sapp asked Complainant her religion, learned that Complainant considered herself a non-practicing Lutheran, and told Complainant that she and Respondent B. Sapp were Seventh Day Adventists.

6) During all times material herein, Respondent Sapp's employed a secretary-receptionist and a bookkeeper, and had about fifteen active salespeople at a time affiliated with it. A number of the people working at Respondent Sapp's during times material were deeply religious.

7) During times material herein, Complainant worked in the office of Respondent Sapp's about forty-five hours per week. Only the bookkeeper worked similar hours at the office, and her primary work location was isolated from that of Complainant. The active salespeople were usually in the office only 9 to 15 hours per week. Respondent B. Sapp was out of the office a great deal during the first two-thirds of Complainant's term of employment and present there more often during the last third thereof, spending overall during Complainant's employment 10 to 23 hours per week in the office. Respondent G. Sapp frequently conducted business away from the office, and she was out of the office at least as much as she was in it.

8) Complainant's work area was a desk in the big open part, or main office, of Respondent Sapp's office. To do her job, Complainant could not leave her desk for any length of time. Respondent B. Sapp was usually in the main office, often sitting at a desk next to Complainant's, while he was in Respondent Sapp's office. Although she had a private office, Respondent G. Sapp worked in the main office often when she was at the office. The salespeople usually worked in the main office while they were at the office of Respondent Sapp's.

9) For the reasons described in Ultimate Findings 7 and 8 above, Complainant was in the main office of Respondent Sapp's about three times more than anyone else except Respondents B. and G. Sapp. Respondent G. Sapp was away from the main office a great deal. No single other person was consistently present, therefore, when Complainant and Respondent B. Sapp were both in the main office.

10) During her work time, when she was not on the telephone, Complainant could not avoid hearing discussion taking place in the main office (unless the main office was unusually noisy or the given discussion was quiet and far from Complainant's desk).

11) Complainant's only knowledge of the Seventh Day Adventist religion comes from her experiences with Respondents Sapp while she worked at Respondent Sapp's.

12) Throughout Complainant's employment at Respondent Sapp's, very frequent discussions and comments about religion occurred/were made in Complainant's work area, the main office, when Complainant was there. Usually Respondent B. Sapp, and sometimes Respondent G. Sapp, initiated and participated in these discussions and made these comments. Although Respondent B. Sapp sometimes addressed his religious remarks to whoever was in the main office, he often singled out Complainant as the target of his comments. The following paragraph illustrates the religious discussion and comments of Respondents Sapp which Complainant heard in the main office of Respondent Sapp's during her employment there.

As exemplified below, Respondents Sapp, and Respondent B. Sapp in particular, very frequently discussed religious teachings in the office, including Biblical topics such as prophecy and the teachings of the founder of the Seventh Day Adventist Church. They read and recited Biblical passages to Complainant personally and related

current events to their religious views. Respondents Sapp, and Respondent B. Sapp in particular, voiced to Complainant their/his belief that only Seventh Day Adventists would be "saved," and that all other religions were wrong. Respondent B. Sapp made negative comments to Complainant about Protestants, Catholics, and Mormons, labeling them "devil worshippers," and made negative comments to Complainant about her Lutheran faith. Respondents Sapp, and particularly Respondent B. Sapp, spoke to Complainant of the importance of a Saturday Sabbath. Respondent B. Sapp often discussed the religion and life style of his listing clients with those present in the main office, including Complainant. Respondents Sapp invited Complainant to attend their church and church activities with them. Respondents Sapp criticized (and tried to change) Complainant's personal life style in various ways, insofar as it deviated from the lifestyle dictated by the Sapps' religious beliefs. Respondent B. Sapp very often introduced religious topics when Complainant made a required daily telephone call to give him his appointment schedule.

13) Respondent Sapp's kept Seventh Day Adventist literature in the waiting room of its office, and Respondent B. Sapp quite frequently gave Complainant religious literature which she had not requested.

14) The activities of Respondents Sapp described in Ultimate Findings of Fact 12 and 13 above constituted a continuing stream of religious discourse and personal criticism of Complainant based upon religion which Complainant could not avoid hearing or otherwise receiving, i.e., they constituted religious advances and other verbal conduct of a religious nature.

15) After a brief period of curiosity, Complainant lost interest in Seventh Day Adventism and tried to ignore or avoid being part of the above-cited religious discussions and comments. She did not succeed, because her work and required work location made her a captive audience. Finally, upset, harassed, and intimidated by the religious discussions and comments of Respondent B. Sapp in particular, Complainant started to make plain to him that she was not interested in hearing, and did not want to hear, him talk about religion to her or in her presence, and that furthermore it really upset her to hear him do so. Although this sometimes caused Respondent B. Sapp to refrain from talking to Complainant about religion for the duration of a conversation, he overall became more and more ardent in his efforts to explain his religious beliefs to Complainant and press them upon her. If Complainant seemed to challenge Respondent B. Sapp's statements about religion, he pursued his point angrily and with renewed vigor. Complainant's unwillingness to submit docilely to Respondent B. Sapp's continuing course of religious intimidation, rather than any "personality conflict" with Mr. Sapp unrelated to religion, resulted in steadily increasing tension between Complainant and Mr. Sapp.

Complainant was not the only worker at Respondent Sapp's who had been greatly bothered by Respondent B. Sapp's religious discussions and comments in the office. Those discussions and comments helped cause at

least two salespeople to terminate their affiliation with Respondent Sapp's. However, for many of the salespeople of Respondent Sapp's, discussions and comments about religion did not pose a major problem.

16) Because of Respondent B. Sapp's relationship to Respondent G. Sapp, Mr. Sapp was not viewed simply as a salesperson at Respondent Sapp's: both Mr. Sapp and Complainant believed that Mr. Sapp had the power to discharge Complainant. This made Mr. Sapp's actions toward Complainant described herein particularly intimidating to Complainant.

17) During July and August 1980, Complainant and Respondent B. Sapp had two heated encounters at the office, which heightened the tension already existing between them because of Mr. Sapp's religious badgering of Complainant. Each of these incidents was rooted in an action Mr. Sapp had taken on the basis of his religion and had recounted to Complainant.

18) In July 1980, after the first and before the second of the above-described incidents, Complainant complained to Respondent G. Sapp about Respondent B. Sapp talking to her or in her presence about religion. Complainant told Mrs. Sapp that she did not want to hear about religion (from Mr. Sapp), that doing so upset and bothered her, and that she wished it would stop. In response, Respondent G. Sapp talked with Respondent B. Sapp, and they merely agreed that religious discussion "might not be pleasing" to Complainant.

Respondent G. Sapp testified that she assumed without asking Complainant that thereafter Respondent B. Sapp did not speak to Complainant about religion, because Mrs. Sapp thought he tried to desist and because Complainant made no further complaint to her.

The above-described actions and inaction's by Respondent G. Sapp in response to Complainant's complaint do not constitute a reasonable effort on Mrs. Sapp's part to stop Respondent B. Sapp's religious harassment of Complainant.

19) In fact, Respondent G. Sapp failed to stop Respondent B. Sapp from continuing to talk and lecture to Complainant about religion and continuing to talk about religion in Complainant's presence. After Mrs. Sapp's discussion with Mr. Sapp about Complainant's complaint to Mrs. Sapp, Respondent B. Sapp did not cease this objectionable behavior in Complainant's presence knowing that it upset her, although he stopped speaking directly to Complainant about religion for about one week.

20) Throughout her employment at Respondent Sapp's, Complainant did whatever was professionally necessary to work with Respondent B. Sapp. (In her efforts to ignore his religious overtures, it is possible that Complainant inadvertently ignored a business question by Mr. Sapp.)

21) Just before Complainant's lunch time on August 25, 1980, and soon after a clash which had left Respondent B. Sapp visibly upset with Complainant, Complainant and Respondent B. Sapp had a verbal altercation over whether or not Complainant should have referred an advertising call to Mr. Sapp. It culminated when Mr. Sapp made a statement to Complainant which Complainant believed meant that he was firing her. Complainant responded to this statement by resigning, telling Mr. Sapp in effect that nothing was worth having to listen to him constantly harangue about religion. Respondent B. Sapp thought that he had fired Complainant and so informed Respondent G. Sapp.

22) Complainant spoke with Respondent G. Sapp later that day. During that conversation, Complainant made clear the determinative role which Respondent B. Sapp's continual stream of comment and discussion about religion played in her termination: she found it intolerable. Respondent G. Sapp conditioned Complainant's continuing, or returning, to work at Respondent Sapp's upon Complainant's willingness to accept Respondent B. Sapp as he was. At the same time, Respondent G. Sapp acknowledged that Mr. Sapp would not change, i.e., he would not stop talking continually about religion at the workplace. Because Complainant was not willing to subject herself to more of the religious harassment and intimidation by Respondent B. Sapp, which had become intolerable to her, she declined to return to work. A reasonable person in Complainant's place also would have felt compelled to resign because of this religious harassment and intimidation.

23) For the 7½ months Complainant worked for Respondent Sapp's, as the direct result of being subjected to an atmosphere of religious harassment and intimidation by Respondents, Complainant suffered steadily increasing (in severity and frequency) mental anguish, which yielded a multitude of negative physical and emotional effects. This anguish and these effects had become extreme and intolerable to Complainant when her employment at Respondent Sapp's was terminated. A reasonable person in her place also would have been so affected.

24) After the termination of her employment at Respondent Sapp's, Complainant's mental suffering steadily diminished over the next six months to a plateau at which it has since remained. Most of the physical and emotional effects of Complainant's mental distress had abated within two years. However, Complainant at present is left with substantial psychological scars and conflict about her inability to feel or communicate a positive attitude about religion and with a continuing smoking habit.

25) As of August 25, 1980, Respondent G. Sapp was satisfied with Complainant's work. If Complainant had not been subjected to an atmosphere of religious harassment and intimidation by Respondents, Complainant would have been happy to continue working for Respondent Sapp's. If Complainant had not objected to that subjection, Respondent Sapps would have continued employing Complainant as secretary/receptionist indefinitely (as long as that position existed). Accordingly, but for the latter subjection, Complainant would have continued working for Respondent Sapp's as secretary-receptionist from August 25, 1980, through December 31, 1981, when Respondent Sapp's eliminated that position for economic reasons. During that period, Respondent Sapp's would have paid her approximately the same amount of money it expended on the wages of her successor, or

approximately $2455.50 in 1980 and $4821.95 in 1981, for a gross total of $7277.45.

In fact, upon diligently searching for other work, Complainant found employment which compensated her a gross total wage of $2800.00 between August 25, 1980, and December 31, 1981. This total was approximately $4477.45 less than Complainant would have earned in the employ of Respondent Sapp's during the same period.

26) For the reasons stated in Findings of Fact 69 through 72 above, this forum has given the following evidence the following relative weight:

a) The Lund interview summary has been given more weight as a statement of fact than Ms. Lund's testimony at hearing, where they differ.

b) Respondent G. Sapp's August 20, 1981, letter has been given more weight than the testimony of Respondent G. Sapp, where they differ.

c) Complainant's testimony has been given more weight than that of either Respondent G. Sapp or Phyllis Medearis, where the testimony of either of the latter differs from that of Complainant.

d) The testimony of Catherine Cormack and all of Respondents' witnesses except Respondent G. Sapp has been given less weight than it would have received but for the reasons specified in Finding of Fact 72 above.

CONCLUSIONS OF LAW

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

2) The words and actions, and the motivations for those words and actions, of Respondent G. Sapp (the sole owner, president, and broker of Respondent Sapp's and Complainant's supervisor) and the bookkeeper of Respondent Sapp's described herein are properly imputed to Respondent Sapp's.

3) Respondent G. Sapp and Respondent B. Sapp are each a "person" within the meaning of ORS 659.010(11), and as such are subject to the provisions of ORS 659.010 to 659.110, including *former* ORS 659.030(1)(e) (1980) (now ORS 659.030(1)(g)).

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

5) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing Respondents and Complainant of the matters described in ORS 183.413(2)(a) through (i).

6) Through the deliberate or intentional actions described below of aiding and abetting by Respondents B. and G. Sapp, Respondent Sapp's Realty, Inc., during times material herein, made Complainant's submission to unwelcome religious advances and other verbal conduct of a religious nature a term or condition of her employment at Respondent Sapp's, used Complainant's rejection of that conduct as the basis for an employment decision affecting Complainant, and, by that conduct, created an intimidating and offensive working environment for Complainant. Respondent Sapp's thereby subjected Complainant to an intolerable atmosphere of religious harassment and intimidation while she was employed by it, and constructively discharged Complainant because she refused to continue working in that atmosphere, as charged. These actions by Respondent Sapp's constitute discriminating against Complainant in the terms, conditions, or privileges of her employment and (constructively) discharging her from that employment because of Complainant's religion, and they are unlawful employment practices in violation of ORS 659.030(1)(a).

7) By deliberately or intentionally imposing upon Complainant, while she was employed by Respondent Sapp's, his religious beliefs and personal criticisms of Complainant based upon those beliefs, despite his knowledge that Complainant did not want to hear or receive them, when both he and Complainant perceived him as having the power to discharge Complainant, and thereby creating an intimidating an offensive working environment for Complainant, Respondent B. Sapp made unwelcome religious advances and engaged in other verbal conduct of a religious nature toward Complainant which constituted religious harassment and intimidation of Complainant. Accordingly, Respondent B. Sapp aided and abetted Respondent Sapp's in the acts described in Conclusion of Law 6 above. These actions by Respondent B. Sapp helped and facilitated Respondent Sapp's in the commission of, and therefore constitute aiding and abetting Respondent Sapp's in the doing of, acts forbidden under ORS 659.030(1)(a), an unlawful employment practice in violation of *former* ORS 659.030(1)(e) (1980) (now ORS 659.030(1)(g)).

8) By deliberately or intentionally imposing upon Complainant, while Complainant was employed by Respondent Sapp's and she had the power to fire Complainant, her religious beliefs and personal criticisms of Complainant based upon those beliefs, despite her knowledge that Complainant did not want to hear or receive them; failing to stop or take reasonable steps to stop Respondent B. Sapp from persisting in his actions described in Conclusion of Law 7 above; and conditioning Complainant's continuing employment upon Complainant's willingness to continue submitting to these acts by Respondent B. Sapp, Respondent G. Sapp helped create an intimidating and offensive working environment for Complainant and made Complainant's submission to the conduct by Respondent B. Sapp described in Conclusion of Law 7 a condition of her employment. By these actions, Respondent G. Sapp made and engaged in and helped make and engage in unwelcome religious advances and other verbal conduct of a religious nature toward Complainant which constituted religious harassment and intimidation of Complainant. Accordingly, Respondent G. Sapp aided and abetted Respondent Sapp's in the facts described in Conclusion of Law 6 above. These actions by Respondent G. Sapp helped and facilitated Respondent Sapp's in the commission of, and therefore constitute aiding and abetting Respondent Sapp's in the doing of, acts forbidden under ORS 659.030(1)(a), an unlawful employment practice in violation of *former*

ORS 659.030(1)(e) (1980) (now ORS 659.030(1)(g)).

