BOLI ORDERS

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

VOLUME 11

Cited: 11 BOLI

Published by the

OREGON BUREAU OF LABOR AND INDUSTRIES

1995

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W. W. GREGG

Printed in the United States of America

BOLI ORDERS

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INTRODUCTORY NOTE

This eleventh 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 June 2, 1992, and July 20, 1993.

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
DOUGLAS COUNTY,
Respondent

Case Number 03-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 2, 1992.

SYNOPSIS

Respondent refused to allow Complainant the use of his accrued sick leave during his parental leave because he was not ill or disabled. The Commissioner granted summary judgment to the Agency, finding that Respondent violated ORS 659.360; awarded Complainant the value of the days he took as leave without pay and $2,000 as damages for mental distress; and directed Respondent to deduct the hours represented by the leave without pay from Complainant's accumulated sick leave. ORS 659.360(1) and (3); 659.365; OAR 839-08-850(1); 839-30-070(6).

The above-entitled matter was regularly scheduled to be heard before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. Alan McCullough, Case Presenter for the Bureau of Labor and Industries, Civil Rights Division (the Agency), represented the Agency. County Counsel Clifford Kennerly and Assistant County Counsel Paul E. Meyer represented Douglas County (Respondent).

As hereinafter recited, the hearing scheduled for January 22, 1992, was canceled due to resolution by summary judgment and by subsequent stipulation of the participants.* Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On March 21, 1991, Complainant Dan R. White filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practice of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 659.360(3) and 659.360(1)(a).

3) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on July 29, 1991, the Agency prepared and served on Respondent Specific Charges, alleging that Respondent had denied the Complainant the use of accrued sick leave during a period of parental leave in violation of ORS 659.360(3) and 659.360(1)(a).

4) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting

* "Participant" or "participants" includes the charged party and the Agency. OAR 839-30-025(17).

forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On August 19, 1991, Respondent's counsel timely filed its answer.

6) On November 7, 1991, the agency filed a motion for summary judgment in part, asking that the Forum grant summary judgment in the Agency's favor on the issue of the statutory violation with specific damages to be established at hearing. On November 13, 1991, the Hearings Referee requested that Respondent file its response, if any, to the Agency's motion by November 22, 1991.

7) Under date of November 20, 1991, timely received by the Forum on November 25, 1991, Respondent issued its memorandum in opposition to the Agency motion.

8) On December 4, 1991, the Hearings Referee granted summary judgment on the Specific Charges, finding that the only facts in dispute involved the harm, if any, resulting to Complainant economically and emotionally as the result of Respondent's failure to allow Complainant to utilize his accrued sick leave during a period of parental leave.

9) Thereafter, in January 1992, Respondent and the Agency entered into a stipulation regarding Complainant's damages with Respondent, by stipulating only to the facts and not the law, preserving its right to appeal any Final Order of the Commissioner which incorporated and verified the Hearings Referee's summary judgment ruling.

10) The stipulation was received by the Forum on January 21, 1992, and the Hearings Referee then declared the hearing scheduled for January 22, 1992, to be canceled and further declared the record herein closed.

11) The Proposed Order, which included an Exceptions Notice, was issued on March 24, 1992. Exceptions, if any, were to be filed by April 3, 1992. Respondent's exceptions were received timely on April 1, 1992. They are dealt with throughout this Order as described at the end of the Opinion section.

FINDINGS OF FACT-- THE MERITS

1) At all times material herein, Respondent was a political subdivision of the State of Oregon which engaged or utilized the personal service of 25 or more persons, reserving to itself the right to control the means by which such service was performed.

2) Complainant was regularly and permanently employed by Respondent as a Librarian I beginning in November 1987.

3) Complainant was anticipating the birth of a child on or about April 27, 1991, of whom Complainant was the parent.

4) Complainant made a written request for parental leave on or about February 14, 1991, for the period June 3 to July 14, 1991, a time period within 12 weeks of the anticipated birth of the child.

5) As part of his parental leave request, Complainant requested the use of accrued sick time from June 3 through June 28, 1991. As of June 3, Complainant had accrued 200 hours of sick leave.

6) Respondent informed Complainant on April 9, 1991, that he would not be allowed to use his accrued sick leave during his parental leave unless his physician or his wife's physician indicated that his presence was medically necessary.

7) Complainant took parental leave from June 3 through July 14, 1991. He was not allowed to use any of his accrued sick leave during his parental leave. Respondent required Complainant to use accumulated vacation leave for the first 114.5 hours of his parental leave. Complainant's parental leave continued thereafter from June 23 to July 13, 1991, a period of three weeks or 120 hours, which was unpaid.

8) At times material, Respondent's Personnel Rules provided:

> "9.7.2 Utilization of Leave Employees may utilize their allowances of sick leave * * * when unable to perform their work duties by reason of * * * illness or death in their immediate families. For such period as the employee has sick leave credit, the use of sick leave to attend a family member shall be limited to the time the employee's presence is actually required. Employees shall promptly make other arrangements for the care of ill family members and may be required to provide a physician's statement regarding the need of the employee to attend the family member.
>
> "9.10.6 Paid Leave The employee shall first apply accrued vacation leave to parental leave time before taking unpaid leave. The employee may use paid sick leave for parental leave only if the employee is entitled to such leave under Rule 9.7."

9) There was no evidence that Complainant's presence to attend his new born child was medically necessary or actually required between June 23 and July 13, 1991. There was no evidence that Complainant provided a physician's statement regarding his need to attend a family member during that period.

10) Complainant earned $12.93 per hour at times material. If he had been allowed to utilize his paid sick leave during that period while on parental leave, he would have been paid $1,551.60 additional in gross wages, and would have expended 120 hours of accrued sick leave.

11) If testimony had been taken on the issue, the evidence would have demonstrated that Complainant experienced emotional distress as a result of Respondent's refusal to allow him the use of his accrued sick leave during the period of his parental leave.

12) If testimony had been taken on the issue, the evidence would have allowed the Hearings Referee to recommend an award of $2,000 to Complainant as compensation for the emotional distress suffered.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.435. ORS 659.010(6).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050.

3) ORS 659.360 provides, in part:

"(1) It shall be an unlawful employment practice for an employer to refuse to grant an employee's request for a parental leave of absence for:

"(a) All or part of the time between the birth of that employee's infant and the time the infant reaches 12 weeks of age

"* * *

"(3) The employee seeking parental leave shall be entitled to utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during the parental leave. The employer may require the employee seeking parental leave to utilize any accrued leave during the parental leave unless otherwise provided by an agreement of the employer and the employee, by collective bargaining agreement or by employer policy."

Respondent violated ORS 659.360 (1)(a) and (3).

4) Pursuant to ORS 659.365 and 659.060, and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of any unlawful practice found, and to protect the rights of others similarly situated. The Order below is a proper exercise of that authority.

OPINION

Prior to the scheduled hearing, the Agency filed a motion for partial summary judgment, pursuant to OAR 839-30-070(6). The Agency asserted that no issue of genuine fact existed on the issue of the statutory violation and that the Agency was entitled to judgment as a matter of law as to the violations alleged. Subsection (c) of OAR 839-30-070(6) provides that, where the Hearings Referee recommends that a motion for summary judgment be granted, the recommendation shall be in the form of a Proposed Order, and the procedure established for issuing Proposed Orders shall be followed. This Order incorporates the Hearings Referee's ruling which granted the Agency's motion and has been issued according to that procedure.

Respondent's answer admitted the basic facts alleged by the Specific Charges, but disagreed with the Agency's conclusion that those facts described a violation of Oregon's Parental Leave Law. The answer acknowledged that during a period of parental leave to which he was entitled following the birth of his child, Complainant was denied the use of accrued sick leave. The Agency's motion asked judgment as to these admitted facts as constituting an unlawful employment practice under ORS 659.360. Respondent submitted its memorandum in opposition to the Agency's motion. Respondent relied upon the terms of its personnel rules and upon Attorney General Opinion 8195 (1988) in denying Complainant paid sick leave during his parental leave.

The Hearings Referee ruled as follows:

"ORS 659.360 provides that it is an unlawful employment practice for an employer of 25 or more employees to refuse to grant the request of an employee, employed by the employer on a non-temporary basis for over 90 days, for parental leave for all or part of the time between the birth of the employee's infant and the time the infant reaches 12 weeks of age; the statute also provides that the employee ' * * * shall be entitled to utilize any accrued * * * sick leave * * * during the parental leave.' OAR 839-08-850(1) provides that the employee has the right to use accumulated leave of any kind.

"There is no dispute as to the underlying facts * * *. Respondent controverts the Agency's legal conclusion based on those facts, contending that they do not form an unlawful employment practice under the statute. Respondent relies on Attorney General's Opinion 8195 * * * (1988)

"The pertinent portion of the Attorney General Opinion suggests that paid sick leave is available during parental leave only if the employee could take sick leave anyway, that is, because the employee is ill or incapacitated. The Commissioner has held otherwise:

"'The Agency * * * asserts that the intent of the * * * language of * * * ORS 659.360 is restated in OAR 839-07-850 and gives the employee-parent the right to use accumulated leave of any kind during the parental leave.

"' * * * It is the Respondent's position that the refusal to grant to Complainant the use of paid sick leave for the portion of his parental leave during which he would not be disabled by illness or injury was not unlawful in that it did not violate ORS 659.360. * * * Respondent cites Attorney General Opinion No. 8195 as supporting Respondent's argument.

"'The Commissioner concludes that the Agency's interpretation is correct.' *In the Matter of Portland General Electric,* 7 BOLI 253, 263-64 (1988).

"ORS 659.360(3) reads:

"'The employee seeking parental leave shall be entitled to utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during the parental leave. The employer may require the employee seeking parental leave to utilize any accrued leave during the parental leave unless otherwise provided by an agreement of the employer and the employee, by collective bargaining agreement or by employer policy.'

"OAR 839-07-850(1) reads:

"'The statute anticipates unpaid parental leave, but gives the employee the right to use accumulated leave of any kind. It also provides that the employer may require the parent to use accumulated leave in accordance with a bargaining agreement or established policy.'

"The above rule is valid as written. *Oregon Bankers Association v. Bureau of Labor and Industries,* 102 Or App 539, 796 P2d 366 (1990).

"Opinion 8195 assumes that the second sentence of ORS 659.360(3) modifies the employee's right described in the first sentence. That is the Attorney General's interpretation. FIFTH QUESTION PRESENTED, Opinion 8195, August 18, 1988. The Commissioner, on the other hand, has taken a different view in *Portland General Electric, supra,* at 266:

"'Subsection (3) does not restrict the employee's right to paid leave, rather it limits the employee's option to choose unpaid leave. This enables the employer to control the length and frequency of absence, and the attendant disruption of the work force, by reducing the likelihood that an employee could be gone for the parental leave period and later utilize accrued leave for an additional absence. If the intent were that the policy, contract or collective bargaining agreement control the unqualified employee right to use any kind of accrued leave, paid or not, the two sentences would have been combined to that purpose.'

"As observed later in *Portland General Electric, supra,* at 269, the qualifying language of the second sentence contains express reference 'to the employer's right to require the use of accrued leave.' (Emphasis in the original.) *See also,* OAR 839-07-865, which allows the employer to count a period of vacation, sick or other leave taken during parental leave as parental leave.

"As to Opinion 8195, the Commissioner said in *Portland General Electric, supra,* at 270:

"'The undisputed advisory nature of the Attorney General's opinion makes it unnecessary to embark on a delineation of legal and policy spheres of authority in order to decide this case, and no portion of this Order is dependent on such delineation. Suffice to say, the Commissioner cannot accept the reasoning of the Attorney General's opinion regarding the parental leave law. To the extent that the statute poses genuine issues of interpretation, they are matters left by the Legislature in the first instance to the rule-making and decisional authority of the Commissioner. In the final analysis, of course, it is the judiciary which must eventually pass on the validity of the Commissioner's rules and action.'"

The Hearings Referee then granted the Agency's motion for partial summary judgment, concluding that Respondent's refusal to allow Complainant to use accrued sick leave for the requested portion of his parental leave was a violation of ORS 659.360(1)(a) and (3), and of OAR 839-08-850(1), and was an unlawful employment practice.

The Forum finds that OAR 839-07-850(1) is valid (*Oregon Bankers, supra*). The Commissioner's interpretation of that rule, as described in *Portland General Electric,* is a reasonable one. The Forum further finds that, for the purpose of interpreting ORS 659.360 to 659.370 and OAR 839-07-800 to 839-07-875, the terms "accrued" and "accumulated" have the same meaning in reference to leave of any kind. The Forum hereby confirms and adopts the Hearings Referee's ruling on summary judgment in accordance with OAR 839-30-070(6).

The participants stipulated that if evidence were taken, the Forum could find that Complainant lost $1,551.60 in wages during his unpaid leave. It was further stipulated that if Respondent's denial of use of accrued sick leave for parental leave was an unlawful employment practice, and if evidence were taken on the effect of the denial, the Hearings Referee could find that Complainant suffered emotional distress as a result of that practice to his damage in the amount of $2,000. Respondent's stipulation specifically was to these facts only, and not to the Agency's view of or to the Hearings Referee's ruling on the law.

Respondent's exceptions

Respondent filed several exceptions to the Proposed Order. Respondent specifically objected to Proposed Finding of Fact – The Merits number 7, having to do with the portion of Complainant's parental leave which was unpaid (exception 1), and to Proposed Finding of Fact – The Merits number 9, having to do with the amount Complainant would have been paid if he had used sick leave (exception 2). Each of those Findings failed to reflect the actual facts. Finding of Fact – The Merits number 7 herein accurately reflects Complainant's unpaid leave. Finding of Fact – The Merits number 10 herein accurately recites Complainant's gross pay loss. The back pay award in Proposed Order paragraph 1a, to which Respondent also excepted, is not changed as it is based on Finding of Fact – The Merits number 10.