9) For reasons stated in the Ruling above and in Section 4 of the Opinion below, Respondents have not proved any of the affirmative defenses set forth in their answers.

10) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant, and to Order Respondents to give Complainant a favorable reference, under the facts and circumstances of this record, and the sums of money awarded as damages, and the making of a favorable reference ordered, in the Order below are an appropriate exercise of that authority.

OPINION

1. Subjection to an Atmosphere of Religious Intimidation

This appears to be a very unusual case. The parties and this forum have discovered just two reported judicial decisions resulting from religious discrimination similar to that at issue herein: *Young v. Southwestern Savings and Loan Association,* 509 F2d 140, 10 FEP 522, 9 EPD S9995 (5th Cir 1975), and *Kallas v. Department of Motor Vehicles*, 88 Wash 2d 354, 560 P2d 709 (1977). Although neither of these decisions explains what would be an appropriate test for religious intimidation, an inference that one element could be proselytism in the workplace can be drawn from *Young, supra*, 9 EPD S9995 at 7143. Other elements are suggested by *Kallas,* in which appellant was disciplined after his supervisor:

> "received a complaint from a member of the staff that appellant was discussing frequently, with personnel under his supervision, religious matters. Investigation revealed that the appellant in fact was doing such during working hours, that employees objected to it, and some felt intimidated because of appellant's position as part of management." *Kallas, supra*, 560 P2d at 710.

The Agency has suggested that this forum adapt the following US Equal Employment Opportunity Commission (hereinafter EEOC) Guideline for sexual harassment, set forth in 29 CFR 1604.11, to cases involving allegations of religious harassment or intimidation on the job:

> "(a) Harassment on the basis of sex is a violation of Section 703 of Title VII.* Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

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*"The principles involved here continue to apply to race, color, religion or national origin."

As further support for this interpretation, the Agency has pointed to EEOC Decision No. 72-1114, February 18, 1972 (CCCH EEOC Decisions [1973] S6347), 4 FEP Cases 842. In that decision, the EEOC held that by allowing a supervisor to occasionally discuss his religious beliefs on the job with his supervisors (one of whom felt his job could be threatened by his reaction to these discussions, one of whom believed the supervisor was trying to convert him, and both of whom felt the discussions interfered with their job performance), the employer failed to provide a working environment free of religious intimidation and thereby violated Title VII of the Civil Rights Act.

Respondents, on the other hand, appear to be arguing that what is alleged herein is religious harassment (as distinguished from intimidation) and suggest that religious harassment in employment is "defined as conditions created by an employer which are sufficiently pervasive to alter the conditions of employment and create an abusive working environment." Respondents' Closing Argument. Respondents' apparent authority for this proposition is *Phillips v. Smalley Maintenance Service, Inc.*, 32 EPD 33,802, 711 F2d 1524 (11th Cir 1983), a sexual harassment case. Respondents have suggested a test for religious harassment derived from *Phillips*, which this forum disregards because it misstates the test relied upon in *Phillips.*

Having considered the arguments of the Agency and Respondents, this forum finds the Agency's suggested test for religious harassment or intimidation in employment appropriate for this case and enunciates it as follows:

> Harassment on the basis of religion is a violation of ORS 659.030. Unwelcome religious advances and other verbal or physical conduct of a religious nature constitute religious harassment when:
>
> (1) submission to such conduct is made, either explicitly or implicitly, a term or condition of the subject's employment;
>
> (2) submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject; or
>
> (3) such conduct has the purpose or effect of unreasonably interfering with the subject's work performance or creating an intimidating, hostile or offensive working environment.

It is important to emphasize that by adopting this test, this forum does not mean to state that general expressions of religious beliefs at the workplace, by themselves, constitute a violation of ORS 659.030.

Since the tests of sections (1), (2), and (3) above all have been met in this matter, Complainant was subjected to religious harassment herein. Furthermore, since the working environment created by Respondents' conduct was intimidating and offensive to Complainant, she was also subjected to an atmosphere of religious intimidation.

2. Was Complainant Constructively Discharged?

The standard for constructive discharge which this forum has adopted is set forth in *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion,* 63 Or App

383, 663 P2d 416 (1983). In that Order, this forum stated that:

> "The general rule, which this forum adopts, is that if an 'employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has encompassed a constructive discharge . . .'" *West Coast Truck Lines*, at 215, quoting *Young, supra*, 509 F2d at 144.

In that Order, the Commissioner concluded that "deliberately" does not mean that "the employer's imposition of the intolerable working conditions must be done with the purpose of forcing the employee to resign" or the intent of ridding itself of the employee; "deliberately" means that the working conditions were imposed by the deliberate or intentional actions or policies of the employer. So, in an alleged constructive discharge, instead of attempting to ascertain the state of mind of the employer, this forum focuses upon the conditions imposed. Therefore,

> "To find a constructive discharge, this forum must be satisfied that 'working conditions . . . so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign' caused the employee to resign and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer." *West Coast Truck Lines*, at 215, citing *Alicea Rosado v. Garcia Santiago,* 562 F2d 114, 119 (1st Cir 1977); *Calcote v. Texas Educational Foundation,* 578 F2d 95, 97-98 (5th Cir 1978), EEOC Decision No. 72-2062 (6-22-72).

This test diverges from the test propounded by Respondents only in that it specifically rejects the notion that the actions of the employer must be "part of a deliberate (sic) plan to force resignation, or reasonably forseeable (sic) to force such resignation." (Respondents' Closing Argument)

Finally, in *West Coast Truck Lines,* the Commissioner adopted the rule that "if there has been a constructive discharge, an employer is liable for any unlawful conduct involved therein as if the employer had formally discharged the employee." *West Coast Truck Lines, supra*, at 216, citing *Young, supra*, 509 F2d at 144.

It is significant that the Commissioner adopted as a general rule for constructive discharge those standards established by the US Court of Appeals for the Fifth Circuit in *Young*, a case involving religious discrimination and facts similar to those at issue herein. In that case, the court found that although there was no atmosphere of religious intimidation at the employer's office, an employee's resignation amounted to an unlawful constructive discharge. (In doing this, the court acknowledged by inference that an atmosphere of religious intimidation could cause a resignation to be interpreted as a constructive discharge.) The plaintiff in *Young,* upon being told by a supervisory official that she was required to attend monthly staff meetings at which, in addition to discussion of business, a short religious talk and prayer were delivered, voiced objections to attending the religious parts of the meeting. No effort was made to accommodate her objections, except that the supervisor advised her she could "close (her) ears" during those portions of the meeting. The court commented:

> "In this case, Mrs. Young enjoyed her work and Southwestern valued her services. The only possible reason for her resignation on September 15, 1971, was her resolution not to attend religious services which were repugnant to her conscience, coupled with the certain knowledge from . . . her supervisor, that attendance at the staff meetings – in their entirety – was mandatory and the reasonable inference that if she would not perform this condition of her employment, she would be discharged . . . Surely it would be too nice a distinction to say that Mrs. Young should have borne the considerable emotional discomfort of waiting to be fired instead of immediately terminating her association with Southwestern. This is precisely the situation in which the doctrine of constructive discharge applies, a case in which an employee involuntary resigns in order to escape intolerable and illegal employment requirements." *Young, supra*, 9 EPD 9995 at 7144.

The Agency is correct in pointing out that there are striking factual similarities between *Young* and the instant matter. Complainant, like Ms. Young, enjoyed her work, and Respondent Sapp's valued her services. On Complainant's last day of work at Respondent Sapp's, Mrs. Sapp offered to allow her to continue working if she accepted Respondent B. Sapp as he was, i.e., persistently talking to Complainant about his religion and criticizing Complainant on the basis of his own religious beliefs. Complainant, like Ms. Young, was forced to leave her employment "in order to escape intolerable and illegal employment requirements."

As long ago as 1972, the EEOC found that the resignation of an employee, where the employer failed to provide a working environment free of religious intimidation, constituted a constructive discharge because of the unlawful factors precipitating the employee's actions. EEOC Decision No. 72-1114, *supra.* In that case, described in the previous section of this Opinion, the EEOC determined that "the evidence established that the supervisor in question did, on occasion, discuss his religious convictions with Charging Parties as well as other employees on the job. Other employees were not as disturbed as Charging Parties." EEOC Decision No. 72-1114, *supra*, EEOC Decisions S6347 at 4629. A like observation could be made in the instant matter.

Did Respondents herein, by their deliberate or intentional actions or policies, make Complainant's working conditions so intolerable that she was forced into involuntary resignation? This forum has found that religion was an issue from the time of Complainant's employment interview, when Respondent G. Sapp asked Complainant her religion; that Respondents Sapp did in fact discuss their religion very frequently in Complainant's work area when she was there; that Complainant, due to the nature of her work and

location of her worksite, could not usually avoid hearing these religious discussions (even if they were not directed specifically at her); that Respondent B. Sapp quite frequently gave Complainant religious literature which she had not requested; that Complainant herself was often the target of criticism by Respondents Sapp based on her deviations from the style of life advocated by the Seventh Day Adventist religion as Respondents Sapp interpreted it; that Respondent B. Sapp persisted in his unwelcome religious overtures to Complainant and in her presence even after he and Mrs. Sapp knew they were unwelcome; that these actions by Respondents B. and G. Sapp were particularly intimidating to Complainant because she believed that either of them could fire her; and that all this in fact was intolerable to Complainant and caused her to resign. The only remaining question is whether "a reasonable person in Complainant's shoes" would have felt compelled to resign. *West Coast Truck Lines, supra,* at 215. The fact that a number of the witnesses who testified at the hearing in this matter did not feel that a reasonable person would have been distressed by religious harassment or intimidation at Respondent Sapp's is irrelevant. Many of these people were not "in the . . . (Complainant's) shoes," and none shared her overall experience at Respondent Sapp's, because they spent little or no time working in the main office while Complainant was there. Consequently, they were not aware that Complainant was singled out as the target of religious comments, and therefore were not aware of, or subjected to, the nature or extent of the religious harassment and intimidation Complainant suffered. Also, a number of witnesses were themselves members of the Seventh Day Adventist Church and may well have been affected quite differently than Complainant by the religious discussions and comments of Respondents Sapp. Third, most of the witnesses at the hearing were significantly older than Complainant and were more experienced in the work world.

As illustrated in the case of *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564, *rev den* 287 Or 129 (1979), a complainant's age and inexperience in the working world are factors which may be taken into consideration in determining the effect of discrimination upon that particular person. In *Fred Meyer*, the employer appealed a 1978 Final Order in which this forum stated:

> "In this present case, as the findings reflect, there is an abundance of evidence concerning ridicule, embarrassment and humiliation meted out to the Complainant by the Respondent. This situation was particularly egregious in view of Hayes' (the Complainant's) youth. That a young man should encounter such an environment in his initial venture in the world of work is outrageous. In circumstances such as this an award for humiliation, mental distress, etc., is not only appropriate but is indeed contemplated by the legislature of the State of Oregon." *In the Matter of Fred Meyer, Inc.*, 1 BOLI 84, 93 (1978), *aff'd in pert. pt., Fred Meyer, Inc., supra.*

The Court of Appeals affirmed the Commissioner's award of $4,000.00 compensation for humiliation and mental distress, remarking that

> "(t)he order explains the award of damages by emphasizing Hayes' youth and the fact that this was his first employment experience."

Fred Meyer, supra, 39 Or App at 266. Although Complainant herein was a bright and mature nineteen-year-old when she began working for Respondent Sapp's, her youth and inexperience are relevant to determining how a reasonable person "in her shoes" would have reacted to working conditions at Respondent Sapp's. Given those factors and the working conditions which this forum found Complainant was subjected to at Respondent Sapp's, this forum has concluded that Complainant found, and a reasonable person in her place would have found, those conditions so intolerable that she felt, and a reasonable person in her place would have felt, compelled to resign on August 25, 1980.

Consequently, this forum has concluded that under the standards previously adopted by this forum, Respondent Sapp's constructively discharged Complainant from her employment there.

3. Is Respondent B. Sapp or Respondent G. Sapp Subject to the Provisions of *former* ORS 659.030(1)(e) (1980) (now ORS 659.030(1)(g))?

During all of 1980, ORS 659.030(1)(e) provided in pertinent part:

> "(1) For the purposes of ORS 659.010 to 659.110 * * *, it is an unlawful employment practice:
>
> "(e) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110 * * * or to attempt to do so."

The terms "aid" and "abet" occur frequently in the law, often within the context of criminal activity. "Aid and abet" is defined to mean:

> "Help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission." *Black's Law Dictionary* (5th ed 1979).

This forum adopts this definition, substituting "an unlawful employment practice" for "a crime."

This forum has previously ruled that a corporate president and sole owner may be held liable for aiding and abetting his or her corporation in the commission of an unlawful employment practice. *In the Matter of N. H. Kneisel, Inc.*, 1 BOLI 28, 38 (1976). *See also Sterling v. Klamath Forest Pro. Assoc.*, 19 Or App 383, 388, 528 P2d 574 (1974). Respondent G. Sapp is in a position very similar to that of the individual respondents in *Kneisel* and *Sterling.* Accordingly, she is subject to *former* ORS 659.030(1)(e) and certainly may be held liable for aiding and abetting Respondent Sapp's in the commission of an unlawful employment practice.

As this forum has not found Respondent B. Sapp to be an employer or employee in this matter, the question becomes whether he should be considered a "person" to whom *former* ORS 659.030(1)(e) applies. This forum rules that he should. This issue previously arose before this forum in *In the Matter of Arden-Mayfair, Inc.*, 2 BOLI 187 (1981). In that Final Order, discussing whether respondent trust was "any person" within the meaning of *former* ORS 659.030(1)(e), this forum stated:

> "It can be argued that the phrase, 'whether an employer or an employee,' excludes the application of the statute to Respondent Trust. However, in view of the general policy against discrimination in ORS 659.020(1), and since ORS 659.010(11) defines 'person' to include trustees, the better construction of the phrase is that it is exemplary rather than limiting. Thus, in paying premiums on a discriminatory policy, Respondent Trust did aid Respondent Mayfair in the discrimination against Complainant." *Arden-Mayfair, supra*, at 190.

This forum implicitly accepted the position that an entity not specifically described in *former* ORS 659.030 (1)(e) would be included in the application of that statute when this forum found a respondent union liable for discrimination in violation of that statute in *In the Matter of Portland Electric & Plumbing Company*, 4 BOLI 82 (1983).

Even though this forum has not found Respondent B. Sapp to be an employer or an employee herein within the meaning of *former* ORS 659.030(1)(e), he is an "individual" and therefore a "person" within the meaning of the statute. ORS 659.010(11). Accordingly, he is subject to *former* ORS 659.030(1)(e), and may be held liable for aiding and abetting Respondent Sapp's in the commission of an unlawful employment practice.

4. Constitutional Issues

In their answers to the Specific Charges, Respondents raise the affirmative defense that ORS 659.030(1)(a) and (e) (1980) violate Article I, Sections 2, 3, and 5 of the Oregon Constitution by allowing the State of Oregon to interfere with their freedoms of worship, religious opinion and speech, and violate the freedom of religion and speech clause of the First Amendment of the US Constitution by allowing a public body to restrict or prohibit the free exercise of religion. Respondents ask therefore that the forum be barred from finding that Respondents have engaged in any unlawful employment practice.

At the close of the hearing in this matter, the Presiding Officer instructed Respondents that she would not consider their constitutional challenges unless Respondents, in their Closing Argument(s), made those challenges more specific than the conclusionary affirmative defense stated in their answers. She asked that Respondents make arguments detailing their objections and include citations of authority therefore.

In response, Respondents offered the arguments included in their Closing Argument. Therein, relying on the Oregon and US Constitutions, Respondents state that imposing sanctions against Respondents for subjecting Complainant to an atmosphere of religious intimidation or harassment, and discharging or constructively discharging Complainant when she refused to tolerate that atmosphere any longer, would be a violation of Respondents' constitutional right to the free exercise of their religion. (Although Respondents make a brief reference to the general constitutional protection of a person's right to "expression," their arguments deal with the "even more protected right" of expressing one's religious beliefs.)

Every statute is presumed to be constitutional, and all doubt must be resolved in favor of a statute's constitutional validity. A corollary to this maxim is that an entity which attacks the constitutional validity of a statute has the burden of establishing its constitutional invalidity. The same burden prevails when one asserts, as herein, that the "acts of an official * * * functioning under a statute valid on its face, are so arbitrary and unreasonable as to trespass upon the aggrieved party's constitutional rights." *Jehovah's Witnesses v. Mullen, et al.*, 214 Or 281, 293, 330 P2d 5 (1958), *cert den* 359 US 436 (1959).

In their closing argument, Respondents acknowledge that ORS 659.030 is constitutional. However, they argue that the action by this forum to enforce that statute prayed for in the Specific Charges would violate Respondents' constitutional rights by chilling their religious expression. Respondents maintain that it would be unconstitutional to apply ORS 659.030(1)(a) to theories of constructive discharge and religious harassment, because that application would be "unconstitutionally vague, broad and overreaching," especially since the Agency has not promulgated rules for the "protection" of claims based upon such theories. Such application, Respondents conclude, would violate Respondents' "constitutional rights to exercise their religion, and express free thought."

In accordance with the above-stated maxim, Respondents bear the burden of proving these contentions.

Because Respondents' arguments focus solely on constitutional guarantees of religious freedom, do not anywhere include the Oregon Constitution's provision guaranteeing free speech (Article I, Section 8) in their recitations of Oregon constitutional authority, and merely mention (obliquely if at all) constitutional guarantees of free speech, it does not appear that Respondents are alleging a violation of the latter guarantees herein. For that reason, and in accordance with the Presiding Officer's above-cited instruction, this forum will address herein the constitutional guarantees of religious freedom and not the constitutional guarantees of free speech.

The guarantee of religious freedom contained in the First Amendment of the US Constitution is identical in meaning to (although expressed in language different from) the Oregon constitutional provisions concerning the same right. *City of Portland v. Thornton*, 174 Or 508, 512, 149 P2d 972 (1944), *cert den* 323 US 770 (1945); *Kemp v. Workers' Compensation Department*, 65 Or App 659, 664, 672 P2d 1343 (1983). Therefore, this forum turns to interpretations of the First Amendment of the US Constitution.

As the US Supreme Court pointed out in *Cantwell v. Connecticut*, 310 US 296, 303-304 (1940), the First Amendment

> "embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Quoted in *State v. Soto*, 21 Or App 794, 795, 537 P2d 142 (1975), *cert den* 424 US 955.

Thus,

> "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions * * * (L)egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion." *Braunfeld v. Brown*, 366 US 599, 603-604 (1961), quoted in *State v. Soto, supra*, 21 Or App at 796.

Thus, although the right to religious freedom should be zealously guarded and protected, the practice of religion is not beyond reasonable limitations. *Thornton, supra*, 174 Or at 513; *see Jehovah's Witnesses, supra*, 214 Or at 319.

Whether the actions of Respondents Sapp in persistently introducing their religious beliefs into Complainant's working environment despite Complainant's protests could possibly be within the scope of the protections of the Oregon and US Constitutions is in itself questionable. Respondents Sapp never claimed that proselytizing, or proclaiming their religious beliefs, was required by their religion. Rather, their inclination to discuss religion in the office seemed to be dictated (especially in the case of Respondent B. Sapp) by personal idiosyncrasy and excessive zeal. The Oregon Court of Appeals has pointed out that

> "(f)rom the case law, it is clear that the Free Exercise Clause of the First Amendment could work to condemn laws * * *, at least where application of such laws clashes 'with imperatives of religion and conscience when the burden on First Amendment values is not justifiable in terms of the government's valid aims.' *Gillette v. United States*, 401 US 437, 462 (1971)." *Copper v. Oregon School Activities Association, et al.*, 52 Or App 425, 430-431, 629 P2d 386, *rev den* 291 Or 504 (1981).

No testimony presented by Respondents suggests that the conversations by Respondent Sapp of their religion at the workplace resulted from "imperatives of religion and conscience" rather than personal inclinations. Thus (although Respondents G. and B. Sapp's speech would be entitled to protection under certain circumstances by the "freedom of speech" constitutional provisions), it is not certain that it would ever merit constitutional protection in the name of "freedom of religion".

The Oregon Supreme Court has observed that:

> "No matter how specious, how intolerant, how narrow and no matter how prejudiced or dogmatic the arguments of the devotees of one belief may appear to others of different persuasion, the right of either to so express themselves is so emphatically a part and parcel of our public policy that it will be defended and protected by the courts of the land to the uttermost, unless it is found that the fanatical and unrestrained enthusiasm of its followers results in acts offensive to the positive law." *U.S. Bank of Portland v. Snodgrass*, 202 Or 530, 538, 275 P2d 860, *rehearing den* (1954).

In Oregon, it is an unlawful employment practice for an employer to discriminate against an employee in terms, conditions, or privileges of employment, or by discharging the employee, because of that employee's religion. ORS 659.030. The significant state interest in enforcing this provision is illustrated by the policy set forth in ORS 659.020:

> "(1) It is declared to be the public policy of Oregon that practices of discrimination against any of its inhabitants because of * * * religion * * * are a matter of state concern and that such discrimination threatens not only the rights and privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.
>
> "(2) The opportunity to obtain employment without discrimination because of * * * religion * * * hereby is recognized as and declared to be a civil right * * *."

In this case, Respondents, in subjecting Complainant to an atmosphere of religious intimidation and constructively discharging her, and in aiding and abetting these acts, have engaged "in acts offensive to the positive law." *See U.S. Bank of Portland, supra.* In these, as in many other circumstances, the state may restrain the expression of religious beliefs in order to protect a legitimate state interest. See examples in *State v. Soto, supra,* 21 Or App at 796-797. As the EEOC noted, in finding that a supervisor's occasional discussing of his religious convictions with employees on the job and thereby causing Complainants to feel intimidated constituted religious discrimination in violation of Title VII of the Civil Rights Act, "(t)hat certain statements by an employer within the employment context are not within the protection of the First Amendment is well settled. (Citation omitted.)" EEOC Decision No. 72-1114, *supra,* EEOC Decisions S6347 at page 4629.

> "The individual cannot be permitted, on religious grounds to be the judge of his duty to obey the regulatory laws enacted by the State in the interests of the public welfare. The mere fact that such a claim of immunity is asserted because of a religious conviction is not sufficient to establish its constitutional validity * * *." *Rice v. Commonwealth*, 188 Va 224, 234, 49 SE2d 342, *quoted in Baer v. City of Bend*, 206 Or 221, 229-230, 292 P2d 134 (1956).

This forum's conclusion that Respondents have committed the unlawful employment practices set forth in the Specific Charges does not strip Respondents of any constitutional protections to which they are entitled. Accordingly, Respondents' first affirmative defense is denied.

5. The Effect of Respondent B. Sapp Not Testifying

There is no evidence on the record directly from Respondent B. Sapp. Although present throughout the hearing, he did not testify, and the written record includes no statement from him. Respondent G. Sapp attempted to substitute her testimony for that of her husband, but this effort was unpersuasive for the following reason. Since Mrs. Sapp had no direct personal knowledge of Mr. Sapp's behavior when she was not with him, and since she was away a great deal from the site of his behavior alleged herein, Mrs. Sapp could not attest on a first-hand basis to what Mr. Sapp had or had not done or said during substantial amounts of time material herein. The only person who could have directly rebutted Complainant's first-hand testimony about Mr. Sapp's religious harassment and intimidation of her was Mr. Sapp himself. The unexplained failure of a named respondent to take the witness stand to rebut evidence supporting allegations against him, when he is the only person who could possibly do so thoroughly, suggests to this forum that Mr. Sapp's testimony would have contributed nothing to his defense. In any case, absent his testimony, there is no first-hand evidence to contradict Complainant's credible first-hand testimony as to the nature and frequency of Mr. Sapp's actions and statements to Complainant (and her reactions thereto).

6. The Damage Award for Mental Suffering

Given the duration and seriousness of the discrimination to which Complainant was subjected herein, Complainant's youth and inexperience in the work world, and the severity and duration of the mental suffering which that discrimination caused Complainant, as well as the severity and duration of the physical and emotional effects of that suffering, this forum has determined that an award to Complainant of $6,000.00 as compensation for her pain and suffering herein is appropriate.

ORDER

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

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Caroline L. Armon in the amount of TEN THOUSAND FOUR HUNDRED SEVENTY-SEVEN DOLLARS AND FORTY-FIVE CENTS ($10,477.45), plus interest upon $4,477.45 thereof, compounded and computed annually at the annual rate of nine percent from the dates the appropriate portions thereof would have been paid Complainant but for Respondents' unlawful employment practices until the date upon which Respondents comply with this paragraph. This award represents $4,477.45 in damages for wages Complainant lost because of Respondents' unlawful employment practices set out above and $6,000.00 in damages for mental anguish Complainant suffered as a direct result of those unlawful employment practices.

2) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a written favorable reference for Complainant.

3) Cease and desist from discriminating against any employee because of the employee's religion.

In the Matter of

SCOTTIE'S AUTO BODY REPAIR, INC., Respondent.

Case Number 16-83

Final Order of the Commissioner

Mary Wendy Roberts

Issued April 1, 1985.

SYNOPSIS

Complainant, an automobile painter, was immediately fired by Respondent's manager after reporting to her that he had called the state OSHA office about Respondent's lack of a painter's spray booth. Discounting Respondent's allegations of the deterioration of Complainant's work, his undependability, and his inability to cooperate with fellow employees, the Commissioner determined that Complainant's safety and health complaint was a determinative factor, i.e., it played a "key role," in his discharge. The Commissioner denied Respondent's motion to dismiss because Complainant had filed a civil complaint, since that filing was based on the right granted by ORS chapter 654, not ORS chapter 659, and since it had been voluntarily dismissed without reaching the merits. The Commissioner awarded Complainant $6,821 in lost wages and $2,500 for mental suffering, with appropriate interest. ORS 654.005(5); 654.062(5)(a) and (b); 659.095; 659.121(1) and (4); OAR 839-03-020; 839-05-015; 839-06-025 (1)(a) and (b).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on May 16 and 17, 1984, in Rooms 311 and 211 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Betty Smith, Assistant Attorney General. Scottie's Auto Body Repair, Inc. (hereinafter Respondent) was represented by Fred C. Nachtigal, Attorney at Law. Complainant Joe C. Garcia, Sr. was present throughout the hearing.

The Agency called as witnesses Larry Jones, shop foreman at Honda of Beaverton when Complainant worked there; James Kiser, Jr., auto body repairman at Honda of Beaverton when Complainant worked there and, thereafter, owner of an auto body shop for which Complainant worked; Complainant; Ben Hockman, body and paint shop manager at Heinrich Datsun when Complainant worked there; Richard Garcia, Complainant's nephew and painter's helper; Naomi Garcia, Complainant's wife; and Joe Garcia, Jr., Complainant's son, painter's helper, and business partner.

Respondent called as witnesses Bill Gregg, Manager of Administrative Services of the Civil Rights Division of the Agency; Mr. Jones; Mr. Kiser; Neal Knight, former employee of Complainant and son of George Knight, deceased manager of the auto body shop at Doherty Ford when Complainant worked there; Richard Bobzien, paint products salesman; Pat Doherty, owner of Doherty Ford; Thomas Cordrey, President and shareholder of Respondent; Larry Meeuwse, auto body repairman at Doherty Ford when Complainant worked there; Charles Leech, Agency conciliator in this matter; Richard Dean, Gerald VanBrocklin and Gus Schwartz, auto body repairmen at Respondent when Complainant worked there; Eugene J. Szekely, manager of the auto body shop at Honda of Beaverton when Complainant worked there; Sharon Cordrey, Respondent's General Manager and Secretary/Treasurer; and John J. Cox, business counselor for Complainant and Respondent during times material. At the Agency's request and with no objection by Respondent, all witnesses except Sharon and Tom Cordrey (Respondent's lay representative and officer/shareholder respectively) were excluded from the hearing room until they had testified. Ms. Cordrey was present throughout all, and Mr. Cordrey throughout most, of the hearing.

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, Ruling on Motion to Dismiss, Findings of Fact – The Merits, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On July 22, 1981, Joe C. Garcia, Sr. filed a verified complaint with the Civil Rights Division of the Agency alleging that Respondent, his employer, had discriminated and continued to discriminate against him in his employment because he had made a complaint under or related to ORS 654.001 to 654.295, the Oregon Safe Employment Act.