Respondent excepted to the Proposed Order's failure to recite that Complainant's presence in the home to attend his new born child was not medically necessary or actually required (during the parental leave) and that Complainant did not provide a physician's statement regarding his need to attend a family member (exception 3). The Forum has included a finding reciting the provisions of Respondent's personnel rules and has acknowledged that there was no evidence of the medical necessity or physician's statement cited by Respondent. *See* Findings of Fact – The Merits number 8 and 9.

Finally, Respondent excepted to the Proposed Conclusions of Law, Proposed Opinion, and Proposed

Order on the ground that Respondent did not violate the parental leave statute (exception 4). As outlined earlier in this Opinion, this Forum finds that a subject employer violates the parental leave law and denies an entitled employee parental leave within the meaning of the statute where the employer denies any right or benefit that should be included with the parental leave, even though the employee actually is granted time off work. The use of accrued sick leave is such a right.

ORDER

NOW, THEREFORE, as authorized by ORS 659.365, 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent, DOUGLAS COUNTY, is hereby ORDERED to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for DAN R. WHITE, in the amount of:

a) ONE THOUSAND FIVE HUNDRED FIFTY-ONE DOLLARS AND SIXTY CENTS ($1,551.60), less legal deductions, constituting the value of accrued sick leave denied to Complainant while he was on parental leave from June 3 to July 14, 1991; PLUS,

b) INTEREST AT THE ANNUAL RATE OF NINE PERCENT from July 31, 1991, until paid, computed, and compounded annually; PLUS,

c) TWO THOUSAND DOLLARS ($2,000), representing damages for the emotional distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

d) Interest on the damages for emotional distress, at the legal rate, accrued between the date of the Final Order herein and the date Respondent complies therewith, to be computed and compounded annually.

2) Deduct from Dan R. White's accrued sick leave sufficient hours to offset the value of accrued sick leave awarded in paragraph 1a of this Order.

3) Cease and desist from refusing to allow employees to utilize accrued leave of any kind, and particularly sick leave, when requested in connection with parental leave for which they otherwise qualify.

In the Matter of
IVAN SKOROHODOFF,
dba Aries Forestry, and Nicholas Ovchinikov, an unlicensed partner,
Respondents.

Case Number 12-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 5, 1992.

SYNOPSIS

The Commissioner granted summary judgment to the Agency, finding that Respondent Skorohodoff, a licensed farm labor contractor, permitted his unlicensed partner to act as a forest labor contractor on four forestation contracts. The Commissioner imposed civil penalties of $8,000 on each Respondent. ORS 658.410(1), (2)(a) and (b); 658.415(1)(c) and (d); 658.417(1) and (2); 658.440(1)(e) and (3)(e); 658.453(1)(a), (c) and (e); OAR 839-15-508(1)(a) and (o); 839-15-510 (1)(a)-(d); 839-15-512(1)-(5); 839-15-520(3)(g); 839-30-070(6).

The above-entitled matter came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 10, 1991, in the Bureau of Labor and Industries conference room, 3865 Wolverine Street NE, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Respondents Ivan Skorohodoff and Nicholas Ovchinikov were present at the commencement of the hearing. Both left the hearing room shortly thereafter, as hereinafter recited. Neither Respondent had counsel present.

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

FINDINGS OF FACT – PROCEDURAL

1) On September 25, 1991, the Agency issued a Notice of Intent to Assess s Civil Penalty (Notice of Intent) to Respondents. The Notice of Intent informed Respondents that the Agency intended to assess a civil penalty against Skorohodoff as a contractor and against Ovchinikov as his unlicensed partner, jointly and severally, in the total amount of $24,000 21 days after the date of their receipt of the notice. The notice cited the following bases for the Agency's action:

Paragraph 1. Respondents Skorohodoff and Ovchinikov entered into a partnership on or about April 1, 1990, and thereafter Respondent Skorohodoff, a licensee, assisted Respondent Ovchinikov, who was unlicensed, in acting as a forest labor contractor without a valid license: four violations for which the Agency assessed $2,000 each;

Paragraph 2. Respondent Ovchinikov acted as a farm labor contractor without having obtained a proper license; four violations for which the Agency assessed $2,000 each; and

Paragraph 3. After Respondents Skorohodoff and Ovchinikov entered into a partnership on or about April 1, 1990, said Respondents failed to provide to the Commissioner certified true copies of all payroll records for work performed on reforestation within the State of Oregon: four violations for which the Agency assessed $2,000 each.

In each paragraph, the Agency assessed penalties for aggravated offenses in that, as to paragraph 1, Respondents knew or should have known of the violation and its serious and fraudulent nature; as to paragraph 2, Respondent Ovchinikov was formerly licensed and knew or should

have known that acting as a reforestation contractor without a license was a violation; and as to paragraph 3, Respondent Ovchinikov had previously been sanctioned for failing to file certified copies of payroll records.

2) The Notice of Intent was served on October 7, 1991, by the Sheriff of Marion County, Oregon, on Respondent Ovchinikov. On October 28, 1991, the Agency received Respondent Ovchinikov's timely request for a hearing on the Agency's intended action, together with denials and allegations of fact intended as his answer. He requested that the hearing be held either before December 25, 1991, or after May 25, 1992, because of "business elsewhere."

3) The Notice of Intent was forwarded for service upon Respondent Skorohodoff on October 2, 1991. The Sheriff of Marion County was unable to find him at 5894 Keene Rd. NE, Gervais, Oregon, 97026, the address appearing on his forest labor contractor license. On October 29, 1991, the Agency made substituted service on Respondent Skorohodoff by serving the Notice of Intent upon the Commissioner and mailing a copy to him, pursuant to statute.

4) On October 31, 1991, the Agency sent the Hearings Unit a request for a hearing date, and on November 8, 1991, the Hearings Unit issued a Notice of Hearing to each Respondent and to the Agency reciting the time and place of the hearing. With the Notice of Hearing, the Forum mailed a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200.

5) On November 13, 1991, the Forum mailed notice to each Respondent that the referee had changed and that the new hearing time would be 10 a.m. December 10, 1991, in the Bureau of Labor and Industries conference room, 3865 Wolverine Street NE, Salem, Oregon.

6) On November 22, 1991, the Hearings Referee mailed to each Respondent prehearing instructions describing the marking of exhibits, the scheduling of witnesses, and similar matters.

7) On December 2, 1991, the Agency timely filed its Summary of the Case and informed the Hearings Referee that the Agency would be filing a motion for summary judgment. Previously, the Agency had received a letter from a Salem attorney advising that he represented Respondent Ovchinikov, suggesting that Respondent Skorohodoff would be outside the state of Oregon on December 10, and inquiring if the Agency still wished to proceed on that date. The Agency sent a copy of its case summary to the attorney.

8) The Agency did not send a copy of its case summary to Respondent Skorohodoff. The Case Presenter pointed out that Respondent Skorohodoff had not timely requested hearing on or filed an answer to the Notice of Intent and was in default.

9) On December 4, 1991, the Agency filed a motion for summary judgment and memorandum in support of the motion, which addressed paragraphs 1 and 2 of the Notice of Intent.

The motion was based upon the Notice of Intent, Respondent Ovchinikov's answer, and the Agency's case summary, and sought summary judgment as to paragraphs 1 and 2 for the period April 1 to May 15, 1990. A copy of the motion was sent to Respondent Ovchinikov's counsel.

10) On December 4, 1991, the Hearings Referee issued a Preliminary Ruling Regarding Agency Motion for Summary Judgment. A copy was sent to Respondent Ovchinikov, his attorney, and the Agency Case Presenter. The Preliminary Ruling afforded Respondent Ovchinikov or his counsel opportunity to respond in writing to the Agency's motion by 5 p.m. December 9, and to be prepared to argue the motion at the commencement of the scheduled hearing.

11) On December 9, 1991, at approximately 9 a.m., a telephone conference call among the Hearings Referee, the Agency Case Presenter, and counsel for Respondent Ovchinikov was initiated as the result of a request by counsel in a December 6, 1991, message to the Hearings Referee. A tape recording of the call was made with the permission of all involved and is hereby admitted as part of the record herein.

12) Counsel stated in the telephone conference that he became involved in the case approximately 10 days to two weeks previous, and that he had written to the Forum questioning whether the Forum would proceed when the co-Respondent was unavailable. It was his understanding that Respondent Skorohodoff, whom he described as a critical witness, was outside the United States. Counsel also questioned the short time between the summary judgment motion and hearing. The Hearings Referee explained that chapter 839 division 30 of Oregon Administrative Rules, which governed this contested case hearing, allowed a motion for summary judgment at any time prior to hearing, thus differing from the Oregon Rules of Civil Procedure.

13) Counsel stated that he was unable to proceed not only because he had insufficient time to investigate the facts, but also because he had another matter scheduled on December 10. The Hearings Referee noted that Respondent Ovchinikov's answer included the demand that the contested case hearing be held before December 25 or after May 25, and further that Respondent Ovchinikov had apparently waited to consult counsel until after a hearing had been set. The Agency Case Presenter stated that she had received a telephone call on December 9 from Respondent Skorohodoff, who was in Oregon. The Agency opposed postponement unless it could be to a date before December 25 and opposed delaying the matter until after May 25, 1992. The Referee explored available dates between December 9 and December 23 with counsel and the Case Presenter but was unable to identify a mutually available date.

14) Counsel stated that he wanted the record to be clear that he would be unable to effectively represent Respondent Ovchinikov on December 10 unless he had opportunity to explore "a number of factual matters" with his client and to locate and interview Respondent Skorohodoff and a witness

who was the author of a document filed with the Agency's summary judgment motion. He suggested that investigation might change his client's position.

15) The Hearings Referee stated that he would rule on the Agency's motion for summary judgment at the commencement of the hearing at 10 a.m. on December 10. Counsel stated that if he could not contact his client Respondent Ovchinikov by the end of December 9, he would not consider himself of counsel in this matter.

16) At the commencement of the hearing on December 10, 1991, pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

17) Respondent Ovchinikov was present without counsel at the commencement of the hearing. He advised the Hearings Referee prior to convenement and on the record that his attorney would not be present to represent him. When he learned that at least one of two observers in the hearing room was a newspaper reporter, Respondent Ovchinikov left the hearing.

18) Respondent Skorohodoff was present at the commencement of the hearing. During the Agency's explanation of the evidence upon which the Agency based its summary judgment motion, Respondent Skorohodoff questioned the reference to him as being in default.

19) The Hearings Referee again outlined the substituted service history and explained to Respondent Skorohodoff that by having a farm/forest labor contractor license he gave permission for substituted service in the event he was not found by regular channels. Respondent Skorohodoff stated he had received copies of the Notice of Intent and of the Hearings Notice and that he had attempted to consult an attorney, but had not had enough time.

20) The Hearings Referee urged Respondent Skorohodoff to consult counsel and explained that Respondent could not present evidence or a defense while in default. Respondent stated he would get an attorney to see what could be done. Respondent Skorohodoff left the hearing.

21) The Forum received no request for relief from default from Respondent Skorohodoff after December 10, 1991.

22) During the hearing, the Hearings Referee granted the Agency's motion for summary judgment on paragraphs 1 and 2 of the Notice of Intent. The Agency then moved to dismiss paragraph 3 of the Notice of Intent. The Referee granted the motion.

23) The Proposed Order, which included an Exceptions Notice, was issued on March 23, 1992. Exceptions, if any, were to be filed by April 2, 1992. No exceptions were received.

FINDINGS OF FACT-- THE MERITS

1) Respondent Ivan Skorohodoff applied to the Commissioner of the Bureau of Labor and Industries for a farm contractor license for the forestation or reforestation of lands under the name Aries Forestry on March 16, 1990. Respondent Skorohodoff represented

over his notarized signature that he was the sole proprietor of Aries Forestry.

2) Based on his March 1990 application, Respondent Skorohodoff was issued a temporary farm/forest labor contractor license and subsequently received a farm/forest labor contractor license on May 29, 1990.

3) Respondent Nicholas Ovchinikov was previously licensed by the Bureau of Labor and Industries as a farm/forest labor contractor from February 8, 1985, to January 31, 1986, from February 14, 1986, to January 31, 1987, and from April 14, 1987, to January 31, 1988. He was not licensed after January 1988.

4) In February 1990 Respondent Ovchinikov pledged real property as collateral security to Amwest Surety Insurance Company, which was the surety for Respondent Skorohodoff doing business as "Aeries Forestry." Respondent Skorohodoff was required to provide a performance bond of 20 percent of the award amount on each United States Forest Service (USFS) forestation contract that he bid successfully.

5) In September 1989, Respondent Skorohodoff's unaudited net worth was listed as $68,000. In December 1989 Respondent Ovchinikov's unaudited net worth was listed as $621,944.

6) On April 1, 1990, Respondent Skorohodoff entered into an agreement with Respondent Ovchinikov whereby they agreed to form a partnership named Aries Forestry and to share equally all profits, expenses, liabilities, and powers to make and

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employed workers to perform such labor for the USFS on USFS contract #52-04M3-0-0031B (31B) on USFS land in the Wallowa-Whitman National Forest near Baker City, Oregon, for $118,237. Respondent Ovchinikov acted as contract representative for Aries Forestry on 31B. 31B was awarded March 14, 1990, on Aries bid of February 10.

8) Respondent Skorohodoff for Aries Forestry contracted to perform tree planting, and recruited and employed workers to perform such labor for the USFS on USFS contract #52-04R4-O -5462 (5462) between April 18 and May 7, 1990, on USFS land in the Rigdon Ranger District of the Willamette National Forest in Oregon for $88,675. 5462 was awarded April 2, 1990, on Aries bid of March 19.

9) Respondent Skorohodoff for Aries Forestry contracted to perform tree planting, and recruited and employed workers to perform such labor for the USFS on USFS contract #52-04N0-O-21C (21C) between April 18 and May 10, 1990, on USFS land in the Ochoco National Forest near Hines, Oregon, for $32,925.75. 21C was awarded March 8, 1990, on Aries bid of February 11.