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated its allegations and, on February 25, 1982, determined that substantial evidence existed to support them.

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

4) On July 22, 1982, the Agency notified Complainant that during the next ninety days he could commence a civil suit in the Circuit Court of Oregon based upon the allegations of his aforementioned complaint filed with the Agency.

5) On October 22, 1982, Complainant filed a complaint in the Circuit Court of Oregon based upon the allegations of his complaint filed with the Agency.

6) On November 30, 1982, Complainant's October 22, 1982, complaint in Circuit Court was dismissed, upon Complainant's motion, because

Complainant's attorney believed it was not timely filed.

7) The Agency caused to be prepared and duly served on Respondent Specific Charges dated March 8, 1984, and the forum duly served on the parties notice of the time and place of hearing. Thereafter, the Agency moved to amend those Specific Charges, and Respondent did not object. Consequently, the Agency granted this motion and caused to be duly served on Respondent the Amended Specific Charges dated May 2, 1984.

8) On or about March 21, 1984, Respondent served its answer to the Specific Charges upon the forum. On or about May 16, 1984, Respondent served its answer and affirmative defense to the Amended Specific Charges upon the forum.

9) Before the commencement of the hearing in this matter, Complainant received from this forum a copy of "Contested Case Rights and Procedures" and stated that he had read this exhibit, had no questions about it, and felt he understood the procedures by which the hearing would take place. Before the commencement of the hearing, Respondent also received from this forum a copy of "Contested Case Rights and Procedures" and, through Sharon Cordrey, Respondent stated that it had read this exhibit, had no questions about it, and felt it understood the procedures by which the hearing would take place. The Presiding Officer instructed Complainant and Respondent to inform the Presiding Officer if at any time during the hearing he or it had any questions about those procedures.

10) For the reasons stated in the Ruling below, Respondent's motion to dismiss is denied.

11) At hearing, the parties stipulated to the admissibility of an exhibit involving painter's earnings and that an exhibit regarding cost of a painter booth would substitute for the oral testimony of Richard Williams.

12) After hearing, the parties made a post-hearing stipulation concerning the record herein. Attached to this stipulation and part of this exhibit is the Summary of Testimony to which the stipulation refers.

RULING ON MOTION TO DISMISS

Before hearing, Respondent filed a motion for an order dismissing this matter which was based upon two arguments:

1. The forum lacks jurisdiction over Respondent because applicable time periods set out in ORS 659.095 expired without the required action by the Agency.

2. Complainant's filing a civil action in state circuit court which fully encompassed all issues concerning his complaint previously filed with the Agency constituted an election of remedies and a waiver of the forum's jurisdiction.

1. ORS 659.095 Argument

Respondent maintained that, under ORS 659.095, since the Commissioner of the Bureau of Labor and Industries did not obtain a conciliation agreement with Respondent or cause to be prepared and attempt to serve Specific Charges within one year after Complainant filed his complaint with the Agency, the forum lacks jurisdiction herein. Respondent misreads ORS

659.095. In pertinent part, the statute simply provides that if the Commissioner does not accomplish one of the latter results within one year of the filing of a complaint, she must so notify Complainant. This notification triggers the Complainant's right to file a civil suit, not a loss of the forum's jurisdiction. The only way the Commissioner can involuntarily lose jurisdiction to proceed in a case pursuant to ORS 659.095 is to not issue an Administrative Determination within one year of the filing of the complaint, as required by the sentence of ORS 659.095 which follows the above-described notification requirement. Herein, as Respondent has noted, an Administrative Determination was issued well within that one year period. Accordingly, Respondent's assertion that the forum lacks jurisdiction over Respondent because it did not meet the timelines of ORS 659.095 is incorrect.

2. Election of Remedies Argument

Respondent also maintained that the forum lacks jurisdiction because Complainant's filing of a civil suit constituted an election of remedies under ORS 659.121(4). (In pertinent part, that is an election of remedies provision which elaborates upon the private right of action granted and described in ORS 659.121(1).)

In response, the Agency pointed out that the Specific Charges allege that Respondent violated ORS 654.062(5) and that when Complainant filed his lawsuit, he was exercising the right to sue provided in ORS 654.062(5)(b), not ORS 659.121(4). Furthermore, the Agency contended, there is no indication in ORS 654.062(5)(b) that filing such a lawsuit constitutes an election of remedies or forum, and there is no language in ORS 654.062(5) tying it to ORS 659.121. The Agency pointed out that ORS 654.062(5) was enacted in 1973 and ORS 659.121 in 1977. The legislative history of ORS 659.121's enactment indicates that the private right to sue created by that statute was intended to supplement, not to replace, the similar right available to employees under ORS chapter 654 (and ORS chapter 30), (both) of which the Legislature was made well aware when it enacted ORS 659.121. ORS 659.121 was aimed at areas of discrimination where there was not an existing private right of action: there is no evidence of any legislative intent to include ORS 654.062(5) in the application of ORS 659.121. This legislative history, argued the Agency, is consistent with the language of ORS 659.121. Its language provides a private right of action for any person claiming to be aggrieved by an unlawful employment practice prohibited by specified provisions of ORS chapter 659, but does not mention in those specifications any provision of ORS chapter 654, i.e., the language of ORS 659.121 does not authorize the filing of a civil complaint for a violation of any provision of ORS chapter 654.

The forum agreed with the Agency that (1) the language of neither ORS 659.121 nor ORS 654.062(5) provides that filing a civil suit alleging a violation of the latter statute constitutes an election of remedies foreclosing further action by the Commissioner on administrative charges addressing the same violation, and (2) there is no evidence of any legislative intent, in the enactment of ORS 659.121, to change, replace, or limit the already-existing rights, including the right to sue, created by ORS 654.062(5). Consequently, the forum could not conclude that Complainant's filing of a civil complaint herein constituted an election of remedies ending the forum's jurisdiction to proceed on his administrative complaint.

Having disagreed therefore with both of Respondent's arguments in support of its motion to dismiss, this forum denied that motion before the hearing. For expedient notice to the parties, this ruling was oral, with the Presiding Officer instructing that a written explanation of the ruling would follow.

At hearing, Respondent requested and was granted an opportunity to present evidence and argument concerning its motion, both to make a record and to induce the forum to reconsider its ruling. When it became apparent that the Presiding Officer had not received from the forum a supplemental "Memorandum and Additional Authority in Support of Motion to Dismiss" which Respondent submitted before it received notice of the Presiding Officer's ruling, the Presiding Officer also granted Respondent's request for reconsideration of her ruling denying the motion to dismiss. However, since Respondent did not present, in its supplemental memorandum or its evidence and argument at hearing, any further evidence or argument on its first contention in support of its motion regarding ORS 659.095, the Presiding Officer informed Respondent that she would assume Respondent was not requesting reconsideration on this first contention, and she would not reconsider her assessment of it. Consequently, the Presiding Officer reconsidered just the validity of Respondent's second, election of remedies, argument.

Respondent's evidence at hearing concerning its election of remedies argument showed that:

1) The Agency's Civil Rights Division handles all complaints of unlawful employment practices under the provisions of ORS chapter 659, including those which allege a violation of ORS 654.062(5)(a).

2) If the Civil Rights Division knows that a complainant has filed a civil suit based upon the same incident and raising the same factual issues as a complaint that complainant has filed with the Division, the Division dismisses the complaint filed with it, as of the date of Division knowledge of the civil suit or as soon as possible thereafter, in accordance with the provisions of OAR 839-03-020.

3) The civil complaint Complainant filed appears to be based upon the same kinds of factual allegations as Complainant's complaint to the Division. (As the Agency did not dispute this evidence, this forum found it to be fact.)

4) Herein, Complainant's civil complaint was filed on October 22, 1982, and voluntarily dismissed by Complainant's attorney on November 30, 1982, with no decision on the merits, because Complainant's attorney was convinced by Respondent's attorney that the civil complaint was not timely filed.

5) The Agency did not learn that Complainant had filed a civil complaint until well after its dismissal. Given the circumstances of that dismissal, it is possible that the Commissioner would have reopened Complainant's case, under her broad remedial powers, if she had previously closed it due to Complainant's civil filing.

6) Complainant filed his civil complaint through counsel after the Agency had sent him a notice of private right to sue pursuant to the requirements of ORS 659.095(1) (mentioned above). Nowhere on that notice did the Agency specify that it would dismiss Complainant's administrative complaint if he filed a civil complaint.

Respondent's legal argument at hearing centered upon *Thomas v. Oregon Metallurgical Corporation,* 43 Or App 149, 602 P2d 338 (1979) (hereinafter *Ormet*). Respondent contended that in this case, the Oregon Court of Appeals ruled that the remedies provided by ORS 654.062(5)(b) (filing a complaint with the Agency and filing a civil complaint) are alternative remedies, i.e., a complainant cannot do both. According to Respondent, the court based this conclusion upon its statement that one must view the private right of action provisions of ORS chapter 654 and ORS chapter 659 together, harmonizing ORS chapter 654 with the rest of the statutory scheme. Respondent noted that ORS 654.062 (5)(b) states that a complaint filed under it shall be processed:

"under the procedures, polices and remedies established by ORS 659.010 to 659.110 and the policies established by ORS 659.001 to 654.295 in the same way and to the same extent that the complaint would be processed by the commissioner...if...(it) involved allegations of unlawful employment practices...under subsection (4) of ORS 659.030."

Respondent argued, therefore, that the only logical way to reconcile ORS chapters 654 and 659 herein is to conclude that once a complainant chooses to file a complaint with the Agency, the complaint falls under ORS chapter 659, including ORS 659.121(4)'s election provisions and OAR 839-03-020 (2). Respondent contended that even if one views Complainant's complaint to the Agency as an ORS 654.062(5) complaint, Complainant's filing of a civil complaint is still an election, under the latter administrative rule and under Agency practice, both of which bind the Agency herein. Respondent concluded therefore that a complainant cannot pursue his or her remedies through the Agency and civil court at the same time.

In response, the Agency again asserted that the provisions of ORS chapter 659 (and especially ORS 659.121) do not limit rights provided by ORS chapter 654 (specifically ORS 654.062(5)). The Agency reiterated in summary its above-cited argument concerning legislative intent. The Agency also pointed out that by ORS 654.062(5)(b), a circuit court is empowered to award a different, broader potential remedy than that court may award under ORS 659.121. The Agency reminded the forum that the civil suit referred to in OAR 839-03-020 is a suit filed under ORS 659.121, most clearly because of the language of the latter rule and the citation of just chapter 659 as statutory authority therefore. Therefore, argued the Agency, if Complainant has an ORS 654.062(5) remedy independent of ORS 659.121, OAR 839-03-020 does not apply to it.

Furthermore, according to the Agency, even if one assumes for the sake of argument that Complainant's civil complaint was filed under ORS 659.121, Complainant's complaint with the Agency should not be dismissed because:

1) The Agency never closed Complainant's case, because the Agency did not know of Complainant's civil complaint until it had been dismissed. At that point, there was no reason to close the case, because the civil complaint had been dismissed.

2) If, in fact, on the date Complainant filed his civil complaint, he no longer had the remedy of going to circuit court because the pertinent timeline of ORS 659.095 had expired, there could have been no election of remedies because Complainant had no remedies from which to choose. The filing of a civil suit therefore was of no legal consequence.

3) Even if the Commissioner had or should have closed Complainant's case because of Complainant's civil complaint, she had the right, and in her discretion might have chosen, to then reopen it and reassert the forum's jurisdiction, based upon the dismissal of the civil complaint under the circumstances of this particular case, because of her broad remedial power to address such a situation.

Having fully considered the arguments offered, this forum denies Respondent's Motion to Dismiss. For the following reasons, Complainant's filing of a civil action in state court which encompassed the matters alleged in the complaint Complainant had previously filed with the Agency did not constitute an election of remedies as to Complainant's rights with respect to matters alleged in his complaint to the Agency.

First, the forum reiterates the conclusion upon which its original denial of this motion was based: neither the language of ORS 659.121 or ORS 654.062(5), nor the legislative history of the later-enacted ORS 659.121, specifies that ORS 659.121 applies to a case alleging violations of ORS 654.062(5), or that filing a civil suit alleging a violation of ORS 654.062 (5)(a) constitutes an election of remedies. (See the forum's resolution of the initial Election of Remedies Argument above for explanation of that conclusion.)

Second, the forum does not agree with Respondent's broad interpretation of the *Ormet* holding. In that case, the Court of Appeals stated that although the remedy language of ORS 654.062 suggests that the two remedies articulated therein are "not alternative remedies", it "must be harmonized with the rest of the statutory scheme." *Id* at 152. The court's examination of "all pertinent statutes" led it to the conclusion that by choosing to file a complaint with the Agency alleging a violation of ORS 654.062(5)(a), "plaintiff placed himself within the ambit of ORS Chapter 659" (and, for purposes of that case,

specifically ORS 659.095). *Id* at 153. The right to file a civil suit (articulated in ORS 654.062(5)(b)) after a complaint has been filed with the Agency is "not without limitation" (in that case, the provisions of ORS 659.095). This forum does not believe that a holding that ORS 659.121(4) does not apply to an ORS 654.062(5) case would contradict the court's pronouncement in *Ormet*. That pronouncement was a reflection of the language in ORS 654.062(5)(b) that an ORS 654.062(5) complaint and case must be "processed" under the procedures, policies and remedies established by "ORS 659.010 to 659.110," a reference not specifically embracing ORS 659.121. Furthermore, *Ormet's* holding does not specify that the provisions of ORS 659.121 limit the right to file civil suit articulated in ORS 654.062(5)(b); instead it examines how ORS 659.095 could do so.

Third, whether or not ORS 659.121(4) applies to a complaint filed under ORS 654.062(5)(b), the record herein does not establish that the Agency would have treated Complainant's October 22, 1982, filing of a civil suit, had the Agency known of it before the suit was dismissed, as an election of remedies. Furthermore, the record indicates that had she done so and dismissed Complainant's administrative complaint because of the filing of his civil complaint, the Commissioner could and should have "reopened" Complainant's administrative case after the dismissal of his civil case, based upon the particular circumstances of that dismissal: the perception of his attorney, accurate or not, that Complainant's civil complaint was not timely filed, and that therefore the circuit court never had jurisdiction over it. The forum agrees that the Commissioner's broad remedial powers would have given her the discretion to address Complainant's situation in this matter. Given the fact that Complainant's attorney voluntarily dismissed the circuit court complaint because of the conclusion that there could be no civil jurisdiction over that complaint, because it was not timely filed, and therefore that Complainant had no choice of forum or remedy, it would have been an appropriate exercise of the Commissioner's powers for her to reassert (or continue, as she obviously did) her jurisdiction over Complainant's administrative complaint after that dismissal.