10) Respondent Skorohodoff for Aries Forestry contracted to perform tree thinning, and recruited and employed workers to perform such labor

for the USFS on USFS contract #52-0M00-O-6 (0-6) between May 8 and July 1990 on USFS land in the Siskiyou National Forest near Gold Beach, Oregon, for $141,912. 0-6 was awarded April 10, 1990, on Aries bid of March 26.

11) Respondent Skorohodoff assigned the proceeds of 0-6 to the Seafirst Bank in Woodburn, Oregon. He signed the assignment for Aries Forestry, giving his title as "partner," on May 21, 1990.

12) Respondent Ovchinikov had previously assisted an unlicensed person to act as a labor contractor.

13) Respondent Ovchinikov had been debarred from acting as a farm/forest labor contractor in another jurisdiction in 1989.

14) The Agency's licensing file information from Respondent Skorohodoff, a licensee, did not reflect that Respondent Ovchinikov had a financial interest as a partner in the licensee's operations as a farm labor contractor or that Respondent Ovchinikov had been debarred elsewhere.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent Skorohodoff, doing business as Aries Forestry, was a licensed farm/forest labor contractor.

2) At times material, Respondent Ovchinikov, a former farm/forest labor licensee, had no farm/forest labor contractor license.

3) Respondent Skorohodoff entered into a partnership known as Aries Forestry with Respondent Ovchinikov effective April 1, 1990, through May 15, 1990.

4) Under the partnership agreement, Respondent Ovchinikov shared equally the profits, expenses, liabilities, and contracting powers of the licensee, Respondent Skorohodoff.

5) Aries Forestry successfully bid upon at least four United States Forest Service forestation contracts which were wholly or partially performed between April 1 and May 15, 1990, and recruited and employed workers to perform such labor for the USFS.

6) Respondent Ovchinikov assisted in the performance of the four USFS contracts and the recruitment and employment of workers either at the contract site, or by supplying financial assistance to Respondent Skorohodoff for the benefit of the partnership, or both, between April 1 and May 15, 1990.

7) Respondent Skorohodoff did not inform the Commissioner that Respondent Ovchinikov had a financial interest as a partner in the licensee's operations as Aries Forestry or that said partner had been debarred in another jurisdiction in 1989.

CONCLUSIONS OF LAW

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

2) ORS 658.440 provides, in pertinent part:

> "(1) Each person acting as a farm labor contractor shall:
>
> " * * *
>
> "(e) File with the Bureau of Labor and Industries, as required by rule, * * * information concerning changes in the circumstances under which the license was issued.
>
> " * * *
>
> "(3) No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:
>
> " * * *
>
> "(e) Assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830."

OAR 839-15-520 provides, in pertinent part:

> "(3) The following actions of a Farm or Forest Labor Contractor * * * licensee demonstrate that the * * * licensee's character, reliability or competence make the * * * licensee unfit to act as a Farm or Forest Labor Contractor:
>
> " * * *
>
> "(g) Failure to report any change in the circumstances under which the license was issued, * * *."

Respondent Skorohodoff assisted Respondent Ovchinikov, an unlicensed person, to act in violation of ORS chapter 658 by entering into and operating a partnership which performed the forestation or reforestation of lands on each of four USFS contracts. By so assisting an unlicensed person, Respondent Skorohodoff specifically violated ORS 658.440 as to each of the four contracts, a total of four violations, allowing the Forum to find under OAR 839-15-520 that Respondent Skorohodoff is unfit to act as a forest labor contractor

3) ORS 658.410 provides, in pertinent part:

> "(1) [N]o person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries. No person shall act as a farm labor contractor with regard to the forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1). * * *"
>
> "(2) Farm labor contractor licenses may be issued by the commissioner only as follows:
>
> "(a) To a natural person operating as a sole proprietor under the person's own name or under an assumed business name registered with the Office of the Secretary of State.
>
> "(b) To two or more natural persons operating as a partnership under their own names or under an assumed business name registered with the Office of the Secretary of State."

ORS 658.415 provides, in pertinent part:

> "(1) No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.503 and 658.830. Any person may file an application for a license to act as a farm labor contractor at any office of the Bureau of Labor and Industries. The application shall be sworn to by the applicant and shall be written on a form prescribed by the Commissioner of the Bureau

of Labor and Industries. The form shall include, but not be limited to, questions asking:

"* * *

"(c) Whether or not the applicant was ever denied a license under ORS 658.405 to 658.503 and 658.830 within the preceding three years, or in this or any other jurisdiction had such a license denied, revoked or suspended within the preceding three years.

"(d) The names and addresses of all persons financially interested, whether as partners, shareholders, associates or profit-sharers, in the applicant's proposed operations as a farm labor contractor, together with the amount of their respective interests, and whether or not, to the best of the applicant's knowledge, any of these persons was ever denied a license under ORS 658.405 to 658.503 and 658.830 within the preceding three years, or had such a license denied, revoked or suspended within the preceding three years in this or any other jurisdiction.

ORS 658.417 provides, in pertinent part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands.

"(2) Pay a license fee of $100, in lieu of the fee prescribed in ORS 658.415(6)."

Respondent Ovchinikov acted as a farm labor contractor with regard to the forestation or reforestation of lands on each of four USFS contracts between April 1 and May 15, 1991. By so acting without a valid license issued to him by the Commissioner, Respondent Ovchinikov violated ORS 658.410, 658.415, and 658.417 as to each of the four contracts, a total of four violations.

4) ORS 658.453 provides, in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries * * * may assess a civil penalty not to exceed $2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.503 and 658.830, recruits, * * * or employs a worker.

"* * *

"(c) A farm labor contractor who fails to comply with ORS 658.440(1), * * * or (3).

"* * *

"(e) A farm labor contractor who fails to comply with ORS 658.417(1) * * *"

OAR 839-15-508 provides, in pertinent part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(a) Acting as a farm or forest labor contractor without a license in violation of ORS 658.410.

"* * *

"(o) Assisting an unlicensed person to act as a contractor in violation of 658.440(3)(e).

OAR 839-15-510 provides, in pertinent part:

"(1) The Commissioner may consider the following * * * aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:

"(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude or seriousness of the violation;

"(d) Whether the contractor or other person knew or should have known of the violation."

OAR 839-15-512 provides, in pertinent part:

"(1) The civil penalty for any one violation shall not exceed $2,000. The actual amount of the civil penalty will depend on all the facts and on any * * * aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and seriousness that a minimum of $500 for each repeated violation will be imposed when the Commissioner determines to impose a civil penalty.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm or forest labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) $500 for the first offense;

"(b) $1,000 for the second offense;

"(c) $2,000 for the third and each subsequent offense.

"(4) The civil penalties set out in (2) and (3) above shall be in addition to any other penalty imposed by law or rule.

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-15-510."

Based on the applicable statute and rules and on the whole record herein, the Commissioner of the Bureau of Labor and Industries of the State of Oregon is authorized to assess civil penalties and the penalties assessed in the Order below are a proper exercise of that authority.

OPINION

The record herein established that Respondent Skorohodoff was served with the Notice of Intent ("charging document" under OAR 839-30-025 (2)(g)) pursuant to statute. He failed to file any response, either an answer or request for hearing, as outlined in the

charging document. Respondent Skorohodoff was found in default. OAR 839-30-185. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's charging document has been made on the record. *See In the Matter of Rainbow Auto Parts and Dismantlers,* 10 BOLI 66 (1991), and cases cited therein.

The Agency has established a prima facie case as to Respondent Skorohodoff. A preponderance of credible evidence on the whole record offered by the Agency and admitted by the Hearings Referee established that Respondent Skorohodoff, a person acting as a farm labor contractor with regard to the forestation or reforestation of lands, entered into partnership with Respondent Ovchinikov as Aries Forestry, the name on Respondent Skorohodoff's farm labor contractor license with forestation indorsement. Respondent Ovchinikov had no farm labor contractor license or forestation indorsement, and was unable to obtain one, but under the agreement Respondent Ovchinikov shared the proprietary functions of Aries Forestry with Respondent Skorohodoff, the licensee. At times material, Respondent Skorohodoff allowed Respondent Ovchinikov to function as co-proprietor of Aries Forestry in the performance of four USFS contracts, in the recruitment and employment of workers under those contracts, and in supplying financial assistance to Respondent Skorohodoff for the benefit of the partnership, all in violation of ORS 658.405 to 658.503. In this manner, Respondent Skorohodoff assisted an unlicensed person to act as a farm labor contractor with regard to the forestation or reforestation of lands, in violation of ORS 658.440(3)(e). Respondent Skorohodoff's liability for penalty under the charging document was established as four separate violations of ORS 658.440(3)(e).

Pursuant to OAR 839-30-070(6), the Agency filed a motion for summary judgment on its Notice of Intent. It asserted that no issue of genuine fact existed and that the Agency was entitled to judgment as a matter of law as to the violations alleged in the charging document. OAR 839-30-070(6)(c) provides that, where the Hearings Referee recommends that the motion for summary judgment be granted, the recommendation shall be in the form of a Proposed Order, and the procedure established for issuing Proposed Orders shall be followed. The Proposed Order granted the Agency's motion and was issued according to that procedure. The Forum hereby adopts that ruling.

Respondent Ovchinikov responded to the Notice of Intent by requesting a contested case hearing thereon; he filed written denials and explanations which the Hearings Referee treated as an answer to the charging document. Respondent Ovchinikov expressly admitted service of the charging document upon him and admitted the existence of the partnership, at least for the period April 1, 1990, to May 15, 1990. He submitted information to the effect that he was not a licensed contractor. The Agency in its motion for summary judgment relied upon exhibits submitted with its case summary which clearly showed Respondent Ovchinikov's involvement with the performance of four Forest Service contracts with Aries Forestry, and clearly showed his financial interest in Aries Forestry, during the time period that Respondent Ovchinikov admitted to the partnership.

Respondent Ovchinikov attended the hearing without counsel and then absented himself without addressing the motion. He had been represented by counsel up to the day of hearing. The Hearings Referee found that the Agency was entitled to judgment as to the violations alleged in paragraphs 1 and 2 of the charging document. Paragraph 3 and the potential civil penalties thereunder were dismissed by the Hearings Referee upon motion of the Agency.

The pertinent statutes require that persons or entities operating as farm labor contractors in regard to the forestation or reforestation of lands be licensed with proper indorsement by the Commissioner. Where a business is in partnership form, each partner must be so licensed. ORS 658.410(2)(b). Respondent Ovchinikov was unlicensed and operated as a farm labor contractor while in partnership with a licensee, Respondent Skorohodoff, on four separate USFS contracts. This constituted four separate violations of ORS 658.410(1), 658.415(1), and 658.417(1).

Civil Penalty

Respondents committed violations subject to civil penalty of up to $2,000 for each violation. They were partners at the time of the violations. There was no evidence from which the Forum might find reason for mitigation. There was evidence from which the Forum could and does infer that the violations were committed knowingly and in furtherance of a scheme to avoid ORS chapter 658 by attempts to disguise the true nature of Aries Forestry. Because of this and the fact that there were multiple violations, the Forum assesses the maximum civil penalty of $2,000 for each violation by Respondent Skorohodoff (a total of $8,000) and the maximum civil penalty of $2,000 for each violation by Respondent Ovchinikov (a total of $8,000).

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, the Commissioner of the Bureau of Labor and Industries hereby orders IVAN SKOROHODOFF to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of EIGHT THOUSAND DOLLARS ($8,000), plus interest thereon at the annual rate of nine percent between a date 10 days after the issuance of this Final Order and the date IVAN SKOROHODOFF complies with this Order;

AND, as authorized by ORS 658.453, the Commissioner of the Bureau of Labor and Industries hereby orders NICHOLAS OVCHINIKOV to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of EIGHT THOUSAND DOLLARS ($8,000), plus interest thereon at the annual rate of nine percent between a date 10 days

after the issuance of this Final Order and the date NICHOLAS OVCHINNIKOV, complies with this Order.

In the Matter of
WILLIAM SARNA
and Suzy A. Sarna, dba B & S Saloon, Respondents.

Case Number 25-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 8, 1992.

SYNOPSIS

Respondents, who defaulted by failing to appear at hearing, failed to pay wage Claimant all wages due and owing within 48 hours after he quit, or at any time after he notified them of his new address after he moved. The Commissioner held that Respondents violated ORS 652.140(2), and ordered them to pay Claimant's wages owed and civil penalty wages. ORS 652.140(2), 652.150.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 5, 1992, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Lee Bercot, an employee of the Agency. Tad C. Plotner (Claimant) was not present at the hearing. William Sarna and Suzy A. Sarna (Respondents), after being duly notified of the time and place of this hearing, failed to appear in person or through a representative.

The Agency called the following witnesses: Mary Houser, an administrative specialist with the Agency; Ron Kimmons, a compliance specialist with the Agency (by telephone); and Tad C. Plotner, the Claimant (by telephone).

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

FINDINGS OF FACT – PROCEDURAL

1) On October 29, 1990, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondents and that Respondents had failed to pay wages earned and due to him.

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

3) On April 22, 1991, the Commissioner of the Bureau of Labor and Industries served on Respondents an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondents owed a total of $230.77 in wages and $1,153.80 in civil penalty wages. The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges. With the Order of Determination, the Agency sent Respondents an "Information Sheet" containing the information required by ORS 183.413. Respondents were advised that "Should you change you [sic] address, you must notify the Agency immediately. Without such notice, the Agency shall presume the address on file to be correct." (Emphasis original.) Respondents never notified the Agency of a change of address.

4) On April 25, 1991, Respondents filed an answer to the Order of Determination. Respondents' answer contained a request for a contested case hearing in this matter. Respondents' answer admitted that Respondents owed Claimant $230.77 in unpaid wages, but set forth the affirmative defense that Respondents were financially unable to pay such wages.

5) On January 4, 1992, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondents, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200.

6) On February 19, 1992, the Hearings Referee notified the participants that, due to a conflict on the hearings docket, it was necessary to reschedule the hearing. The Hearings Referee sent an Amended Notice of Hearing to Respondents, the Agency, and Claimant indicating a new date for the hearing.

7) On April 9, 1992, the Agency filed a motion to change the place of the hearing from Eugene to Portland, due to the availability of witnesses and telephone equipment, and in order to promote economy. On April 10, the Hearings Referee sent a letter to Respondents asking for their response to the motion. Respondents never responded. On April 23, the Hearings Referee granted the Agency's motion. The Hearings Referee issued a Notice of Changed Hearing Location to Respondents, the Agency, and the Claimant.

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

9) On May 1, 1992, the Agency notified the Hearings Referee that the Agency planned to call three witnesses by telephone and requested telephone equipment.

10) At the time and place set forth in the Notice of Hearing for this matter, the Respondents did not appear or contact the Agency or the Hearings Unit. Pursuant to OAR 839-30-185(2), the Hearings Referee waited 15 minutes before resuming the hearing. At that time, Respondents had still not

appeared or contacted the Agency or the Hearings Unit. The Hearings Referee then found Respondents in default as to the Order of Determination and proceeded with the hearing.

11) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

12) The Proposed Order, which included an Exceptions Notice, was issued on May 19, 1992. Exceptions, if any, were to be filed by May 29, 1992. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondents, as partners, did business as B & S Saloon, a restaurant and bar located in Ashland, Oregon. They employed one or more persons in the State of Oregon.

2) From on or about September 4 to on or about September 18, 1990, Respondents employed Claimant as a cook.

3) Respondents and Claimant entered into an oral agreement that Claimant would perform work for $1,000 per month.

4) Claimant's records and testimony, which are accepted as fact, reveal that during the period between September 11 and 16 he worked 36 total hours in six days.

5) Claimant quit without advance notice on Tuesday, September 18, 1990. He spoke to Respondents that day. He moved to Redding, California. Respondents did not know his new address.

6) On October 2, 1990, Claimant sent Respondents a letter requesting payment of his wages and provided Respondents with his new address. To the date of hearing, Respondents had not paid Claimant any wages for his work during the period of his claim.

7) Respondents ceased doing business as the B & S Saloon on January 1, 1991.

8) On February 5, and again on May 24, and again on June 13, 1991, the Agency wrote to Respondents in an attempt to resolve Claimant's wage claim. Respondents never replied or presented any evidence to support their position, as stated in their answer dated April 25, 1991, that they were financially unable to pay Claimant's wages. None of the Agency's letters to Respondents were returned to the Agency.

9) Civil penalty wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: $230.77 (the actual wages earned) divided by six (the number of days worked during the claim period) equals $38.46 (the average daily rate of pay). This figure of $38.46 was multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of $1,153.80. This figure is set forth in the Order of Determination.

10) Respondents did not provide any evidence for the record of a financial inability to pay Claimant's wages at the time they accrued.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondents were persons who employed one or more persons in the State of Oregon.

2) Respondents employed Claimant from September 4 to 18, 1990.

3) During the wage claim period, that is from September 11 to 16, 1990, Respondent and Claimant had an oral agreement whereby Claimant's rate of pay was $1,000 per month. Claimant worked six days and earned $230.77.

4) Claimant quit employment with Respondent without notice on September 18, 1990.

5) Respondents willfully failed to pay Claimant $230.77 in earned, due, and payable wages. Respondents have not paid Claimant the wages owed, and more than 30 days have elapsed from the due date of those wages.

6) Claimant's average daily rate for the wage claim period of employment was $38.46 ($230.77 earned divided by six days equals $38.46 average rate per day). Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, equal $1,153.80 (Claimant's average daily rate, $38.46, continuing for 30 days).

7) Respondents made no showing that they were financially unable to pay Claimant's wages at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Respondents were employers and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.405.

3) Former ORS 652.140(2) provided:

> "When any such employee, not having a contract for a definite period, shall quit employment, all wages earned and unpaid at the time of such quitting shall become due and payable immediately if such employee has given not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of an intention to quit employment. If such notice is not given, such wages shall be due and payable 48 hours, excluding Saturdays, Sundays and holidays, after such employee has so quit employment."

Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within 48 hours, excluding Saturdays, Sundays, and holidays, after Claimant quit employment, and after Claimant notified them on October 2, 1990, of his new address in California.

4) Former ORS 652.150 provided:

> "If an employer willfully fails to pay any wages or compensation of any employee who is discharged or who quits employment, as provided in ORS 652.140, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days; and provided further,

> the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondents are jointly and severally liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

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

OPINION

The Respondents failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. *See In the Matter of Judith Wilson,* 5 BOLI 219, 226 (1986); *In the Matter of Art Farbee,* 5 BOLI 268, 276 (1986); *In the Matter of John Cowdrey,* 5 BOLI 291, 298 (1986); *see also* OAR 839-30-185.

Where a respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. Where a respondent fails to appear at hearing, the Forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. *In the Matter of Richard Niquette,* 5 BOLI 53, 60 (1986); *In the Matter of Jack Mongeon,* 6 BOLI 194, 201 (1987). In a default situation where the respondent's total contribution to the record is his or her request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Mongeon, supra,* at 201.

The Agency has established a prima facie case. Respondents admitted in their answer that they employed Claimant during the period of the wage claim and that the sum of $230.77 in wages was due and owing. Credible evidence established that Respondents owe Claimant $230.77, and violated ORS 652.140 as alleged.

Awarding a civil penalty turns on the issue of willfulness. The Attorney General has advised the Commissioner that "willful," under ORS 652.150, "simply means conduct done of free will." A.G. Letter Opinion No. Op. 6056 (9/26/86). "Willful" does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency. *State ex rel Nilsen v. Johnston et ux,* 233 Or 103, 377 P2d 331 (1962).

> "A financially able employer is liable for a penalty when it has willfully done or failed to do any act which foreseeably would, and in fact did, result in its failure to meet its statutory wage obligations." A.G. Letter Opinion, above.

The Respondents in this case must be deemed to have acted willfully under this test and thus are liable for civil penalty wages under ORS 652.150.

Respondents alleged that they were financially unable to pay Claimant. This Forum has repeatedly held that it is a respondent's burden to show the respondent's financial inability to pay a claimant's wages. *See* ORS 652.150; ORS 183.450(2); OAR 839-30-105(10); *see also In the Matter of Jorrion Belinsky,* 5 BOLI 1, 10 (1985); *In the Matter of Mega Marketing,* 9 BOLI 133, 138 (1990). Respondents failed to show that they were financially unable to pay Claimant's wages at the time they accrued.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders WILLIAM SARNA and SUZY A. SARNA to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR TAD C. PLOTNER in the amount of ONE THOUSAND THREE HUNDRED and EIGHTY-FOUR DOLLARS and FIFTY-SEVEN CENTS ($1,384.57), representing $230.77 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by the Respondent, and $1,153.80 in penalty wages, plus interest at the rate of nine percent per year on the sum of $230.77 from November 1, 1990, until paid, and nine percent interest per year on the sum of $1,153.80 from December 1, 1990, until paid.

In the Matter of
MARK GEORGE VETTER,
dba Court Street Apartments,
Respondent.

Case Number 31-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 17, 1992.

SYNOPSIS

Respondent, who defaulted by failing to appear at hearing, failed to pay wage Claimant, who had given Respondent over 48 hours notice of her intent to quit, final wages due and owing immediately on her last day of work or at any time thereafter. The Commissioner held that Respondent violated ORS 652.140(2), and ordered him to pay Claimant's wages owed and civil penalty wages. ORS 652.140(2), 652.150.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 19, 1992, in Room 1004 of the Portland State Office Building, 800 NE Oregon

Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Lee Bercot, an employee of the Agency. Shirlee L. Mitchell (Claimant) was present throughout the hearing. Mark George Vetter (Respondent) failed to appear in person or through a representative.

The Agency called the following witnesses (in alphabetical order): Dianne Anderson, owner of Anderson Property Management; Karen Barnes, tenant of Court Street Apartments (by telephone); John Bushman, Claimant's brother-in-law; Joe Couch, tenant of Court Street Apartments (by telephone); Colleen Hooper, owner of Hooper Bookkeeping; Mary Houser, administrative specialist for the Agency; Mark Kendricks, tenant of Court Street Apartments (by telephone); Claimant Shirlee Mitchell; and Bill Pick, compliance specialist for the Agency.

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

FINDINGS OF FACT – PROCEDURAL

1) On around November 20, 1989, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondent and that Respondent had failed to pay wages earned and due to her.

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

3) On August 23, 1990, the Agency assigned Claimant's wage claim in trust for collection to the California State Labor Commissioner, pursuant to ORS 652.430 and the terms of a reciprocal agreement between the Agency and the Division of Labor Standards Enforcement for the State of California. The Agency provided the California Labor Commissioner with the following address for Respondent: 1162 Norumbega Drive, Monrovia, CA 91016. On November 16, 1990, the Division of Labor Standards Enforcement notified Claimant that it would take no further action on her claim after Respondent failed to reply to a notice mailed to his address, and after a telephone contact to (818) 358-0545, in which the division "was advised that Mr. Vetters no longer resides there."

4) On May 20, 1991, the Commissioner of the Bureau of Labor and Industries served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondent owed a total of $967.80 in wages and $968 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges. With the Order of Determination, the Agency sent Respondent an "Information Sheet" containing the information required by ORS 183.413. Respondent was advised that "Should you change you [sic] address, you must notify the Agency immediately. Without such notice, the Agency shall presume the address on file to be correct." (Emphasis original.) Respondent never notified the Agency of a change of address.

5) On June 4, 1991, Respondent filed an answer to the Order of Determination. Respondent's answer also contained a request for a contested case hearing in this matter. Respondent's answer denied that Respondent owed Claimant $967.80 in unpaid wages, and further set forth the defense that Claimant was not employed by him in July 1989. Respondent used the following address on his answer: 1162 Norumbega Dr., Monrovia, CA 91016.

6) On March 2, 1992, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200. The notices and rules described above were mailed to Respondent at: 1162 Norumbega Drive, Monrovia, California 91016.

7) On March 30, 1992, the Notice of Hearing materials referred to in Finding of Fact 6 above were returned to the Hearings Unit by the Post Office marked "Return, Address Unknown." The Hearings Unit notified the Agency that Respondent's address was not current. On March 31, the Agency notified the Hearings Unit that it was attempting to find a current address for Respondent, but that it would rely on OAR 839-30-030(1) and *In the Matter of Kevin McGrew*, 8 BOLI 251, 260 (1990), if it was unable to find a current address. The Post Office advised the Agency on April 2, 1992, that Respondent had "Moved, Left No Forwarding Address."

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

9) At the time and place set forth in the Notice of Hearing for this matter, the Respondent did not appear or contact the Agency or the Hearings Unit. Pursuant to OAR 839-30-185(2), the Hearings Referee waited 15 minutes before resuming the hearing. At that time, Respondent had still not appeared or contacted the Agency or the Hearings Unit. The Hearings Referee then found Respondent in default as to the Order of Determination and proceeded with the hearing.

10) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

11) During the hearing, the Agency moved to amend the Order of Determination to correct the name of the Respondent from "George Mark Vetters" to "Mark George Vetter," which is the way Respondent signed his name on his answer. The Hearings Referee granted the motion.

12) The Proposed Order, which included an Exceptions Notice, was issued on May 28, 1992. Exceptions, if any, were to be filed by June 8, 1992. No exceptions were received.

FINDINGS OF FACT– THE MERITS

1) During all times material herein, the Respondent, a person, did business as the Court Street Apartments, located in The Dalles, Oregon. He employed one or more persons in the State of Oregon.

2) From October 1, 1988, to July 30, 1989, Respondent employed Claimant as the apartment manager of the Court Street Apartments, also known as the Commodore Apartments.

3) Respondent and Claimant entered into an oral agreement that Claimant would perform work for $1,000 per month for all hours worked.

4) Claimant's records and testimony, which are accepted as fact, reveal that she worked for Respondent during the period between July 1 and 30, 1989.

5) Claimant gave notice to Respondent on July 4, 1989, that she was quitting on July 30, 1989. Claimant quit on Sunday, July 30, 1989.

6) Claimant demanded her wages from Respondent several times. Respondent said he had no money to pay her wages because of repairs that needed to be made at the apartments. On one occasion, Respondent told Claimant that he would pay her when he sold a piece of property in California. At the time of hearing, Respondent had not paid Claimant any wages for her services in July 1989.

7) Claimant's wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: $1,000 (the monthly salary) divided by 31 (the number of days in the month of July) equals $32.26 (the average daily rate of pay). This figure of $32.26 was multiplied by 30 (the number of days Claimant worked in July 1989) for a total of $967.80. Pursuant to Agency policy, civil penalty wages were computed the same way: $32.26 (the average daily rate) multiplied by 30 (the number of days for which civil penalty wages continued to accrue) equals $967.80, which was rounded to the nearest dollar – $968. These figures are set forth in the Order of Determination.

8) Respondent did not allege in his answer an affirmative defense of a financial inability to pay the wages due at the time they accrued, nor did he provide any evidence for the record of a financial inability to pay Claimant's wages.

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

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person who employed one or more persons in the State of Oregon.

2) Respondents employed Claimant from July 1 to 30, 1989.

3) During the period from July 1 to 30, 1989, Respondent and Claimant had an oral agreement whereby Claimant's rate of pay was $1,000 per month for all hours worked. Claimant worked 30 days and earned $967.80.

4) Claimant quit employment with Respondent on July 30, 1989. Claimant gave Respondent not less than 48 hours' notice, excluding Saturdays, Sundays, and holidays, of her intention to quit employment.