Accordingly, this forum has concluded that Respondent's Motion to Dismiss should be denied based upon the failure of Respondent's arguments in support thereof.

(NOTE: After the Presiding Officer's formulation of the Proposed Order in this matter, the Oregon Court of Appeals issued *Carsner v Freightliner Corporation,* 69 Or App 666, 688 P2d 398 (1984). In pertinent part thereof, the court considered whether the one year and ninety day time requirements of ORS 659.095 time bar a civil action filed under ORS 654.062(5). The defendant argued that although generally ORS chapter 659 time limits and procedures are separate from and don't apply to complaints and ensuing civil actions brought under ORS 654.062 (5), the two above-mentioned time requirements of ORS 659.095 should apply to proceedings under ORS 654.062(5). *Id.* at 671-72. After noting the "absence of logical or authoritative

support" for this specific selective application, the court concluded that:

> "the basic difficulty with defendant's argument is its failure to recognize that, by its terms, ORS 654.062(5) incorporates all of the chapter 659 procedures that are not inconsistent with its own provisions." *Id.* at 672.

As explanation for this conclusion, the court pointed to the portion of ORS 654.062(5) which states that complaints filed pursuant to it must allege "discrimination under the provisions of ORS 659.040" and to the portion of ORS 654.062(5)(b) quoted above.

For the following reasons, this forum has concluded that this *Carsner* conclusion should not cause the forum to modify its above conclusion that the election of remedies provision of ORS 659.121(4) does not bar the administrative adjudication of Complainant's ORS 654.062(5) complaint.

First, the absence of an explicit "no election of remedies" provision in ORS 654.062(5)(b) squarely contradictory to the election of remedies provision of ORS 659.121(4) does not render the latter provision consistent with ORS 654.062(5)(b). In fact, for all the reasons discussed at length from "2. Election of Remedies Argument" through to the beginning of this NOTE above, to incorporate the ORS 659.121(4) election of remedies provision into ORS 654.062(5)(b), in the sense of applying that provision to complaints filed under ORS 654.062(5)(b), would be inconsistent with the meaning (as discerned through the language and legislative history) of ORS 654.062(5)(b) and ORS 659.121(4).

Second, even if, by the application of ORS 659.121(4), Complainant elected his remedy when he filed his civil complaint, the Commissioner could have continued or reasserted her jurisdiction over Complainant's administrative complaint after the dismissal of his civil complaint, for the reasons described above.)

FINDINGS OF FACT -- THE MERITS

1) At all times material herein, Respondent was an Oregon corporation which provided auto body repair and painting services in the State of Oregon. In that business, during all times material herein, Respondent directly engaged or utilized the personal service of one or more employees in the State of Oregon, reserving the right to direct and control the means by which such service was performed and remunerating its employee(s) for such service.

At all times material herein, Thomas Cordrey was the president (and therefore a director) of Respondent, and he owned half of the shares of the corporation. His brother John Cordrey owned the other half of those shares and was also a director of Respondent. Sharon Cordrey, wife of Thomas Cordrey, was Respondent's secretary-treasurer (a director position), and, during all times material after about February 1980, Ms. Cordrey was also Respondent's general manager. During all times material herein, as two of Respondent's three directors, Thomas and John Cordrey could overrule, by majority vote, Ms. Cordrey's actions as general manager or as a director of Respondent.

2) During all times material herein, Respondent was a "segregated" rather

than "combination" auto body shop, i.e., it had separate repair and paint units where different craftspeople performed the repair function and the paint function.

3) During all times material herein, all the repair people and painters working for Respondent were male, so this forum will hereafter use masculine nouns and pronouns in referring to them.

4) Respondent employed Complainant, an individual, from January 31, 1980, to June 23, 1981. Complainant worked as Respondent's head (and only) auto painter throughout his employment for Respondent and also worked as Respondent's assistant manager between approximately May 16, 1980, and November 26, 1980. Respondent employed Complainant on a full-time basis throughout his employment.

5) When Complainant started working for Respondent, he was a very experienced auto painter. After Mr. Cordrey initially approached Complainant to come to work for Respondent, Ms. Cordrey hired him. She and Mr. Cordrey knew at the time that Complainant was a good painter, and he had previously done piecemeal paint work for Respondent.

6) During Complainant's employment, Respondent paid Complainant for his paint work on a commission, flat rate basis. Complainant received a percentage of an hourly rate multiplied by the number of hours Respondent had estimated a paint job would take (its "flag" time), rather than by the number of hours Complainant actually spent doing the job. For example, when Complainant left Respondent's employ, he was being paid 48 percent of $22.00 (i.e., $10.56) for every hour flagged (estimated) for his paint work on a job.

7) During all times material herein, the repair and paint process at Respondent consisted, roughly, of the following steps. Ms. Cordrey or her assistant manager, if any, made a binding estimate of the total cost of repairing and painting a damaged vehicle. When that vehicle came to Respondent's shop for repair and painting, Respondent's auto body repairman first repaired the damaged portion of it. (This could involve taking parts to Respondent's painter to have them "edged" with paint and then returned to the repairman for placement on the vehicle.) When the repairman felt he had finished the repair, he submitted the vehicle to Respondent's painter. It was the painter's responsibility to check the repairman's work for anything overlooked or not done right and to return any such work to the repairman for completion or correction before painting.

When the painter was satisfied that repairs on a vehicle were complete and satisfactory, the painter painted whatever portion of the vehicle had to be painted. (A "complete" is painting the entire vehicle; a "spot" job is painting part of the vehicle.) To paint a vehicle, the painter "prepped" it by sanding the pertinent parts of the vehicle and spraying primer, sealer, paint (often if not usually acrylic enamel) and clear coat on all or part of the vehicle. The painter performed each of these steps a number of times on each job. When the painting was complete and dry, the vehicle went back to the repairman if there were any parts to affix. Thereafter, it was returned to the painter for cleaning, after which the job was complete.

8) Besides painting vehicles, inspecting finished repairs to detect unsatisfactory work and returning such work to the repairman who had done it, Complainant's duties during his employment at Respondent included taking care of the paint room, maintaining painter health and safety equipment, and making Ms. Cordrey aware if any such equipment was needed.

9) During Complainant's tenure as Respondent's painter, he had one or two helpers (after an initial period with none). He hired and supervised his helpers and paid one-half of their wages.

In addition, Respondent employed Ms. Cordrey and three repairmen at a time during Complainant's employment. Respondent's repairmen during that time included Richard Dean, Gerald VanBrocklin, Gus Schwartz, and Gary Surpise (spelling phonetic).

10) Respondent's painter was very important, during all times material herein, to Respondent. Not only did he have to assess all repair work and detect flaws therein before painting, but his paint work had to be of good and lasting quality. Respondent guaranteed the quality of its work as long as the customer owned the vehicle, and paint (the final finish on any repaired vehicle) had to last in order to prevent invocation of that guarantee by the customer.

11) Because the relationship between repairman and painter in a segregated shop revolves around both working on one job, with one charged with assessing the work of the other, that relationship naturally involves a certain amount of friction, and occasional conflict between a repairman and painter over whether a piece of work is paint-ready pretty commonly arises in the regular course of auto body work. This friction and conflict is intensified to the extent that extremes in worker attitude (pride and perfectionism as opposed to apathy) are both involved in delivering one job to a customer who must be satisfied.

12) To be a good auto painter, one must paint well and get along with coworkers, including repairpeople. Painting itself is a very demanding, stressful craft. It takes at least two years of painting just to develop good prepping abilities and to be able to do easier jobs satisfactorily.

13) Ms. Cordrey was Complainant's immediate supervisor throughout his employment for Respondent.

14) Ms. Cordrey became Respondent's general manager when its previous general manager retired shortly after Complainant began working at Respondent. Ms. Cordrey had no previous experience in management, but she had been Respondent's part-time, then full-time, bookkeeper. Her management training before Complainant's discharge consisted of a one-day seminar in personnel management and a weekend course in financial management, plus reading and asking questions. Throughout Complainant's employment, therefore, Ms. Cordrey was a "learning" manager.

15) As assistant manager, Complainant's duties were to help Ms. Cordrey run Respondent, and particularly

to take over making estimates, answering the telephone, and overseeing the shop work when Ms. Cordrey was not available to do so. Complainant assumed these duties in addition to his duties as painter. After about 6½ months as assistant manager, Complainant resigned the post because he wanted to be paid more than Respondent was willing to pay him. Thereafter, Complainant continued working as Respondent's painter.

16) As Respondent's painter, Complainant (and his helpers) did virtually all the auto painting and at least 90 percent of the preparation therefor in a poorly-ventilated room. This paint room had double garage doors which did not seal tightly to the floor when closed, so air and dust moved under them. The room could hold three regular-sized cars.

Respondent's repair work was done in a big room which was in a building separate from Respondent's paint room, and which had no fan or other ventilation devices.

17) The sanding done when an auto painter is working produces dust. All the coats of sealer, primer, paint, and clear coat a painter applies create an "overspray" which builds up over time if the paint site is not properly ventilated to let it escape.

18) Unlike Respondent during times material herein, many auto body shops had (and have) a spray booth in which their painter paints. This is essentially a metal room with a fan (to draw air into and through the booth), filters at the end of the booth opposite the fan (to filter out overspray, all of which the outgoing air carries, before the air goes out into a vent into which the fan draws), and a filter on its doors (to keep dust out of the air drawn back onto the booth). Such a booth, therefore, circulates air into and out of the booth and filters that air.

19) A spray booth is important because it filters out and traps, i.e., minimizes, dust and overspray which, if inhaled, can harm the breather's health. Overspray can harm both a painter working in a place where overspray is accumulating and the general public breathing air into which unfiltered overspray is being vented.

20) In addition to its health benefits, a spray booth provides a controlled, i.e., clean, atmosphere which allows a good painter to improve both the quality and speed of his or her painting.

21) The auto body shop for which Complainant worked immediately before he began his employment at Respondent had a spray booth. From the time Ms. Cordrey hired Complainant, he was aware of the health and work quality benefits of a spray booth, and urged Ms. and Mr. Cordrey to purchase one for Respondent. Complainant even told Mr. Cordrey that if Respondent did not have a paint booth when Complainant's first year of employment ended, Complainant would resign. The Cordrey's told Complainant they would try to get a booth.

22) The Cordrey's did look into acquiring a spray booth. When Mr. Cordrey located an older, used model, he had Complainant inspect it. Complainant advised the Cordrey's to get a later model, because it would be a better purchase for the money. The Cordrey's also asked Complainant to obtain estimates on the cost of a new booth from several suppliers, and a bid from a building contractor for installing the booth, which Complainant did.

23) Respondent subsequently ordered a new booth, but Mr. Cordrey canceled it when he discovered that it would cost an estimated $29,000.00 over the $16,000.00 cost of the booth to make structural changes necessary to set up the booth. In addition, Mr. Cordrey knew that if his long-standing efforts to acquire a lot adjacent to Respondent's site were successful, Respondent would have to tear down and move its booth, wasting $45,000.00. Mr. Cordrey testified that he did not want to spend that sum "just" to keep Complainant working for Respondent.

24) Respondent did not obtain a spray booth while Complainant worked for it. Complainant and the Cordrey's continued to talk about a booth, and the Cordrey's told Complainant that although they could not afford one at the time, they would be obtaining a booth in the future. Complainant continued his employment at Respondent because of that representation.

25) The views of Complainant and Ms. Cordrey concerning Complainant's tenure at Respondent differ markedly.

Ms. Cordrey sees her relationship with Complainant as fraught with ever-increasing tension and conflict, starting toward the end of his tenure as assistant manager and ending with his termination seven months later. Toward the end of Complainant's time as assistant manager, Ms. Cordrey started feeling threatened by Complainant, because she felt he wanted to take over and she need not be there at all. She felt Complainant was spending too much time "helping" in the repair shop, when she had hoped that having an assistant manager would allow her to spend more time there. She occasionally discussed this problem with Complainant.

Ms. Cordrey felt that increasingly Complainant was "hammering" on her with "nitpicky" complaints about the repairmen's work and "hammering" at her to get a spray booth, as well as complaining to her that her paint time estimates were too low.

Ms. Cordrey testified that for two months before the end of Complainant's employment, she could not depend upon him to be at the shop in the afternoon or to even give her notice when he was going to be gone. Consequently, Complainant was not available, according to Ms. Cordrey, to consult with her about painting when she needed him. Furthermore, Ms. Cordrey felt that Complainant's helpers were doing his work for him during his absences, and Ms. Cordrey felt this lowered the quality of Respondent's paint work toward the end of Complainant's employment. She felt Complainant also had his helpers, of whose salary Respondent paid half, do Complainant's personal work during work hours.

Ms. Cordrey felt that Complainant's relationship with the repairmen which had never been good, became palpably tense over time. Ms. Cordrey heard Complainant and the repairmen yelling at each other in the shop about twice a week toward the end of Complainant's employ, and this bothered her. Four to five months before the end of Complainant's employ, one repairman, Richard Dean, told her he would quit if she did not fire Complainant. (He did not.) Ms. Cordrey testified that

increasingly, Complainant painted cars on which the repairs were not complete or satisfactory, forcing Respondent to have both the repair and paint work redone and the car finished late. (She told Mr. Cordrey that twice Complainant expected to be paid for repainting such cars.) Ms. Cordrey felt this was indicative of the poor communication and coordination between Complainant and the repairmen, for which she blamed Complainant.

Toward the end of Complainant's employment, Ms. Cordrey was also irritated because Complainant "seemed" to be getting a lot of personal telephone calls at work.

Ms. Cordrey maintained that these problems with Complainant continually became worse, until she was so frustrated that she did not want to go to work and face them.

Ms. Cordrey is not willing to hire back Complainant.

26) Complainant, on the other hand, believes that he had a "good relationship" with Ms. Cordrey and that he enjoyed working with her. In addition, he considered Ms. Cordrey a personal friend during his employment at Respondent. Except for disagreeing once on how Complainant should treat his helper (see Finding of Fact 32 below), Complainant feels that he and Ms. Cordrey did not ever have any discussions or conflicts concerning how Respondent's business was operated. Other than his dissatisfaction concerning the lack of a spray booth, Complainant enjoyed working at Respondent.

Complainant testified that he was absent from work for meal breaks taken when it was advantageous to leave a project and to pick up necessary work materials. He stated he was not absent "a lot" for other reasons and that he received no reprimand from Ms. Cordrey for taking long breaks. Complainant denied leaving most of his work for his helpers to do, stating that he never had them do work he felt he should do. He denied painting over unsatisfactory repair work.