5) Respondent willfully failed to pay Claimant $967.80 in earned, due, and payable wages. Respondent has not paid Claimant the wages owed, and more than 30 days have elapsed from the due date of those wages.

6) Claimant's average daily rate for the wage claim period of employment was $32.26 ($1,000 per month divided by 31 days). Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, equal $968. (Claimant's average daily rate continuing for 30 days).

CONCLUSIONS OF LAW

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

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) Former ORS 652.140(2) provided:

> "When any such employee, not having a contract for a definite period, shall quit employment, all wages earned and unpaid at the time of such quitting shall become due and payable immediately if such employee has given not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of an intention to quit employment. If such notice is not given, such wages shall be due and payable 48 hours, excluding Saturdays, Sundays and holidays, after such employee has so quit employment."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid at the time she quit employment on July 30, 1989.

4) Former ORS 652.150 provided:

> "If an employer willfully fails to pay any wages or compensation of any employee who is discharged or who quits employment, as provided in ORS 652.140, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

5) Under the facts and circumstances of this record, and according

to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant her earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

OPINION

Respondent was personally served, pursuant to OAR 839-30-030 (1),* with the charging document. With the charging document, the Agency served on Respondent a five-page document entitled "Instruction Sheet" that directed him to notify the Agency immediately if he changed his address. He filed his answer and a request for a hearing by regular US Mail. His answer and the envelope it came in showed his address as 1162 Norumbega Drive, Monrovia, California 91016. This was the same address printed on Respondent's checks used to pay Claimant's wages before July 1989. Pursuant to OAR 839-30-055 (2),** the Hearings Unit sent a Notice of Hearing by regular US Mail to Respondent at the Monrovia address, which was the last known address for Respondent in the Commissioner's files. Respondent had moved and left no forwarding address. His failure to advise the Agency of his new address and to leave a forwarding address caused the Notice of Hearing to be returned to the Agency. The Commissioner has previously held that a respondent defaults for failure to appear at hearing where he was personally served with a charging document, but the Notice of Hearing sent by regular US Mail to the respondent's last known address was returned undelivered. *In the Matter of Kevin McGrew,* 8 BOLI 251, 260 (1990); *In the Matter of Jorrion Belinsky,* 5 BOLI 1, 10-12 (1985). The Respondent in this case failed to appear at the hearing, and thus defaulted to the charges set forth in the Order of Determination.

In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. *See In the Matter of Judith Wilson,* 5 BOLI 219, 226 (1986); *In the Matter of John Cowdrey,* 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee,* 5 BOLI 268, 276 (1986); *see also* OAR 839-30-185.

Where a respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. Where a respondent fails to appear at hearing, the Forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. *In the Matter of Richard Niquette,* 5 BOLI 53, 60 (1986); *In the Matter of Jack Mongeon,* 6 BOLI 194, 201 (1987). In a default situation where the respondent's total contribution to the record is his or her request for a hearing and an answer which contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Mongeon, supra,* at 201.

The Agency has established a prima facie case. A preponderance of the credible evidence on the whole record showed that Respondent employed Claimant during the period of the wage claim and willfully failed to pay her all wages, earned and payable, when due. That evidence, which established that Respondent owes Claimant $967.80, was credible, persuasive, and the best evidence available, given Respondent's failure to appear at the hearing.

The record establishes that Respondent violated ORS 652.140 as alleged and that he owes Claimant civil penalty wages pursuant to ORS 652.150. Awarding a civil penalty turns on the issue of willfulness. The Attorney General has advised the Commissioner that "willful," under ORS 652.150, "simply means conduct done of free will." A.G. Letter Opinion No. Op. 6056 (9/26/86). "Willful" does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency. *State ex rel Nilsen v. Johnston et ux,* 233 Or 103, 377 P2d 331 (1962). "A financially able employer is liable for a penalty when it has willfully done or failed to do any act which foreseeably would, and in fact did, result in its failure to meet its statutory wage obligations." A.G. Letter Opinion, *supra.* The Respondent in this case must be deemed to have acted willfully under this test and thus is liable for civil 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 MARK GEORGE VETTER to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR SHIRLEE L. MITCHELL in the amount of ONE THOUSAND NINE HUNDRED THIRTY-FIVE DOLLARS AND EIGHTY CENTS ($1,935.80), representing $967.80 in gross earned, unpaid, due, and payable wages, and $968 in penalty wages, plus interest at the rate of nine percent per year on the sum of $967.80 from September 1, 1989, until paid, and nine percent interest per year on the sum of $968 from October 1, 1989, until paid.

* OAR 839-30-030(1) provides: "The Charging Document shall be served on the party or their representative by personal service or by certified mail. All other documents may be served by regular US Mail to the last known address in the Agency file for the case to be heard."

** OAR 839-30-055(2) provides, in pertinent part: "The Agency shall serve the party requesting the hearing with a Notice of Hearing addressed to the party at the address in the Commissioner's files by regular US Mail or any other means reasonably calculated to give the party notice of the scheduled hearing."

In the Matter of

GLENN WALTERS NURSERY, INC.,

Midway Plant Farms, Inc., and Glenn Walters, Respondents.

Case Number 13-92

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 12, 1992.

SYNOPSIS

The Commissioner found that HIV-infected Complainant was a disabled person pursuant to ORS 659.400 and for purposes of ORS 659.425. The Commissioner found no violation of ORS 659.425, where Respondent discharged Complainant for his unexcused absence from work for three days following a 30-day leave of absence. ORS 659.400; 659.425.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 9, 1992, in Room 1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. George Wesley Brundage, Jr. (Complainant) was present throughout the hearing and was not represented by counsel. Glenn Walters Nursery, Inc. (Respondent Nursery), Midway Plant Farms, Inc. (Respondent Midway), and Glenn Walters (Respondent Walters) were represented by John Spencer Stewart, Attorney at Law. Glenn Walters was present throughout the hearing on his own behalf and as Respondents Nursery's and Midway's representative.

The Agency called the following witnesses (in alphabetical order): Complainant George Wesley Brundage, Jr.; John Coulter, former general manager of Respondent Midway; Ken Klawitter, former manager for Respondent Midway; Chuck Rendsland, personnel director for Respondent Nursery and Respondent Midway during times material; Molly Tietze, former assistant manager (now manager) for Respondent Midway; and Glenn Walters, Respondent.

Respondent called the following witnesses: John Coulter, former general manager of Respondent Midway, and Chuck Rendsland, personnel director for Respondent Midway during times material.

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

FINDINGS OF FACT – PROCEDURAL

1) On August 21, 1990, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent Nursery discriminated against him because of his disability (HIV positive) in that, on August 6, 1990, Respondent Nursery terminated him.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent Nursery in violation of ORS 659.425.

3) Attempts to resolve the Complaint by conference, conciliation, and persuasion were unsuccessful.

4) On November 21, 1991, the Agency prepared and duly served on Respondents Nursery and Walters Specific Charges that alleged that Respondent Nursery discharged Complainant from employment based on his record of physical impairment, in violation of ORS 659.425(1)(b). In the alternative, the Agency alleged that Respondent Nursery discharged Complainant from employment because Respondent Nursery regarded Complainant as being physically impaired, in violation of ORS 659.425(1)(c). With each alternative, the Agency also alleged that Respondent Walters aided and abetted Respondent Nursery's discharge of Complainant, in violation of ORS 659.030(1)(g).

5) With the Specific Charges, the Forum served on Respondents Nursery and Walters the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On December 18, 1991, the Forum issued to Respondents Nursery and Walters a "Notice of Default," which notified them that their failure to file a responsive pleading within the required time constituted a default to the Specific Charges, pursuant to OAR 839-30-185. The notice advised Respondents that they had 10 days in which to request relief from the default.

7) On December 20, 1991, Respondents Nursery and Walters, through an attorney, filed a request for relief from default and an answer, which included two affirmative defenses. In their request, their attorney asserted that "by inadvertence and excusable neglect, the date for filing an Answer to the charges was not" docketed. The attorney asserted that the failure was not discovered until the Notice of Default was received because Respondents' principal attorney's secretary had been on vacation for eight days, and also because of Thanksgiving and Christmas season absences of the same attorney (John Spencer Stewart). Respondents claimed that neither the Agency nor Complainant would be prejudiced by granting relief from default.

8) On December 30, 1991, the Hearings Referee denied Respondents Nursery's and Walters's request for relief from default. The Hearings Referee found that none of the reasons advanced by Respondents constituted good cause, as required under OAR 839-30-190 and 839-30-025(11), because:

> "First, a showing of prejudice is not an element in evaluating the sufficiency of a request for relief from default. *In the Matter of the City of Umatilla*, 9 BOLI 91, 109 (1990), *aff'd without opinion, City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991).

"Second, the Specific Charges with the attached notices and rules were served on Respondents and their counsel. It was within Respondents' counsel's control to discover the filing deadline from the information provided with the Specific Charges, and to properly docket it. Respondents' stated reasons do not constitute 'circumstances over which the party had no control.'

"Third, the reasons given for failing to answer do not satisfy the 'excusable mistake' requirement set forth in the applicable rule.

> "'To be excusable, a mistake leading to default would have to be based on facts or circumstances actually inviting the mistaken behavior. For instance, if the Notice of Hearing showed that an answer was not due for 30 days, or if the respondent had received written notice that the Charges were dismissed, in short, if the party was misled by facts or circumstances which would mislead a reasonable person in like or similar circumstances, a resulting mistake would be excusable.' *In the Matter of 60 Minute Tune*, 9 BOLI 191, 202 (1991).

"In a 1987 case, the Commissioner denied relief from default where a respondent wrote down a hearing date on the wrong day of his calendar, and failed to appear at hearing. The Commissioner found that

> "'that mistake shows a simple failure to exercise due care. Unilateral carelessness does not constitute excusable mistake or a circumstance beyond Employer's control.' *In the Matter of Jack Mongeon*, 6 BOLI 194, 195 (1987).

"In another case, the Commissioner found that the absence of an attorney's regular secretary on the date Specific Charges were received, and for 10 days thereafter, and the failure of the substitute secretary to bring it to the attorney's attention did 'not rise to the level of "excusable mistake."' *City of Umatilla, supra*, at 109.

"Accordingly, Respondents' Request For Relief From Default is DENIED and the Respondents will not be allowed to present evidence at the hearing scheduled in this matter. *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988)."

9) On January 8, 1992, Respondents Nursery's and Walters's principal attorney, Mr. Stewart, filed a Supplemental Request for Relief from Default with a supporting affidavit. In these documents, Respondents presented facts that were not presented in their original request for relief. According to Mr. Stewart's affidavit, his law firm had a new computerized docketing system that failed to properly flag the date for filing Respondents' answer, apparently due to an erroneous entry code. Respondents' attorney "has been assured by company representatives that such will not occur again." Mr. Stewart's affidavit referred to an "electronic glitch in the scheduling system."

10) On January 14, 1992, the Hearings Referee granted Respondents' request for relief, stating:

> "'Good cause' means 'that a party failed to perform a required act due to an excusable mistake or circumstance over which the party had no control.' Respondents' correctly note that 'an excusable mistake or circumstance over which the party had no control' has been shown where there has been 'a superseding or intervening event which prevents timely compliance.' *In the Matter of the City of Umatilla*, 9 BOLI 91, 108 (1990), *aff'd without opinion, City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991). I find that a system error in a new computer docketing system, which results in the system's failure to flag the date for filing an answer, is a circumstance over which Respondents had no control. I will note here, however, that a situation involving a data entry error would be little different than the 1987 case, *In the Matter of Jack Mongeon*, 6 BOLI 194, in which the Respondent wrote down the wrong date for the hearing and failed to appear there. As I mentioned in the December 30 ruling, the Commissioner denied relief from default in that case.
>
> "Accordingly, Respondents are relieved from default, and their answer filed December 20, 1991, is accepted."

11) On January 17, 1992, Respondents Nursery and Walters filed a motion for a postponement of the hearing set to begin on April 28, 1992. The Agency had no objection to the postponement, and the Hearings Referee granted it on January 27. A new hearing date was set for June 9, 1992, and a Notice of Hearing was issued accordingly.

12) On around May 15, 1992, the Agency filed a motion to amend the Specific Charges to add Midway Plant Farms, Inc. as a named Respondent, because it had been unaware that Respondent Nursery and Respondent Midway were two corporations. Respondents Nursery and Walters objected to the Agency's "eleventh-hour request," asserting that they had provided information, in the form of checks, during the investigation of this matter that indicated that Complainant was an employee of Midway Plant Farms, Inc., rather than of Respondents Nursery or Walters. The Agency filed a reply to Respondents' response, disputing that the Agency had received any checks from Respondents. The Agency argued that Respondents would not be prejudiced by the amendment and pointed out that Respondents' answer admitted that Complainant was an employee of Respondent Nursery. The Hearings Referee granted the Agency's motion, based OAR 839-30-075(2) and 839-30-085, and found no prejudice to Respondents by the amendment.

13) Pursuant to OAR 839-30-071, the participants* each filed a Summary of the Case.

14) On June 3, 1992, the Agency prepared and duly served on

* "Participant" or "participants" includes the charged parties and the Agency. OAR 839-30-025(17).

Respondents Midway and Walters Specific Charges which alleged that Respondents Nursery and Midway discharged Complainant from employment based on his record of physical impairment, in violation of ORS 659.425(1)(b). In the alternative, the Agency alleged that Respondents Nursery and Midway discharged Complainant from employment because they regarded Complainant as being physically impaired, in violation of ORS 659.425(1)(c). The Agency also alleged that Respondent Walters aided and abetted Respondents Nursery's and Midway's discharge of Complainant, in violation of ORS 659.030(1)(g).

15) With the Specific Charges, the Forum served on Respondents Midway and Walters the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

16) On June 8, 1992, Respondents filed a supplemental answer and affirmative defenses.

17) A prehearing conference was held on June 9, 1992, at which time the Agency and Respondents stipulated to facts that were admitted by the pleadings. Those facts were admitted into the record by the Hearings Referee at the beginning of the hearing. The Agency moved to dismiss the Specific Charges against Respondent Nursery. That motion was granted on the record.

18) At the commencement of the hearing, the attorney for Respondents stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

19) Pursuant to ORS 183.415(7), the Agency and Respondents were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

20) At the end of the Agency's case in chief, Respondents moved to dismiss the Specific Charges because the evidence failed to support the allegations. The Hearings Referee denied the motion with regard to Respondent Midway. The Hearings Referee found that there was evidence on the record from which a prima facie case of an unlawful employment practice in violation of ORS 654.425 could be established. The Hearings Referee held in abeyance until the Proposed Order ruling on Respondents' motion with regard to Respondent Walters and to back wage damages.

21) After all of the evidence was presented, the Agency moved to amend the Specific Charges to drop its allegations against Respondent Walters. Respondents had no objection. The Hearings Referee granted the motion pursuant to OAR 839-30-075.

22) In July 9, 1992, the administrator of the Support Services Division of the Bureau of Labor and Industries granted an extension of time to the Hearings Referee to issue the proposed order in this matter. The proposed order was due on July 17, 1992.

23) The Proposed Order, which included an Exceptions Notice, was issued on July 16, 1992. Exceptions, if any, were to be filed by July 27, 1992. No exceptions were received.

FINDINGS OF FACT– THE MERITS

1) At all times material herein, Respondent Midway was an Oregon corporation registered to do business in the State of Oregon, and an employer in this state that employed six or more persons, subject to the provisions of ORS 659.010 to 659.435.

2) At all times material herein, Respondent Walters was president of Respondent Midway.

3) Complainant was employed on January 31, 1990, by Respondent Midway as a general laborer.

4) At times material, Chuck Rendsland was personnel director for Respondent Midway. The personnel director hired and fired employees. Rendsland interviewed and hired Complainant for 40 hours per week.

5) At times material, John Coulter was the general manager of Respondent Midway. When Complainant was first employed, Ken Klawitter was his supervisor and a manager. Molly Tietze was an assistant manager and Complainant's supervisor (as interim manager) after Klawitter was discharged in April 1990. On June 10, 1990, Kellie Keele was hired as manager, and she became Complainant's immediate supervisor.

6) After Complainant had been employed for two or three days, he talked to Rendsland with the intent of quitting, because he wanted to take a cruise in the Caribbean Sea in mid-March 1990. Complainant did not expect to receive a leave of absence so soon after being hired. Rendsland said that there was no problem and that Complainant could take a leave. Complainant also talked to Klawitter and Tietze about the leave. Complainant did not give anyone at Respondent Midway a specific date for his return to work. No one at Respondent Midway gave Complainant a specific date to return to work or told him that he would be terminated if he did not return by a specific date. Klawitter told Complainant that when he came back from leave, Respondent Midway would give him his job back. Complainant was a good worker. If Complainant had come back two to three months later, he would have gotten his job back, as far as Klawitter was concerned. Complainant took the leave for two and one-half weeks in mid-March. He returned to his same job on March 27, 1990.

7) Respondent Midway was incorporated in 1987. Complainant's leave of absence was the first one requested and approved by Respondent Midway.

8) There was no policy at that time regarding leaves of absence at Respondent Midway.

9) Complainant was not given an open-ended leave of absence. Respondent Midway did not approve that kind of leave for any employee. Klawitter had no authority to grant an open-ended leave.

10) On June 5, 1990, Complainant learned that he had tested positive for the human immunodeficiency virus (HIV). The virus weakened and diminished Complainant's immune system, damaging his health. Within a day or two, Complainant told Tietze, Coulter,

Cori Bagley (an assistant manager), and Judy Sepe that he had the virus. He felt it was necessary for them to have that information. Coulter told Complainant he was sorry about the diagnosis. Coulter said he needed to talk with the company's lawyers with regard to any notification of Complainant's co-workers and would get back to Complainant.

11) The public's beliefs, opinions, and prejudices toward individuals with HIV infection substantially curtail their major life activities. They are shunned socially and often excluded from public life. Their employment opportunities are substantially limited. *See* Opinion.

12) Neither Rendsland nor Coulter knew of another employee of Respondent Midway who had AIDS or had tested positive for HIV.

13) Coulter discussed Complainant's HIV-positive diagnosis with Rendsland. Coulter told Keele, Tietze, and Bagley about Complainant's diagnosis.

14) After Complainant informed Respondent Midway about his infection, Tietze asked Complainant, for the safety of employees and customers, to not handle the fresh strawberries that were for sale. Complainant felt that that requirement was unreasonable, but did not inform anyone of his opinion.

15) On or about June 21, 1990, Complainant requested and was granted a leave of absence from Respondent Midway.

16) Complainant asked Coulter for time off from work because he wanted to inform his family and friends about the diagnosis. Coulter told Complainant that it was a busy time of year, but that Respondent Midway could give him a leave of absence for 30 days. Coulter told Complainant to check out with the manager of the facility before going on leave. The manager would then mark on Complainant's timesheet that he was on leave, and the manager would discuss with Complainant when he had to be back to work. Complainant agreed to do that. Coulter told Complainant to talk with Rendsland.

17) On Complainant's timesheet for the period June 17 to 23, 1990, Keele wrote: "Leave of absence [sic] until July 23. Please mail paycheck."

18) In June 1990, Respondent Midway had no formal written policy regarding leaves of absence. It was left to the general manager of the facility to determine personnel issues. Coulter was given the latitude and discretion to make such determinations. On August 1, 1990, Respondent Midway issued "Midway Plant Farm, Inc. Hourly Employees' Handbook August 1, 1990." In the handbook, on pages 16 to 18, was a leave of absence policy. The handbook stated, "On March 1, 1990, Midway Plant Farm, Inc. enacted a leave of absence policy for all workers" and stated the purposes, policy, and criteria to request and approve a leave of absence. The March 1 effective date was an error. No formal written policy existed before August 1, 1990, when the handbook was distributed to employees.

19) Coulter never told Complainant that he could come back from leave any time he wanted to. Respondent Midway had no such policy and could not be run with such a policy. Rendsland had no authority to grant an

open-ended leave of absence to an employee, and never did so.

20) Complainant talked to Tietze, Bagley, and Rendsland about taking a leave. He asked Tietze to have his paycheck mailed to his address in Oregon. When Complainant met with Rendsland after Coulter had approved the leave, Complainant informed Rendsland of the time off that he needed. Rendsland wished Complainant good luck. Rendsland never informed Complainant of a specific date that he had to return. Complainant and Tietze never discussed a specific return date. No one from Respondent Midway or Respondent Nursery ever told Tietze of a specific date for Complainant to return from leave. Tietze had no understanding of when Complainant would return from leave.

21) Beginning on June 21, 1990, Complainant began a leave of absence from Respondent Midway.

22) From the end of March until the end of June is a busy period in the nursery industry in Oregon. Respondent Midway hired five new employees in the week Complainant went on leave. When Complainant was not working at Respondent Midway, other general laborers did the work he would have done.

23) Complainant did not work for Respondent Midway between June 21 and August 6, 1990. With the exception of a few days on each end of the leave when he was in Oregon, Complainant spent the time on leave in California.

24) Respondent Midway had a policy in place at times material that provided that, if an employee did not come to work and did not contact the company for three work days, the employee abandoned the employee's job. When Coulter gave Complainant a 30-day leave in June 1990, he did not tell Complainant about the policy described in this finding.

25) On Complainant's timesheet for the period of July 22 to 28, 1990, someone wrote "unexcused absence," beginning on July 23.

26) On July 27, 1990, Rendsland informed Coulter that Complainant had been gone for three days without authorization. At that point, Coulter determined that Complainant had forfeited his job with Respondent Midway, "in keeping with our standard policy of three days of unauthorized absence from work." Coulter terminated Complainant's employment because he had been absent from work without excuse for over three days. Coulter instructed Rendsland to hire a replacement for Complainant. Someone was hired for that position.

27) On August 6, 1990, Complainant returned from his leave. Complainant went to Respondent Midway and talked to Tietze. They discussed recent renovations at the business and recent shipments. Tietze told Complainant to talk with Rendsland. Rendsland told Complainant he was fired because he had not come in to work for three days without authorization. Complainant told Rendsland that he was HIV positive. Rendsland did not fire Complainant because he was HIV positive.

28) On Complainant's timesheet for the period of July 29 to August 4, 1990, Rendsland wrote "Terminated. Failure to show up on 7/23/90 as

agreed upon. No call or contact until 8/6/90."

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Midway employed six or more persons within the State of Oregon.

2) Complainant was employed by Respondent Midway.

3) Complainant had the human immunodeficiency virus, a physical impairment that weakened and damaged his health.

4) At times material, Complainant's physical impairment substantially limited one or more major life activities.

5) Respondent Midway discharged Complainant because, without authorization, he failed to report to work for three days after the end of his leave.

CONCLUSIONS OF LAW

1) At all times material, Respondent Midway was an employer subject to the provisions of ORS 659.010 to 659.110, 659.400 to 659.460, and OAR 839-06-200 to 839-06-255. ORS 659.400(3).

2) Complainant is a disabled person for purposes of ORS 659.425.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.435.

4) Respondent Midway did not violate ORS 659.425.

5) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and the complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

The threshold issue in this case is whether Complainant is a "disabled person," as defined in ORS 659.400(1) and (2), and is protected from discrimination by ORS 659.425. The next issue is whether Respondent Midway discharged Complainant because he was disabled.

Complainant Is a Disabled Person

Subsection (1)(a) of ORS 659.425 prohibits discrimination against an individual based upon an actual disability, that is, a physical or mental impairment that substantially limits one or more major life activities. *OSCI v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743 (1989). The Agency did not plead this subsection as a violation. Notwithstanding that, the Agency put on evidence to show that Complainant had a physical impairment that substantially limited major life activities.

This Forum has previously addressed the issue of whether a person with the AIDS virus is a "disabled person" for purposes of ORS 659.425. In a 1989 contested case involving a complainant in the symptomatic AIDS Related Complex stage of the HIV infection, the Forum found that "HIV infection is a physical impairment that substantially limits one or more major life activities," and that, since the complainant was "so infected, she was as a matter of law a handicapped person."* *In the Matter of Casa Toltec,* 8 BOLI 149, 168, 171 (1989). Oregon's law protecting the rights of persons with disabilities is modeled after the federal Rehabilitation Act of 1973. *OSCI,* 780 P2d at 746 n. 6. The conclusion in *Casa Toltec* is consistent with the opinions of courts construing 504 of the federal Rehabilitation Act and state antidiscrimination acts. *See Cain v. Hyatt,* 734 F Supp 671 ED Pa 1990), and the cases cited therein.

However, the Agency did not charge a violation of ORS 659.425(1)(a). The Agency charged violations of ORS 659.425(1)(b) and (c). Those subsections do not require that an individual have a present or an actual impairment that substantially limits a major life activity. *Devaux v. State of Oregon,* 68 Or App 322, 325-26, 681 P2d 156, 158 (1984).

ORS 659.425(1)(b) prohibits discrimination because an "individual has a record of a physical or mental impairment." "Has a record of such an impairment" means that an individual has a history of, or has been misclassified as having, an impairment that substantially limits one or more major life activities. ORS 659.400(2)(b); *Devaux,* 68 Or App at 326, 681 P2d at 158. ORS 659.425(1)(b) is appropriately pled when an individual does not have an impairment that substantially limits a major life activity, but has a history of, or has been misclassified as having, such an impairment. *See, e.g., In the Matter of Pzazz Hair Designs,* 9 BOLI 240 (1991) (an individual with arrested alcoholism had a record of an impairment that substantially limited major life activities). As the gravamen of Complainant's allegations concern his current HIV infection, and as there is no evidence on the record from which to conclude that Complainant was misclassified in any respect, the Forum finds that Complainant does not have a record of HIV infection and therefore does not enjoy the protection of the statute for that reason.

ORS 659.425(1)(c) prohibits discrimination because an individual is regarded as having a physical or mental impairment that substantially limits a major life activity. *OSCI,* 780 P2d at 746. ORS 659.400(2)(c) reads:

> "'Is regarded as having [such] an impairment' means that the individual:
>
> "(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;
>
> "(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment;
>
> "(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment."

Taking those paragraphs in reverse order, ORS 659.400(2)(c)(C) simply is not applicable here, because Complainant has a physical impairment: the AIDS virus.

With regard to ORS 659.400 (2)(c)(B), the Forum takes judicial notice that the "attitude of others"* toward

* Note that in 1989 the Legislature amended ORS 659.400 and 659.425 to change "handicapped" to "disabled." Sections 129 and 131, chapter 224, Oregon Laws 1989.

* OAR 839-06-205(2) reads: "'The attitude of others toward such impair-

persons with the AIDS virus results in substantial limitations on those persons' major life activities. *See Cain, supra.* The Forum may take notice of judicially cognizable facts and take official notice of general, technical, or scientific facts within its specialized knowledge. ORS 183.450(4). A fact may be judicially noticed and need not be proved if it is a fact not subject to reasonable dispute because it is generally known or can be accurately and readily determined by resort to sources whose accuracy cannot be reasonably questioned. Oregon Attorney General's Administrative Law Manual 86 (1991). Accordingly, the Forum has found that Complainant is a "disabled person" under ORS 659.400(2)(c)(B) and for purposes of ORS 659.425(1)(c).