Complainant testified that his only problems with Respondent's repairmen arose over whether or not Complainant accepted their work when it was submitted to him for painting. He admitted that sometimes a repairman became upset when Complainant asked him to do more work on a car the repairman felt he had finished, but stated that such instances were not occurring more than usual toward the end of Complainant's employment. Complainant admitted that toward the end of that employment, he would go straight to Ms. Cordrey if a repairman "gave" him "any static" about work he sent back. Complainant testified that Ms. Cordrey would "back him" in such instances.

27) Three of the four repairmen who worked for Respondent during Complainant's employment testified at hearing.

Richard Dean traced Complainant's problems with repairmen to when, as assistant manager, Complainant did small repair jobs and told the repairmen they were slow. (Complainant testified that he did small repair jobs to help, when he had no paint work to do.) Mr. Dean also testified that by the time he reached his last four to five months of employment at

Respondent, Complainant was "always stirring up trouble." He stated he heard Complainant complain virtually daily about Respondent's facility (especially the lack of a paint booth) and how Respondent's operation was run. Mr. Dean's major objection to Complainant seemed to be the several times when Complainant was not in the paint room when Mr. Dean needed parts painted. Due to a back problem, Mr. Dean sometimes did not feel well at work during times material herein, and this forum notes that this problem may have caused what appears to be, when compared with the testimony of other witnesses, an exaggeratedly negative reaction to Complainant.

Gerald VanBrocklin testified that he and Complainant had a lot of disagreements about whether Mr. VanBrocklin's work was paint-ready. He indicated that Complainant was a perfectionist, expecting more from repairmen than Mr. VanBrocklin had experienced before. Mr. VanBrocklin felt that Complainant believed he was better than his coworkers. Mr. Van Brocklin stated that "lots of times" when repairmen were looking for Complainant, he'd be gone or unavailable. He attested to one specific instance toward the end of Complainant's employ when Complainant demanded that a repairman be assessed the amount of Complainant's wages for repainting a vehicle which Complainant had initially painted before the repair work was done satisfactorily. Mr. VanBrocklin objected to Complainant's having done quite a bit of spot paint work in the body shop, ignoring Complainant's explanation that he did this when he had no place else to paint work which was due.

Gus Schwartz testified that during the six months before his termination Complainant "got a short fuse and use to blow his top a lot" and was "picky" more often and more difficult to deal with, but that Mr. Schwartz had no disagreements with Complainant except over whether Mr. Schwartz's repair work was done properly. Mr. Schwartz also testified that he never noticed Complainant being absent beyond what was normal in the shop.

Mr. Dean and Mr. Schwartz stated that they would not want to work in the same shop as Complainant today.

28) To corroborate Respondent's allegations concerning Complainant's conflicts with repairmen and other problems at work, Respondent also offered the testimony of the following people who worked with Complainant before and after his employment with Respondent.

a) Neal Knight, who worked as a painter for Complainant for two weeks about eight to nine years ago, testified that he did not get along very well with Complainant at the time. Mr. Knight stated that although Complainant could be very personable to talk with, he was overbearing in work matters and gave the impression he thought he was superior to coworkers, at least partly because he was a perfectionist in work. (Complainant testified that Mr. Knight, who had then only painted for one year, was too inexperienced to be qualified for the work he was supposed to do for Complainant.)

b) Pat Doherty, who ran the auto dealership in whose body shop

Complainant worked just prior to coming to Respondent, testified that Complainant's attitude was a "little bit" insubordinate, because Complainant was too independent with his time, feeling free to take long breaks from work and to delegate too much to his helper. Mr. Doherty's opinion was based in large part upon what Complainant's supervisor, now deceased, had told him. (Complainant testified that a dispute over one such incident was the only time he did not get along well with that supervisor, and that he had no problems getting along with the other personnel in that shop.) One repairman at that shop, Larry Meeuwse, testified that he had problems with Complainant because Complainant was never satisfied with his work. Mr. Meeuwse felt that Complainant wanted him to do work to finish the repaired area which was properly Complainant's task. However, because Mr. Meeuwse had no previous experience in a segregated shop, he was not accustomed to division of repair and paint duties and assessment of his work by a painter.

c) Eugene Szekely managed the body shop at which Complainant worked for seven months during the year after he was terminated from Respondent's employ. He testified that Complainant made one repairman "white with rage" by complaining about that repairman's work. Mr. Szekely also testified that Complainant and the other painter did not talk after Complainant had been employed one or two week(s). (Mr. Szekely did not state the reason for this.) Mr. Szekely also testified that Complainant came to work late and numerous times left work without telling him, despite Mr. Szekely's having asked Complainant not to do either.

Messrs. Knight, Doherty, Meeuwse, and Szekely testified they would not want to work today in the same shop as Complainant.

28)To corroborate Complainant's testimony concerning his ability to get along with coworkers and help refute Respondent's evidence concerning Complainant's flaws, the Agency offered the testimony of the following people who worked with Complainant during and after his employment with Respondent.

a) Joe Garcia, Jr., Complainant's son, worked as Complainant's helper throughout all of Complainant's employment at Respondent except the first week and last four weeks. He testified that he witnessed some disagreements between Complainant and repairmen, but that they all arose when Complainant pointed out to the repairman work he had not done satisfactorily. Joe Jr. also testified that he was not doing all Complainant's work when Complainant was absent and that Complainant did not push his work on Joe Jr. so that Complainant could leave work.

b) Richard Garcia, Complainant's nephew, substituted for Joe Jr. as Complainant's helper during the last four weeks of Complainant's employment at Respondent. He testified that he saw Ms. Cordrey discussing business with Complainant, and they seemed to have a "pretty good working relationship." He stated that he never heard Ms. Cordrey criticize Complainant in any way or complain about his work. He testified that he did not see atypical conflicts between Complainant and Respondent's repairmen, and that those he did see concerned whether or not work repairmen had submitted to Complainant was paint-ready. He stated that Complainant had never had him clean Complainant's personal vehicle during work time.

c) Ben Hockman, manager of the auto body shop where Complainant worked nearly three months after his discharge by Respondent, testified that Complainant was a particularly good employee, reliable, punctual, and a perfectionist.

d) Larry Jones and James Kiser, Jr. worked for Honda of Beaverton as shop foreman and repairman, respectively, when Complainant worked there. Mr. Kiser later contracted with Complainant to paint for Mr. Kiser's auto body shop. Mr. Kiser had no trouble "whatsoever" getting along with Complainant at Honda of Beaverton or his own shop. He testified that two other Honda of Beaverton repairmen who came to work for Mr. Kiser when Complainant worked there had no problems getting along with Complainant at Honda of Beaverton or Mr. Kiser's shop. Mr. Kiser also testified that Complainant is a perfectionist. Mr. Jones testified that as far as he knows, Complainant had no extraordinary problems getting along with coworkers at Honda of Beaverton. Mr. Jones later testified that Complainant had some problems with coworkers, but he did not know what they were. Mr. Jones would not have dealt with those problems as a rule.

e) Joe Garcia, Jr., Complainant's full-time helper at Honda of Beaverton, testified that there was not an unusual amount of conflict between Complainant and the repairmen at Honda of Beaverton, and that neither he nor repairmen Kiser, Byrd, or Larsen had any problems getting along with Complainant there or at Mr. Kiser's shop.

30)As early as September 1980, Ms. Cordrey made some effort to locate a painter to replace Complainant. She contacted the Autobody Craftsman's Association to inquire whether any good painters were looking for work. At several times during Complainant's employment, she talked with John J. Cox, her business counselor, about problems she was having with Complainant and her need for a new painter. (Mr. Cox, who also counseled Complainant, testified that Complainant had problems managing employees and that he and Ms. Cordrey conflicted because both tried to run the shop when they were there.) One or two months before discharging Complainant, Ms. Cordrey once asked Richard Bobzien, a paint products salesman who called on approximately seventy different auto body shops, to look for a good painter for Respondent. Her explanation was just that she was having paint problems. These very tentative requests or comments did not appear to reflect any actual intent on Ms. Cordrey's part to discharge Complainant.

Ms. Cordrey testified that before Complainant's employment, Respondent had so much trouble with painters that Ms. Cordrey would "do almost anything than go through finding another one." This forum must view the latter part of her remark as an exaggeration, since Ms. Cordrey had only

to look in her own shop, to Mr. VanBrocklin, to replace Complainant when she did terminate him.

31) On the morning of June 23, 1981, Complainant had a disagreement with his helper Richard Garcia. Complainant had told Richard not to take his morning break until Richard had reached a certain point in his work, so that they could meet Complainant's schedule for the job involved. (Complainant carefully planned the work schedules of himself and his helper.) When Complainant returned to Richard's worksite later, Richard was taking his break even though he had not reached the specified point in his project. Richard had gone to Ms. Cordrey and told her that Complainant would not let him take his break until he got his project to a given stage, and Ms. Cordrey had told him he could take his break right away.

Complainant took Richard to Ms. Cordrey and asked her to make out Richard's final paycheck, because Richard had not listened to Complainant. Ms. Cordrey told Complainant that Richard was entitled to take his break and could do so. Complainant explained why he wanted Richard to leave, and Ms. Cordrey reiterated her position. Finally, Ms. Cordrey told Complainant that if he did not calm down, he would be the one to leave if anyone did at that point. Neither Richard nor Complainant felt that Ms. Cordrey gave the impression that Complainant was about to be fired. In fact, he and Richard returned to work, and neither thought the incident "was a big deal." Both thought it was over. At hearing, however, Ms. Cordrey described herself as a "nervous wreck" afterward, because this incident added to the conflict which had been building between her and Complainant for a long time. Ms. Cordrey stated that it "was getting so that * * * (she) just did not want Complainant around anymore."

33) Since Complainant had discovered information which led him to believe that Respondent could in fact afford to get a spray booth and simply chose not to, Complainant had been considering reporting Respondent to the Accident Prevention Division of the Worker's Compensation Department (hereinafter the APD) in order to induce Respondent to acquire a booth. He found out the APD's telephone number about one month before June 23, 1981, and kept it until that date. When Complainant went home for lunch on June 23, 1981, Complainant called the APD and told it he was reporting an occupational health violation: the lack of a spray booth at his place of employment. In response to the APD's questions, Complainant stated that painting conditions at Respondent were unhealthy because the painter and helper did all the prep and spray work in a little room with insufficient ventilation and overspray buildup. Complainant did not mention any other health or safety problems to the APD. The APD told Complainant that it would inspect Respondent's premises and that Respondent could not discharge Complainant for complaining to the APD. (Complainant wanted and intended to continue working for Respondent indefinitely.)

34) Because he did not want to deceive Respondent and he did want to be honorable, fair, and loyal to

Respondent, Complainant told Ms. Cordrey, later on June 23, 1981, that he had just reported Respondent to "OSHA" (i.e., the APD). According to Complainant and Richard Garcia, Ms. Cordrey replied by telling Complainant, "Pack 'em up * * * I want you off the premises." Ms. Cordrey testified that her response to Complainant's announcement was "Joe, I don't give a damn, just pack your stuff and get out of here." Complainant specifically denies that Ms. Cordrey said that she didn't care, she didn't give a damn, or anything to that effect. Regardless of whether Ms. Cordrey said this or not, Ms. Cordrey testified that, in fact, at the time she didn't care if Complainant had reported Respondent or not.

After Complainant had ascertained that Ms. Cordrey had fired him, Complainant asked for his final paycheck. According to Complainant, Ms. Cordrey said she would pay him only for work on vehicles whose paint work was finished.

Complainant insisted upon talking with Mr. Cordrey before leaving Respondent's premises on June 23, 1981. Complainant testified that he wanted to talk with Mr. Cordrey about getting paid for painting he was in the process of completing, and Mr. and Ms. Cordrey understood that Complainant wanted to talk with Mr. Cordrey because he did not think Ms. Cordrey had the authority to fire him. In any case, Mr. Cordrey came and talked with Complainant. Thereafter, Complainant left. Respondent paid Complainant for all paint work he had done.

35) Ms. Cordrey testified that she did not discharge Complainant because he complained to the APD. She testified that she discharged him because she was tired of the build-up of tension, of putting up with all of Complainant's nit-picking complaints, of Complainant's unavailability, and of not wanting to get up and go to work because of Complainant. She said she had "just had it." (Mr. Cordrey did not deny that Complainant's complaints about the lack of a spray booth were part and parcel of his nit-picking complaints.) Ms. Cordrey insisted that if Complainant had come to her on the afternoon of June 23, 1981, and asked for or wanted to do anything, she would have fired him. She stated that any contact with Complainant at that time would have resulted in her discharging him, and that Complainant's report to the APD itself did not contribute to his discharge at all. Finally, Ms. Cordrey testified that if she had not fired Complainant when she did, Complainant would have resigned or she would have fired him another, unspecified time.

36) On June 24, 1981, the day after his discharge, Complainant brought Ms. Cordrey a letter from Complainant's attorney stating that Complainant believed that she had fired him for reporting to the APD what Complainant believed was a violation by Respondent of occupational health law. The message stated that it is illegal to discharge an employee for this reason, and requested reinstatement of Complainant. Ms. Cordrey replied that she was aware of the law involved and denied the reinstatement request.

37) Ms. Cordrey testified that during his employment at Respondent, Complainant had never mentioned that he

needed a spray booth for health reasons; he had always led Ms. Cordrey to believe that a spray booth was not for his health, but because of overspray, dust, and the inconvenience caused by the fact that the paint room was tied up every time there was a complete paint job in progress. However, this forum does not believe that, when she discharged Complainant, Ms. Cordrey did not know, from Complainant's repeated remarks thereon and her experience in the auto body industry, that paint overspray and dust could be hazardous to worker health, and that Complainant wanted a spray booth at least in part to minimize those hazards. This forum concludes that not only did Ms. Cordrey know these facts when she discharged Complainant, but that Complainant made clear to Respondent immediately after the discharge (in his June 23, 1981, conversation with Mr. Cordrey and his June 24, 1981, request for reinstatement) that which Respondent already knew or should have known: Complainant had reported Respondent to the APD because Respondent did not have a spray booth.

38) During all times material herein, Complainant reasonably believed that Oregon occupational health and safety law required that any occupational spraying of automobile paint be performed in a spray booth, to protect worker health.

39) The day after Complainant reported Respondent to the APD, an APD compliance officer conducted an inspection of Respondent's premises and cited Respondent for five general violations of worker health and safety law. The first violation was "production spray finishing operations at * * * (Respondent) were not conducted inside of a spray paint finishing booth or room." The citation stated that APD required correction of this violation by August 17, 1981.