With respect to ORS 659.400 (2)(c)(A), it "protects the person who has a nonsubstantial impairment that the employer erroneously treats as substantial[.]" *OSCI,* 780 P2d at 746. The Forum has already found, under ORS 659.400(1) and (2)(c)(B), that Complainant has an impairment that, as a result of the attitudes of others, substantially limits major life activities. However, even if the Forum had not so found (that is, if the Forum had found that at times material Complainant's impairment did not substantially limit major life activities), evidence showed that Complainant had a physical impairment that Respondent Midway treated as substantially limiting. The evidence showed that Respondent Midway asked Complainant, for the safety of employees and customers, to not handle the fresh strawberries that were for sale. Respondent Midway apparently treated Complainant's HIV infection as potentially dangerous to employees and customers if he handled food products. This perception, if it were true, would substantially limit Complainant's major life activities of at least employment and socialization, since it would substantially limit his ability to be employed as a chef (a profession he had worked in for 15 years) and to socialize. In such a case, the Forum would find that Complainant was a "disabled person" under ORS 659.400(2)(c)(A).

Cause for the Discharge

The Agency charged that Respondent Midway fired Complainant either because of his record of a disability or because Respondent Midway regarded him as having a disability. The Agency was required to make out a prima facie case of discrimination. The Agency presented evidence that showed that:

(1) Respondent Midway was an employer that employed six or more persons. ORS 659.400(3).

(2) Complainant is a "disabled person," for purposes of ORS 659.400 and 659.425.

(3) Complainant was discharged by Respondent Midway. OAR 839-05-010(1).

As in most cases, most of the evidence focused on the disputed issue of whether there was a causal connection between the discharge and

ment' means an opinion, evaluation, or belief, held by another person or persons toward the individual's perceived or actual physical or mental impairment."

Complainant's protected class. The Hearings Referee carefully observed the demeanor of each witness and evaluated the credibility of the testimony based upon its inherent probability, its internal consistency, whether or not it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible. *See Lewis and Clark College v. Bureau of Labor,* 43 Or App 245, 256, 602 P2d 1161 (1979) (Richardson, J., concurring in part and dissenting in part). There was no direct evidence of a causal connection between the discharge and Complainant's protected class. The Agency presented evidence, in the form of testimony from Complainant and Klawitter, that Respondent Midway permitted Complainant to take an open-ended leave in March (before he was diagnosed as being HIV infected) and gave him another such leave in June, but then fired him based on some unspoken or nonexistent policy. From all of this evidence, the Forum could infer that Respondent Midway discharged Complainant because of his protected class.

Respondent Midway presented evidence of a legitimate nondiscriminatory reason for the discharge: that Complainant failed to return from an approved 30-day leave when required and was absent without authorization for three days thereafter. Respondent's witness, Coulter, testified that he had the discretion to set personnel policies and had given Complainant a 30-day leave. Coulter instructed Complainant to work out the return date with his supervisor, Keele. Coulter and Complainant agreed that it was Keele's handwriting on Complainant's June 21, timesheet, which said that Complainant was on leave until July 23. The timesheet went to Rendsland, whose credible testimony was that, a few days after July 23, he contacted Coulter regarding Complainant's failure to return from leave. Coulter made the decision to terminate Complainant for his unexcused absence from work for three days. Coulter's and Rendsland's testimony was credible, consistent, and corroborated by documentary evidence.

The Agency offered evidence to show that Respondent's asserted reason for the discharge was pretextual. Complainant testified that he was never given a date to return from the leave and that the leave was open ended. He testified that Respondent Midway had granted him an open-ended leave in March (before he notified Respondent Midway that he was infected with HIV). That testimony was supported by Klawitter, who knew of no 30-day leave policy in March. With respect to Complainant's leave of absence in March, Klawitter would have received Complainant back to work after more than 30 days. In addition, Tietze did not know of any set date for Complainant's return from his second leave in June and July. The Agency's evidence included Respondent Midway's employee handbook, which stated that the leave of absence policy was effective on March 1, 1990 (before Complainant's first leave). The Agency argued that Respondent Midway had not followed its policy and that the handbook had no policy calling for

termination after an unexcused absence of three days.

The Forum has found that the preponderance of credible evidence on the whole record supports Respondent's stated reason for Complainant's discharge. Respondent Midway's witnesses gave credible testimony, which was supported by documentary evidence. The Agency's evidence offered to prove that the asserted reason was pretextual was not persuasive. Klawitter's testimony about the lack of a policy in March was consistent with the testimony of Respondent Midway's witnesses that there was no leave policy in March. It was consistent with Respondent Midway's evidence that the March 1 effective date for the leave policy in the handbook was in error. It was consistent with Respondent Midway's evidence that there was no formal written leave policy before August 1. Such evidence is not persuasive that Complainant was given an open-ended leave in March or that Coulter granted Complainant an open-ended leave in June. Tietze's testimony that she didn't know when Complainant would return from leave does not show pretext, given that she was no longer Complainant's supervisor. The strongest evidence offered by the Agency was Complainant's testimony that he had never been given a return date. The Hearings Referee found Complainant's testimony generally credible, but he testified to problems with his memory. In large part, the disputed evidence boiled down to a test between Complainant's testimony and the testimony of Coulter and Rendsland. The Forum found that the Agency did not prove by a preponderance of the evidence that Respondent Midway's legitimate nondiscriminatory reason was pretextual. Accordingly, the Forum has found that Respondent Midway did not violate ORS 659.425.

ORDER

NOW, THEREFORE, as Respondent Midway has not been found to have engaged in any unlawful practice charged, the complaint and the amended specific charges filed against Respondents are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of
EFRAIN CORONA,
Respondent.

Case Number 21-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued August 12, 1992.

SYNOPSIS

The Commissioner refused to renew Respondent's forest labor contractor license because (1) he violated former ORS 658.440(2)(e) by subcontracting with an unlicensed person, and (2) he failed to make workers' compensation insurance premium payments when due, which actions demonstrated that his character and reliability made him unfit to act as a forest labor contractor. ORS 658.445(1) and (3); OAR 839-15-145(1)(f) and (g), 839-15-520(1)(e), (2), and (3)(j). The Commissioner assessed a $1,000 civil penalty for Respondent's violation of former ORS 658.440(2)(e).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on April 29, 1992, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Efrain Corona (Respondent) was represented by James M. Brown, Attorney at Law. Mr. Corona was present throughout the hearing.

The Respondent called the following witnesses (in alphabetical order): Efrain Corona, Respondent; Gary Marchant, a credit analyst with Liberty Northwest Insurance Company, Respondent's workers' compensation insurance carrier at the time of hearing; and Donald S. Matsuda, an assistant district director of the US Small Business Administration.

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

FINDINGS OF FACT – PROCEDURAL

1) On October 16, 1991, the Agency issued a "Notice of Proposed Refusal to Renew Farm Labor Contractor License and to Access Civil Penalties" (charging document) to Respondent. The charging document informed Respondent that the Agency intended to refuse to renew his farm labor contractor license and assess him a $6,000 civil penalty. The charging document cited the following bases for the proposal to refuse to renew the license and to assess the civil penalties: (1) making misrepresentations, false statements, or willfully concealing information on the license application; (2) failure to report any change in the circumstances under which the license was issued; (3) assisting an unlicensed person to act in violation of ORS chapter 658; (4) failure to pay workers' compensation insurance premium payments when due; and (5) violations of or failure to comply with any provision of ORS 658.405 to 658.503. The notice was served on Respondent, through Respondent's attorney, Elaine Ciafarone Tunzat, around October 16, 1991.

2) On December 16, 1991, the Agency received Respondent's answer to the charging document and a request for a hearing. In his answer, Respondent denied all of the alleged violations and asserted four affirmative defenses.

3) On December 16, 1991, the Agency requested a hearing from the Hearings Unit.

4) On January 16, 1992, the Hearings Unit issued to Respondent and the Agency a "Notice of Hearing,"

which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to Respondent a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.

5) On January 24, 1992, the Agency filed a motion for summary judgment on all violations alleged in the charging document. The motion was supported by numerous exhibits.

6) On January 24, 1992, the Hearings Referee wrote a letter to the Respondent regarding the motion for summary judgment and required his response to the motion by February 14, 1992.

7) On February 13, 1992, Respondent substituted attorneys, and his substituted attorney, James Brown, requested an extension of time to respond to the motion for summary judgment. On February 20, 1992, the Agency opposed the length of the requested extension. On February 26, 1992, the Hearings Referee granted the motion, because to deny it would create an undue hardship on Respondent, citing OAR 839-30-040(2).

8) On March 20, 1992, Respondent filed a motion to strike the Agency's motion for summary judgment. Respondent also filed a memorandum in opposition to the motion for summary judgment, with an exhibit and the affidavits of Elaine Ciafarone Tunzat and Respondent.

9) On March 31, 1992, the Agency requested an extension of time to reply to Respondent's motion and memorandum because the case presenter did not receive the documents until March 30. On April 1, 1992, the Hearings Referee granted that motion. The Hearings Referee directed the participants to continue to prepare for hearing and advised them that case summaries were due on April 13.

10) On April 2, 1992, the Agency filed its response to the Respondent's motion to strike and to Respondent's memorandum in opposition to summary judgment.

11) On April 7, 1992, the Hearings Referee issued rulings on the Agency's motion for summary judgment and Respondent's motion to strike the Agency's motion. The Hearings Referee granted the Agency's motion for summary judgment with respect to paragraphs three (assisting an unlicensed person to act in violation of ORS chapter 658) and four (failure to pay workers' compensation insurance premium payments when due). The Hearings Referee denied the motion with respect to paragraphs one, two, and five of the charging document. The Hearings Referee also denied Respondent's motion to strike.

12) On April 8, 1992, the Agency withdrew paragraphs one, two, and five of the charging document (the allegations on which summary judgment was denied). The Agency requested that the matter proceed to a determination of the sanctions for the violations found and that the hearing be conducted in writing. Respondent's counsel was unable to agree to that during a telephone conversation with the

Hearings Referee, so the referee directed that the hearing scheduled for April 21 would begin on schedule on all remaining issues. The Hearings Referee reset the due date for case summaries to April 16, 1992.

13) On April 13, 1992, Respondent filed a motion for postponement of the hearing (due to the need to conduct discovery) and filed a motion for reconsideration of the motion for summary judgment. By letter dated April 14, the Agency opposed the motions. On April 15, 1992, the Hearings Referee denied both of Respondent's motions. On April 15, Respondent requested reconsideration of the motion for postponement. On April 16, the Hearings Referee made a conference call to Respondent's counsel and the Agency's Case Presenter. After hearing arguments, the Hearings Referee found that Respondent had not shown good cause for a postponement. Notwithstanding that, the Hearings Referee postponed the hearing to April 29 because Respondent was not prepared to go to hearing. OAR 839-30-100(4). In addition, the Hearings Referee moved the hearing from Salem to Portland, and adjusted the due date for case summaries.

14) Pursuant to OAR 839-30-071, the Agency and Respondent each filed a Summary of the Case.

15) On April 23, 1992, the Agency objected to a request from Respondent for discovery of Commissioner's Final Orders, Consent Orders, or other alternate dispositions wherein the Agency had proposed that a license should be revoked, denied, or not renewed due to violations of specified statutes and rules. The Agency objected to the request as untimely, unduly burdensome, and immaterial. The Hearings Referee sustained the Agency's objection to Respondent's request.

16) A prehearing conference was held on April 29, 1992, at which time the Agency and Respondent stipulated to certain facts, which were admitted into the record by the Hearings Referee during the hearing.

17) At the start of the hearing Respondent's attorney said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

18) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

19) At the beginning of the hearing, the Agency moved to amend the charging document to proposed a civil penalty of $1,000 (down from $2,000) for Respondent's violation of former ORS 658.440(2)(e), now ORS 658.440(3)(e). Respondent did not object. The Hearings Referee granted the motion.

20) During the hearing, Respondent requested an opportunity to submit an exhibit after hearing. The Agency did not object. The record of the hearing was left open until May 8, 1992, for that document. Respondent timely submitted the document, which is hereby admitted to the record.

21) On May 8, 1992, pursuant to the April 29 ruling, the Hearings Referee closed the record herein.

22) On June 4, 1992, the administrator of the Support Services Division

of the Bureau of Labor and Industries granted the Hearings Referee an extension of time to issue the Proposed Order in this case.

23) On July 2, 1992, a Proposed Order in this matter was issued and mailed to all persons listed on the face of the Certificate of Mailing at their last known addresses. Included in the Proposed Order was an Exceptions Notice that allowed 10 days for the filing of any exceptions. Exceptions were filed by Respondent and received by the Hearings Unit in a timely manner. Those exceptions have been addressed throughout this Order.

FINDINGS OF FACT– THE MERITS

1) On February 19, 1986, Respondent, with the advice of counsel, consented to the entry of an order (No. 04-85) against him by the Agency. In the order, Respondent admitted violating ORS 658.415(5) (regarding maintaining a corporate surety bond or letter of credit to cover liability for the period for which the license is issued), but denied two other violations. Respondent represented to the Bureau of Labor and Industries that he would take appropriate steps calculated to ensure compliance with all provisions of ORS chapter 658. The Commissioner assessed a civil penalty of $250.

2) On March 23, 1988, Respondent entered into a subcontract agreement with Tomas Benitez to do hand tubing and bud capping in the Siuslaw National Forest. Benitez represented to Respondent that Benitez had applied for a farm labor contractor license, and Respondent believed that Benitez qualified for the license.

3) Benitez first applied to the Agency for a farm labor contractor license on September 28, 1988. The Agency issued Benitez a license for only farm labor contracting on October 10, 1988. Benitez received a special indorsement to act as a farm labor contractor with regard to the forestation or reforestation of lands on March 15, 1989.* Benitez was licensed as a farm labor contractor (without a special indorsement for forestation or reforestation) at the time of hearing.

4) On September 9, 1988, Respondent, with the advice of counsel, consented to the entry of an order (No. 09-89) by the Agency against him. In the order, Respondent admitted violating ORS 658.440(1)(e) (Respondent failed to report a change in the circumstances under which his license was issued, namely, a vehicle used to transport forest labor workers). Respondent represented to the Commissioner that he would comply with the Farm Labor Contractor Law, ORS 658.405 to 658.485. Respondent agreed to pay a civil penalty of $2,000 for the violation of ORS 658.440(1)(e).