Ms. Cordrey stated that in telling her how to comply with the requirements of this citation, an APD inspector did not tell her she had to have a spray booth, but told her Respondent could not paint anymore completes without a spray booth.

Respondent corrected all the other problems noted on the citation, apparently desisted from doing completes, and has not heard from the APD since the summer of 1981. Respondent installed a spray booth in August 1983.

40) According to Ben Hockman's best recollection (as set forth in a signed statement he gave the Agency in October 1981), Ms. Cordrey telephoned him sometime between June 23, 1981, and July 6, 1981, and said that she heard he had hired Complainant. (Ms. Cordrey testified that she had received a notice concerning Complainant's unemployment claim and wanted to see if he was employed.) When Mr. Hockman told Ms. Cordrey that he was considering hiring Complainant but had not yet done so, Ms. Cordrey (according to Mr. Hockman's statement) told Mr. Hockman she had "some problems" with Complainant and was dissatisfied with him, and that Complainant was unhappy because Respondent had no facilities and no spray booth. According to Mr. Hockman, Ms. Cordrey also told him that she was "real mad" at Complainant, because he had gone to the APD

over her head and that Mr. Hockman should watch out for him.

At hearing, Ms. Cordrey stated that during this conversation, when Mr. Hockman told her Complainant had told him that she fired Complainant because he had reported Respondent to the APD, she denied this and told Mr. Hockman that she had discharged Complainant because of building tension, Complainant's not getting along with other employees, and deterioration of Complainant's work.

This forum believes Mr. Hockman's statement, as it was made much closer in time to the conversation at issue than was Ms. Cordrey's testimony, and because there is no apparent reason for Mr. Hockman to prevaricate, exaggerate, or even be mistaken. However, this forum notes that Mr. Hockman's statement does not clearly indicate that Ms. Cordrey told him she had discharged Complainant because of his APD report (even though that is apparently how Mr. Hockman interprets Ms. Cordrey's remarks to him). Mr. Hockman's statement does indicate, Ms. Cordrey does not contest, and this forum finds, that (even) after Complainant's discharge, Ms. Cordrey's response to Complainant's complaint to the APD was substantial anger.

41) Richard Garcia, Jr. and Messrs. Dean, VanBrocklin, and Schwartz found Ms. Cordrey to be a very fair "boss" who treated her employees well and was very easy to work with.

42) Virtually all of the record supports the conclusion, and so this forum finds, that at all times material herein, Complainant performed excellent paint work. In terms of the quality of his craftsmanship as a painter, Complainant was (and apparently still is) at the top of the auto painting trade. Complainant was/is also a proud, meticulous perfectionist in his work, independent and working according to his own standards of what are good, honorable, and fair practices. As his son and long-time helper stated, Complainant wants to do his work "right and best" more than anyone else he's ever encountered.

Ms. Cordrey testified that the quality of Complainant's work at the end of his employment at Respondent "seemed" not as good as it had been at the start. She attributed this to Complainant having his helpers do a lot of jobs by themselves, when Complainant was not there. In support of her contention, Ms. Cordrey testified that she had located records of seven of Complainant's paint jobs being returned for flaws since shortly after Complainant left. However, an exhibit indicates, and so this forum finds, that Complainant performed approximately six hundred paint jobs while employed by Respondent. Seven returns represent a mere one per cent of those jobs. Ms. Cordrey did not indicate how many of the seven were returned because of paint flaws, because she also held Complainant responsible for repair flaws, since he had been willing to paint each job. The only other criticism of Complainant's painting was by Mr. Dean, who testified that Complainant's work was below standard in terms of durability. Again, given Respondent's long-term guarantee however, a return rate of just one per cent (even if Complainant is responsible for all seven returns) belies this claim.

43) Complainant's reaction to being discharged by Respondent was one of total surprise and shock (he had not expected to be fired), as well as severe embarrassment, hurt, and shame. He was, in short, very distressed once he realized that he really had been fired. He soon became anxious, worried about supporting his family, suffered a severe loss of pride (he had never been fired before) and became depressed and withdrawn from his wife (to whom he had been very close before his discharge). Although Complainant was and is a "closed person" who held/holds his emotions inside himself, his wife noticed his depression and withdrawal right after his discharge, as his communication with her became very poor. Complainant talked to his wife and went places with her much less often. They stopped enjoying each other's company and having fun together. Complainant was so preoccupied and distressed by his discharge and its effects that he wanted to be alone. Complainant's relationship with his wife did not start to "get back to normal" until October 1983, and his discharge affects their marriage in some ways to the present.

Within four to six months of his discharge, Complainant began to feel severe symptoms of what turned out to be an ulcer. He had not experienced any of those symptoms before his discharge. However, without any medical evidence linking this ulcer to Complainant's discharge, this forum lacks the information and knowledge to find that this ulcer was caused by the discharge.

As a result of his discharge, Complainant suffered a loss of reputation in his community which continues to the present.

44) On July 6, 1981, Complainant began working as an auto painter for Heinrich Datsun. He worked there on a temporary, trial basis to assess the amount of work available for him there. Heinrich Datsun paid Complainant $9.50 per hour, on a commission basis. Complainant earned a total of $3301.01 in this employment.

On September 30, 1981, when Complainant and Heinrich Datsun agreed that there was insufficient work for Complainant, they terminated Complainant's employment so that he could look for other auto painting work.

45) Thereafter, Complainant was unemployed for six weeks, during which he received $150.00 per week in unemployment compensation.

46) Thereafter, Complainant did some (non full-time) paint work on an independent basis, earning a total of $849.75, $173.75 of which was from moonlighting Complainant would also have done if he had been working for Respondent at the time.

47) From Complainant's June 23, 1981, discharge through December 31, 1981, Respondent's painter earned $13,149.93. Assuming, as it must, that Respondent's painter earned this total at a steady rate, this forum finds that he earned about $2399.62 per month between June 23, 1981, and November 10, 1981. During that 4½ month period, therefore, Respondent's painter earned approximately $10,798.30.

48) Between the July 1, 1981, expiration of Respondent's health insurance coverage for Complainant and his family and November 10, 1981, Complainant and his family incurred $5.88 in medical costs. However, this forum cannot ascertain whether this sum would have been paid by Respondent's insurance had Complainant been covered by it, because this forum does not know if Complainant would have already met the applicable deductible for 1981.

49) On November 10, 1981, Complainant began what he then regarded as permanent, full-time employment as an auto painter for Honda of Beaverton. He was paid $10.00 per hour flagged for the work he did (rather than per actual hour of work). During his employment at Honda of Beaverton, Complainant earned a total of $20,199.23.

Complainant terminated his employment at Honda of Beaverton on July 30, 1982, because he feared that he had a severe health problem (later found to be an ulcer) and wanted to move to his familial home in Sacramento, California. Complainant also quit because he believed that the paint work at Honda of Beaverton was not being distributed equally between him and the other painter. (However, an exhibit shows the monthly flag time of Complainant and the other painter ("Smitty"), and evidences that Complainant by and large was assigned more flag time than Smitty. Complainant's perception was based upon the fact that he and his full-time helper sometimes had no work to do, while Smitty, who had a less than part-time helper, had several jobs waiting. Complainant did not seem to consider the fact that he and his helper could complete work much faster than Smitty.) In any case, Complainant left his employment at Honda of Beaverton voluntarily.

50) During Complainant's employment at Honda of Beaverton, Respondent employed one painter at a time, at a rate equaling $10.56 per flag hour. The record contains pay figures for that painter during time periods which do not exactly coincide with the period of Complainant's employment at Honda of Beaverton. Assuming, as this forum therefore must, that Respondent's painter earned this total at a steady rate during Complainant's employment at Honda of Beaverton, Respondent's painter(s) earned a total of $20,778.31 during that time. This estimate totals $579.08 more than Complainant earned at Honda of Beaverton during the same period. However, since this small difference, constituting only about one per cent of what Respondent's painter(s) apparently earned during the time, is based upon the above-cited inexact assumption, it is of no significance herein.

51) This forum assumes that Complainant would have earned less than Respondent's painter actually did between November 10, 1981, and July 30, 1982, had Complainant been working at Respondent throughout that time. Complainant would have been paid for the time flagged for the work he did, and he would have done all Respondent's paint work. Respondent's painter was paid, and worked, on the same bases. However, Respondent's painters were not subjected to the time-consuming personal conflict with and hostility of co-workers which Complainant would have experienced (even absent his spray booth complaints). Consequently, although

Complainant would have done the same work as Respondent's painter did and would have been paid at the same rate therefor, this forum assumes that Complainant would have had less time to work productively and therefore would have accomplished at least slightly less work than Respondent's painter did.

52) For the reasons cited in Findings of Fact 50 and 51 above, this forum concludes that had Complainant worked at Respondent between November 10, 1981, and July 30, 1982, he would have earned a total sum equal to or less than what he earned during that time at Honda of Beaverton.

53) In terms of fringe benefits, Honda of Beaverton, like Respondent, offered health insurance for Complainant and his family. Witnesses were unable to inform the forum of the amount of the health insurance deductible at Respondent between November 10, 1981, and July 30, 1982, and there is no evidence on the record concerning vacation benefits at Honda of Beaverton during that time. Consequently, there is insufficient evidence on the record from which to ascertain whether the fringe benefits existing at Honda of Beaverton and Respondent between November 10, 1981, and July 30, 1982, differed, much less calculate the monetary effects of any such differences.

54) During all periods of unemployment between his discharge from Respondent's employ and the start of his employment for Honda of Beaverton, Complainant diligently searched for work.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an auto body shop employing one or more persons in Oregon. Sharon Cordrey has been Respondent's general manager since about February 1980. She and Respondent's owners Thomas Cordrey (Ms. Cordrey's husband) and John Cordrey have been Respondent's corporate directors during all times material herein.

2) Respondent employed Complainant as Respondent's only auto painter from January 31, 1980, to June 23, 1981. During that full-time employment, Complainant's paint work was excellent. While continuing to work as painter, Complainant also worked as Respondent's assistant manager for 6½ months between approximately May 16, 1980, and November 26, 1980.

3) During his employment at Respondent, Complainant had difficulty getting along with the people who repaired the damaged vehicles which Complainant then painted. As painter, Complainant was charged with assessing the repair work on a vehicle and assuring that it was complete and satisfactory before Complainant painted the vehicle. If it was not, Complainant was supposed to return the vehicle to the pertinent repairman for additional work. At segregated body shops, this relationship between painter and repairman normally caused a certain amount of friction on the issue of whether repair work was paint-ready, and this conflict intensified to the extent the repairman applied different standards of quality to his work than did the painter. In this case, the fact that Complainant was a rather inflexible perfectionist meant that he subjected repair (and his own) work to high standards, which led to frequent, overt conflict (as well as hurt coordination) between Complainant and Respondent's repairmen. Toward the end of Complainant's employment at Respondent, when such conflict occurred, Complainant reported it to his supervisor, Ms. Cordrey, who, according to Complainant's undisputed testimony, backed Complainant and had the repairman redo the work which was the subject of conflict. However, Complainant's frequent criticism of the repairmen's work was an irritant to Ms. Cordrey, and she blamed Complainant for his problems with the repairmen. The repairmen interpreted Complainant's assessment of their work (and to a much lesser extent, his attempts to help them with minor body work and his occasionally doing spot painting in the body shop) as an indication of arrogant conceit, and they did not like working with him.

4) During all times material herein, Complainant's workspace as Respondent's painter was a poorly ventilated, dusty paint room. From the very beginning of his employment at Respondent, Complainant made it clear to Respondent that he felt strongly that Respondent should obtain a spray booth, a ventilated metal room equipped with air circulating and filtering devices. Complainant wanted a spray booth both to protect painter (and public) health (by minimizing ingestion of harmful paint residue and dust), and to increase Complainant's efficiency and the quality of his work (by minimizing its exposure to paint residue and dust and maximizing space for painting). In response to Complainant, Respondent attempted to obtain a spray booth, but delayed acquisition throughout Complainant's employment at Respondent because of the expense of buying and installing the booth, and the possibility of having to subsequently dismantle and move the booth if Respondent succeeded in its efforts to obtain property adjacent to its shop. Throughout the entire period of his employment at Respondent, Complainant very frequently talked to Respondent, and particularly Ms. Cordrey, about the need for a paint booth. By at least the time Complainant's employment ended, Ms. Cordrey knew Complainant's reasons for complaining about the lack of a spray booth.

5) During Complainant's employment, Ms. Cordrey (and two of Respondent's three repairmen) became increasingly vexed about Complainant's absences from Respondent's paint room without notice to Ms. Cordrey. (Complainant's testimony that most of these absences were taken for legitimate reasons -- to obtain supplies or to take his breaks at times optimal for his paint work -- was uncontroverted and therefore is adopted as fact.) Ms. Cordrey's testimony that Complainant had his painter's helper(s) doing his work during his absences is effectively controverted (and therefore not found to be fact) by the testimony of those helpers and Complainant, and the low incidence of cars painted during Complainant's employment being returned for faulty work.

6) From the time of Complainant's tenure as Respondent's assistant manager, Ms. Cordrey, an

inexperienced manager, saw Complainant as a challenge to her authority, because of what she saw as Complainant's obdurate "hammering" on her with complaints about repair work and complaints about the lack of a spray booth, as well as his complaints that her paint estimates were too low and his failure to always let Ms. Cordrey know when he was going to leave the shop. Ms. Cordrey saw her relationship with Complainant as beleaguered by tension and conflict, which grew throughout Complainant's employment and for which she blamed Complainant. Complainant did not feel this tension and conflict.

7) On June 23, 1981, Complainant had three encounters with Ms. Cordrey. The first consisted of Complainant again complaining about the lack of a spray booth to Ms. Cordrey. The second involved Complainant's helper taking a break when Complainant had told him not to, Ms. Cordrey letting the helper take the break when he did, and Complainant then asking Ms. Cordrey to give the helper his final paycheck because he had not obeyed Complainant. Ms. Cordrey, vexed by Complainant, declined to do what Complainant asked.

Before this third encounter with Ms. Cordrey on June 23, 1981, Complainant reported the lack of a spray booth as a violation of the Oregon Safe Employment Act to the APD, as he had long contemplated doing. Complainant made this complaint because he felt it might cause Respondent to finally get a spray booth. He fully intended to continue working for Respondent. A few hours later, Complainant told Ms. Cordrey he had made his complaint to the APD, because he did not feel it would be right to hide that fact. Ms. Cordrey immediately discharged Complainant.

8) Ms. Cordrey claims that she discharged Complainant because she had enough of the accumulating tension and conflict between her and Complainant (caused by Complainant's complaining to her about the lack of a spray booth and the quality of the repairmen's work, as well as his absences from work without notice). Ms. Cordrey claims that she did not discharge Complainant because he (told her he) had reported Respondent to the APD. However, it is obvious from Ms. Cordrey's testimony that Complainant's numerous complaints to her about the lack of a spray booth played at least a substantial role in her being sufficiently "fed up" with Complainant to discharge him. In addition, it is equally obvious to this forum the Complainant's complaint to the APD triggered, even if it did not by itself cause, Complainant's discharge. After all, Ms. Cordrey discharged Complainant in immediate response to learning of his APD complaint. Ms. Cordrey perceived his APD complaint, as she perceived so many of Complainant's actions, as a challenge to her authority ("going over" her "head" in order to work according to his own standards of health and quality). Although Ms. Cordrey testified she told Complainant she didn't "give a damn" (about his report to APD) before she fired him, she admitted that she felt very angry about it when she talked to a potential employer of Complainant during the two weeks after Complainant's discharge. This forum concludes therefore that

although Ms. Cordrey claims that her perception that Complainant could not get along with his coworkers, his absences from work without notice, and his complaints about the lack of a spray booth solely caused Complainant's discharge, this forum finds that the latter complaints, capped by Complainant's complaint to the APD, together played a determining, key role in Respondent's discharge of Complainant. Complainant's complaints about the lack of a spray booth to Ms. Cordrey and the APD made a difference: Ms. Cordrey would not have discharged Complainant when she did if he had not made (and told her of) his complaint to APD, and if he had not repeatedly complained to Ms. Cordrey about the same topic throughout his employment at Respondent.

9) During all times material herein, Complainant reasonably believed that Respondent's failure to have a spray booth was a violation of APD rules under or relating to ORS 654.001 to 654.295, and it was.

10) As a direct result of being discharged by Respondent, Complainant suffered shock and mental distress, which deeply affected him and his relationship with his wife. Even ignoring his suffering because of the ensuing administrative and judicial proceedings, this forum concludes that Complainant's mental anguish directly caused by his discharge was initially severe, that it lasted in lessening but notable degrees until recently, and that it has had multiple negative emotional effects upon Complainant and his relationship with his wife.

11) If Complainant had worked for Respondent between June 23, 1981, and November 10, 1981, he would have earned approximately $10,798.30 in Respondent's employ, plus an additional $173.75 from other work, or a total of $10,972.05. In fact, during that same time period Complainant earned $3301.10 at Heinrich Datsun plus $849.75 in other work, or a total of $4150.85, in temporary, non full-time work which was not substantially equivalent to the work Complainant had done at Respondent. The difference between the latter two total sums is $6,821.20.

12) Between November 10, 1981, and July 30, 1982, Complainant had permanent, full-time employment as an auto painter, earning wages equivalent to (herein, equal to or slightly more than) what he would have earned at Respondent during that time period. This employment, therefore, was substantially equivalent to the work Complainant had done at Respondent. Complainant voluntarily terminated his employment as of July 30, 1982.

13) During all periods he was unemployed between June 23, 1981, and November 10, 1981, Complainant searched diligently for work.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent, an Oregon corporation, was a person and an employer subject to the provisions of ORS chapter 654 and ORS 659.010 to 659.110.

2) Between January 31, 1980, and June 23, 1981, Complainant was Respondent's employee, as defined by ORS 654.005(5).

3) The words, actions, and inactions, and the motivations therefor, described herein, of Sharon Cordrey

(Respondent's general manager and secretary-treasurer), Thomas Cordrey (Respondent's president and one-half owner) and John Cordrey (Respondent's one-half owner), all three of whom were also Respondent's corporate directors during all times material herein, are properly imputed to Respondent.

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

5) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing Respondent and Complainant of the matters described in ORS 183.413(2)(a) through (i).

6) By discharging Complainant from employment on June 23, 1981, because Complainant made complaints under or related to ORS 654.001 to 654.295, Respondent violated ORS 654.062(5)(a).

7) The purpose of a back pay award in an employment discrimination case is to eliminate the loss in compensation a complainant has suffered because of the respondent's unlawful practice. Accordingly, when, on November 10, 1981, Complainant obtained permanent, full-time employment in the same occupation in which he had worked for Respondent, earning the same or more compensation than he could have earned at Respondent, i.e., when Complainant obtained work substantially equivalent to his work for Respondent, the accrual of Complainant's back pay award herein ceased.

As part of the remedy herein, Complainant could have been awarded reinstatement to his position at Respondent or, in the alternative, a lump sum front pay award (if reinstatement were not appropriate given Respondent's hostility toward Complainant). However, since Complainant obtained the alternate employment described in the previous paragraph, and since he left it voluntarily, Complainant no longer has any right to reinstatement or like remedy, because as far as this forum can ascertain, Complainant would have had substantially equivalent alternate employment now if he had not of his own accord ended it.

There is persuasive evidence that, unfairly or not (which is not for this forum to decide), Respondent did not find Complainant to be a "good" employee (even aside from his spray booth complaints) during the last part of his employment. Consequently, it would not be appropriate, as part of the remedy herein, for this forum to order Respondent to give Complainant a "good" reference, as the Amended Specific Charges request.

8) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and awarding as damages the sums of money specified in the Order below is an appropriate exercise of that authority.

OPINION

Context and Casualty

After a careful analysis of all the testimony concerning the perceptions of the persons involved in this matter (as described, for example, in Findings

of Fact 25 through 30, 32, 34, 35 and 41 above), this forum has concluded that while some of it is exaggerated (by the advocacy context of the hearing, the passage of time, and the personality differences involved) or at least unfair, most of it is at least an accurate reflection of how the perceiver now feels about occurrences relevant herein. Complainant does (and did, during times material) see himself as a proud, fine craftsman, who did not behave in a way which should have unduly or unusually upset anyone working at Respondent. He found his working relationship with his supervisor, Sharon Cordrey, acceptable, even good, and thought they were friends. Ms. Cordrey, on the other hand, believes that she was, ultimately, pushed to her boiling point by what she perceived almost from the start of Complainant's employment as his challenges to her authority, i.e., his constant "hammering" at her with complaints about, for the most part, the lack of a spray booth and the quality of the work of Respondent's repairmen, and his afternoon absences from work without notice.

After listening carefully to Complainant and observing him closely during hearing, the forum finds that during times material herein, he was a proud, independent and expert craftsman who could be uncompromising about what he felt was fair and just and about his work standards. In areas affecting his strong sense of personal honor and professional pride, he did not "give and take" with others as much as his coworkers and supervisors expected in the team process of repairing and painting automobiles. Ms. Cordrey was a new manager who felt very sensitive to and threatened by Complainant's obdurate insistence that Respondent function according to his own standards and upset by his frequent conflict with repairmen. Complainant's assessment of repairmen's work (which, it is important to note, Complainant was required by his job to formulate and voice) and his way of presenting those assessments understandably offended those repairmen who did not share Complainant's perfectionism. (This is consistent with the pattern of how many repairmen -- especially the inexperienced, less exacting or injured -- and some supervisors reacted, in differing degrees, to Complainant.) The conflict and tension between Complainant and Respondent's repairmen seems to largely have been the result of Complainant being the excellent painter Respondent expected him to be (and not being particularly tolerant of craftsmen satisfied with anything less than excellence). In any case, Complainant's conflicts with repairmen and complaints about them to Ms. Cordrey exacerbated her feeling pushed and upset by Complainant. Ms. Cordrey blamed Complainant for whatever turmoil existed in her shop. (She appears not to have anticipated or understood that excellence in work can have grating side effects.) Essentially, therefore, for reasons probably beyond his understanding or control, Complainant became a frequent irritant to Ms. Cordrey, as a direct and indirect result of his striving to improve Respondent's repair and paint process and product in different ways and his independent work attitude, both of which were perceived as a threat to Ms. Cordrey's authority. There seems

to have been a textbook "personality conflict" between Ms. Cordrey and Complainant.

That is how this forum sees the context of this matter's dispute. The question herein is what role did Complainant's complaint to Ms. Cordrey and, finally, to the APD about Respondent not having a spray booth play in Ms. Cordrey's discharging Complainant?

Given the evidence by everyone working for Respondent during times material herein, including Ms. Cordrey's testimony as to how Complainant drove her to fire him, this forum must conclude that, together, Complainant's many and frequent complaints about the lack of a spray booth to Ms. Cordrey and his complaint about this to the APD played at least a determining role in Ms. Cordrey's discharging Complainant. His spray booth complaints to Ms. Cordrey constituted at least a substantial amount of the "hammering" on Ms. Cordrey, which so annoyed her, and, according to Ms. Cordrey, ultimately predisposed her to discharge Complainant at the slightest provocation. (This is ironic, because not only does Oregon law allow, but Ms. Cordrey stated Complainant's job required, Complainant to bring occupational health and safety equipment concerns to her attention.) Furthermore, because Ms. Cordrey fired Complainant in direct response (i.e., immediate reply) to learning of Complainant's complaint to the APD, and because she admitted, in effect, that the APD complaint made her so angry that she was still angry about it when she talked to Mr. Hockman during the following two weeks, this forum must conclude that learning of Complainant's complaint to APD at least triggered the pre-existing tension Ms. Cordrey felt toward Complainant to erupt into her discharging him.

In this forum's view, there is no question that Complainant's complaints about Respondent's lack of a spray booth were complaints related to or under Oregon's occupational health and safety laws. Complainant recognized and worried about the health hazard of painting without the air ventilation and circulation afforded by a spray booth, and this, along with the other positive features of a booth, caused him to virtually and persistently insist that Respondent get a booth as soon as at all possible. Oregon's APD, which enforces Oregon's occupational health and safety laws, accepted Complainant's complaint about the lack of a booth, and subsequently cited Respondent for having its paint work done without a booth. Respondent's attempt to portray this issue as related to convenience and work quality rather than worker health clearly fails.

There is also no question in this forum's view that ORS 654.062(5)(a)'s prohibition against taking an adverse action against an employee because that employee has made any complaint under or related to ORS 654.001 to 654.295, by its plain and unambiguous language, embraces complaints to the employer or the state agency enforcing the latter statutes. (This position is reflected in OAR 839-06-025 (1)(a) and (b), promulgated after times material herein.)

ORS 654.062(5)(a) prohibits an employer from discharging an employee because that employee made a

complaint concerning worker health. To what degree must Complainant's health-related complaints to Respondent and to the APD have caused Respondent to discharge Complainant in order to render that discharge unlawful under ORS 654.062(5)(a)? In order to meet the statutory standard implicit in "because", must those complaints be the only factor, the determining factor, a determining factor, or a factor in the discharge – or something else in the causality spectrum?

This forum has long used a "key role" test to aid in resolving causality questions: did Complainant's health-related complaints to Respondent and the APD play a key role in his discharge. The Oregon Court of Appeals has accepted that without comment, and the Agency, effective June 12, 1982, promulgated an administrative rule articulating it. (See *Donaldson v. Polk County ESD*, 50 Or App 611, 625 P2d 1390 (1981), and OAR 839-05-015.)

Most recently, in *Ogden v. Bureau of Labor*, 68 Or App 235, 682 P2d 802 (1984), *rev allowed* (1984), the Court of Appeals concluded that Oregon employment discrimination law prohibits use of age as a "determining factor" in an employment decision. The court appeared to define "determining factor" as a factor which "made a difference" in the employment decision at issue. This, plus the court's later reference, twice in its opinion, to the prohibition against age being "a factor" in an employment decision, leads this forum to conclude that any factor playing more than a minimal role is a determining factor. This dovetails with the description of a "key role" articulated in OAR 839-05-015. Although in *Ogden* the court cited some statutory law and legislative history particular to age as a protected class status, the court clearly also based its causality conclusion upon ORS 659.030(1), Oregon's generic statute prohibiting employment discrimination (on the basis of many protected class statuses, including age) and upon a race discrimination case brought under ORS 659.030(1). In fact, in *Ogden* the court referred to all the protected classes named in ORS 659.030(1) as "criteria prohibited in employment decisions, whether used alone or with legitimate reasons." *Id.*, 682 P2d 802 at 809. Finally, the court's rationale in support of the determining factor test are all equally applicable to both age and the other protected class statuses named in ORS 659.030(1). Consequently, this forum finds the *Ogden* court's "determining factor" test applicable to all the protected classes named in ORS 659.030(1).

During times material herein, ORS 654.062(5), the statutory provision under which the instant matter is brought, stated that the Agency must process an ORS 654.062(5) case

> "under the procedures, policies and remedies established by ORS 659.010 to 659.110 * * * in the same way and to the same extent that the complaint would be processed * * * if * * * (it) involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age"

under ORS 659.030(4),* the employment discrimination statute's subparagraph prohibiting retaliation because of

opposition to discrimination. This subparagraph parallels ORS 654.062(5)'s prohibition of retaliation because of opposition to or complaint against occupational safety and health problems. In following this directive of ORS 654.062(5), this forum has always employed the same "degree of causality" standard as it uses in cases brought under ORS 659.030(1). *See In the Matter of Oregon Metallurgical Corporation*, 2 BOLI 73 (1981).

For all these reasons, this forum adopts the "determining factor" test which the Court of Appeals enunciated in *Ogden* as clarification of the meaning of this forum's key role test: a protected class status played a key role in an adverse action by an employer if that status was a determining factor in that action.

Having concluded above that Complainant's occupational health complaints to Respondent and to the APD played a determining role in Respondent's discharge of Complainant, this forum must also conclude that those complaints played a key role in that discharge. Accordingly, under the law, Respondent discharged Complainant because of those complaints.

ORDER

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

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Joe C. Garcia, Sr. in the amount of NINE THOUSAND THREE HUNDRED TWENTY-ONE DOLLARS AND TWENTY CENTS ($9,321.20), plus interest upon $6,821.20 thereof compounded and computed annually at the annual rate of nine per cent until the date upon which Respondent complies with this paragraph. This award represents $6,821.20 in damages for wages Complainant lost because of Respondent's violation of law set out above, and $2,500.00 in damages for pain and anguish Complainant suffered as a direct result of that violation.

2) Cease and desist from discriminating against any employee because that employee has made a complaint under or related to ORS 654.001 to 654.295.

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* A 1983 correction by the Legislature of ORS 654.062(5)(b)'s reference to ORS 659.030(4), a nonexistent subsection, indicates that the Legislature intended, during times material herein, to refer in ORS 654.062(5)(b) to ORS 659.030(1)(d), now re-labelled ORS 659.030(1)(f).