5) On August 30, 1989, Liberty Northwest Insurance Company (Liberty) was assigned by the National Council on Compensation Insurance (NCCI) to provide workers' compensation insurance to Respondent, as part of the assigned risk pool. Respondent was required to make monthly payroll reports and premium payments to Liberty. Respondent's premium payments were timely made. Respondent's reports to Liberty were delinquent. Liberty issued a cancellation notice to Respondent. A Workers' Compensation Division tax was also assessed on Respondent, to be collected by Liberty. Liberty did not receive the tax from Respondent by the effective cancellation date of December 18, 1989. Respondent's policy was canceled on that date. At the end of 1989, Liberty conducted an audit of Respondent, and Respondent's insurance was reinstated. From that time to the date of hearing, Liberty had a "good relationship" with Respondent with regard to timely premium payments. Audits at the end of each year resulted in credits to Respondent. Respondent was current with his payments to Liberty at the time of hearing.

6) In 1989, the Office of Inspector General of the federal Small Business Administration (SBA) conducted an audit of selected reforestation contractors in Oregon. The audit report, dated January 25, 1990, reads in summary:

> "The contractors operated within the requirements of the 8(a) program except for Efrain L. Corona (Corona), a proprietorship, who engaged in practices detrimental to the business and had not operated in a businesslike manner. Corona did not maintain a job cost accounting system and made cash payments outside the official payroll records to workers; therefore, individual contract costs could not be effectively verified. The cash payments to workers appear to have resulted in avoiding payment of over $466,000 in worker's compensation insurance premiums (although this matter is being contested by Corona). In addition, Corona personally withdrew over $2 million from the company during a 4-year period, thus threatening the company's ability to pay the premiums from company net worth in the event the full amount must be paid.
>
> "We are recommending that the contractor be required to implement specific corrective actions on the deficiencies noted. Furthermore, we are recommending that the District Director monitor the proceedings concerning Corona's alleged nonpayment of workers compensation insurance and initiate further action if those proceedings determine that payrolls were improperly reported to avoid payment of workers compensation insurance."

Some of the Inspector General's findings were based on information that Respondent disputed in his appeal of an Oregon Department of Insurance and Finance (DIF) final order (*see* Finding of Fact 7, *infra*). Because that final order was on appeal, Donald Matsuda, an assistant district director in the Portland Office of the SBA, did not believe that the Inspector General's findings were conclusively proved. Matsuda believed that Respondent had a "fairly good reputation" with the US Forest Service (USFS) and the Bureau of Land Management (BLM), and did his work competently. Matsuda

* ORS 658.417 requires that one who acts as a farm labor contractor with regard to the forestation and reforestation of lands must, among other requirements, obtain a special indorsement authorizing such activity and pay a higher fee than a farm labor contractor not involved with forestation or reforestation. OAR 839-15-004 defines such a farm labor contractor as a "forest labor contractor."

believed other agencies "don't want to be matched" with Respondent because of the "situation he's in right now." Whenever Respondent got a contract with the USFS or BLM, those agencies got letters from competing farm labor contractors and "congressionals" (which are letters to congressional offices from constituents) questioning why the agencies continue to give contracts to Respondent. At the time of hearing, the SBA was recommending that Respondent be the farm labor contractor on an SBA contract with the Ochoco National Forest.

7) During May and June 1990, Respondent participated in a hearing before the Oregon Department of Insurance and Finance (DIF), Case No. 89-08-04, in which he appealed workers' compensation insurance premiums charged by SAIF Corporation (SAIF) for premium years 1986 to 1988. Following audits, SAIF had billed Respondent approximately $750,000 for premiums unpaid during 1986 to 1988, and Respondent appealed those billings. Respondent was represented by counsel at the hearing. The issue in the DIF case was whether Respondent made sufficient workers' compensation insurance payments during 1986 to 1988. DIF fully and fairly heard Respondent's evidence and legal arguments on whether premiums were owed, and, through its final order, required Respondent to pay premiums in the approximate amount of $600,000. Respondent appealed the final order to the Court of Appeals, which permitted all but 10 percent of that order to be enforced while the appeal was pending, stating that "even if [Respondent] prevails on the portions of the order as to which [the insurance companies] make concessions, that is likely to reduce the amount due under the order, at a maximum, by 10%."

8) On or about January 28, 1991, Respondent executed and submitted a notarized farm labor contractor license renewal application to the Bureau of Labor and Industries.

9) On March 11, 1991, NCCI instructed Liberty to cancel Respondent's workers' compensation insurance, as he was not eligible for the assigned risk pool due to his delinquency with SAIF. Before Liberty canceled Respondent's insurance, NCCI directed Liberty to reinstate Respondent's insurance without lapse because he had appealed the DIF order and had filed a Chapter 11 bankruptcy.

10) At the time of hearing, Respondent's insurance premium and tax payments were current.

11) While Respondent testified, the Hearings Referee observed his demeanor and recognized that English was his second language. Some of Respondent's testimony was not credible. For example, Respondent testified that Benitez told him that Benitez was licensed as a farm labor contractor when they entered into the subcontract. However, in his sworn affidavit in the record, Respondent testified that Benitez told him that Benitez had "applied for" a license; this is consistent with what is written on the subcontract. On another issue, Respondent and Matsuda testified about a 1989 USFS contract on which Respondent was defaulted. Respondent testified that:

> "There was never a default job. There was a letter only saying that contract could be put up in a default clause if the problem of some of the plot cards brought in from one of my employees to the Forest Service. The inspector disagreed with some of the numbers, and the [Contracting Officer] he sent me a kind of nasty letter saying if I don't correct the problem he put the job in a default. But when that happened the job was already over, and [the Contracting Officer] signed the letter."

The record shows that on June 9, 1989, the USFS issued a Notice of Default to Respondent, stating in part:

> "it is the conclusion of the Contracting Officer that most, if not all, of the inspections submitted by you on this contract were falsified. On the basis of the foregoing preponderance of evidence, the Government finds you to be in default of the contract pursuant to the above-mentioned clauses. However, it is determined to be in the Government's best interest not to terminate your right to proceed at this time."

Respondent testified that he understood "default" to mean that the contract was terminated. The USFS made a final inspection of Respondent's work under the contract on June 12, 1989, and issued a notice of acceptance on August 17, 1989. In his exceptions to the Proposed Order, Respondent suggested that inconsistencies in his testimony were caused by "semantic and translation difficulties" and "obvious communication problems." The Forum recognizes that English is not Respondent's first language and that he may have had some difficulty in understanding the questions put to him and in articulating his answers. Whatever the cause of these apparent inconsistencies in his testimony, they caused the Hearings Referee to question the reliability and credibility of Respondent's testimony. Accordingly, Respondent's testimony was given less weight whenever it conflicted with other credible evidence on the record.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondent was a farm/forest labor contractor, as defined by ORS 658.405, doing business in the State of Oregon.

2) Tomas Benitez entered into a subcontract with Respondent to act as a farm labor contractor for the forestation or reforestation of land. Benitez was not licensed as a farm labor contractor when he and Respondent entered into the subcontract. Respondent knew Benitez was unlicensed at the time.

3) Between 1986 and 1988, Respondent failed to pay workers' compensation insurance premium payments when due.

4) Respondent's character and reliability make him unfit to act as a farm labor contractor.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein. ORS 648.405 to 658.485.

2) Any person who subcontracts with another for the forestation of

reforestation of lands is a farm labor contractor, as defined in ORS 658.405(1) and OAR 839-15-004 (5)(e). Therefore, pursuant to ORS 658.410, Tomas Benitez was required to possess a valid farm labor contractor's license issued by the Agency.

3) Former ORS 658.440 (1987) provided in part:

> "(2) No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:
>
> "* * *
>
> "(e) Assist an unlicensed person to act in violation of ORS 658.405 to 658.485."

Respondent violated former ORS 658.440(2)(e) (now ORS 658.440 (3)(e)).

4) ORS 658.445 provides, in pertinent part:

> "The Commissioner of the Bureau of Labor and Industries may revoke, suspend or refuse to renew a license to act as a labor contractor upon the commissioner's own motion or upon complaint by any individual, if:
>
> "(1) The licensee or agent has violated or failed to comply with any provision of ORS 658.405 to 658.503 and 658.830 and ORS 658.991(2) and (3); or
>
> "* * *
>
> "(3) The licensee's character, reliability or competence makes the licensee unfit to act as a farm labor contractor."

OAR 839-15-145 provides, in pertinent part:

> "(1) The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules includes [sic], but is [sic] not limited to, consideration of:
>
> "* * *
>
> "(f) Whether a person has paid workers' compensation insurance premium payments when due.
>
> "(g) Whether a person has violated any provision of ORS 658.405 to 658.485."

OAR 839-15-520 provides in pertinent part:

> "(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny or refuse to renew a license application * * *:
>
> "* * *
>
> "(e) Assisting an unlicensed person to act as a Farm or Forest Labor Contractor[.]
>
> "* * *
>
> "(2) When * * * a licensee demonstrates that the * * * licensee's character, reliability or competence makes the * * * licensee unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the * * * license of the licensee be suspended, revoked or not renewed.
>
> "(3) The following actions of a Farm or Forest Labor Contractor * * * licensee * * * demonstrate that the * * * licensee's character, reliability or competence make the * * * licensee unfit to act as a Farm or Forest Labor Contractor:
>
> "* * *
>
> "(j) failure to make workers' compensation insurance premium payments when due."

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 Respondent's license to act as a farm labor contractor.

5) In 1987 ORS 658.453(1)* provided, in part:

> "In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries, in the same manner as provided in ORS 183.310 to 183.550 for a contested case proceeding, may assess a civil penalty not to exceed $2,000 for each violation by:
>
> "* * *
>
> "(c) A farm labor contractor who fails to comply with ORS 658.440 * * * (2)(e) * * *."

Under the facts and circumstances of this record, and in accordance with ORS 658.453 and related portions of ORS 658.405 to 658.503 and of Oregon Administrative Rules, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for the violation found herein. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

OPINION

Summary Judgment

Pursuant to OAR 839-30-070(6), the Agency filed a motion for summary judgment on its charging document. It asserted that no issue of genuine fact existed and the Agency was entitled to judgment as a matter of law as to the violations alleged in the charging document. Subsection (c) of OAR 839-30-070(6) provides that, where the Hearings Referee recommends that a motion for summary judgment be granted, the recommendation shall be in the form of a Proposed Order, and the procedure established for issuing Proposed Orders shall be followed. That procedure has been followed in this case.

Pursuant to OAR 839-30-070(6)(a):

> "A motion [for summary judgment] may be made by the Agency or party, or by decision of the Hearings Referee, for an accelerated decision in favor of the Agency or any party as to all or part of the issues raised in the Charging Document. The motion

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* ORS 658.453(1)(c) now provides, in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries, in the same manner as provided in ORS 183.310 to 183.550 for a contested case proceeding, may assess a civil penalty not to exceed $2,000 for each violation by:

"(c) A farm labor contractor who fails to comply with ORS 658.440 * * * (3)[.]"

Under both the 1987 and the 1991 versions of the statute, the Commissioner may assess a civil penalty on a farm labor contractor who assists an unlicensed person to act in violation of the Farm Labor Contractor Law: ORS 658.440(2)(e) (1987); ORS 658.440(3)(e) (1991).

may be based on any of the following conditions:

"(A) Direct or collateral estoppel;

"(B) No issue of genuine fact* exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceedings; or

"(C) Such other reasons as are just."

When considering a motion for summary judgment, the Forum, as a general rule, will draw all inferences of fact from the record against the participant filing the motion for summary judgment (here, the Agency) and in favor of the participant opposing the motion (here, the Respondent). *Uihlein v. Albertson's, Inc.*, 282 Or 631, 580 P2d 1014, 1015 (1978).

The Hearings Referee granted the Agency's motion with regard to paragraphs three and four of the charging document, as follows:

"Paragraph Three

"In paragraph three of the Notice, the Agency alleges that Respondent entered into a subcontract with Tomas Benitez, an unlicensed reforestation contractor, and assisted Benitez to act in violation of Oregon's Farm Labor Contractor statutes. The Agency alleged that Respondent violated former ORS 658.440(2)(e). Respondent admitted in his answer that on March 23, 1988, he entered into a subcontract with Tomas Benitez. In his memorandum, Respondent asserts that the Agency is collaterally estopped from disputing that Benitez was Respondent's employee, based upon the order of the Department of Insurance and Finance (DIF), Case No. 89-08-04. In his affidavit, Respondent states that 'Mr. Benitez had represented to me that he had applied for a farm labor contractor license. I believe that he qualified for that license.'

"The Agency's motion for summary judgment with regard to paragraph three is granted.

"ORS 658.405(1) provides in pertinent part that '"Farm Labor Contractor" means any person * * * who enters into a sub- contract with another for any of those [forestation or reforestation] activities.' Similarly, OAR 839-15-004(5)(e) defines 'Forest Labor Contractor' to mean 'Any person who subcontracts with another for the forestation or reforestation of lands.' Under those definitions, the Forum finds that Tomas Benitez was acting as a farm labor contractor with regard to the forestation or reforestation of lands when he entered into the subcontract with Respondent on March 23, 1988.

"By affidavit, Lucretia Elders, the Agency's Licensing Administrative Specialist, stated that Benitez first applied for a farm labor contractor license on September 28, 1988, and a license was issued on October 10, 1988, for farm labor contracting only. Benitez did not obtain a forestation/ reforestation endorsement until March 15, 1989. Therefore, Benitez had no license on March 23, 1988, when he entered into the subcontract with Respondent. ORS 658.410(1) provides in part that 'No person shall act as a farm labor contractor with regard to the forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1).' Similarly, ORS 658.415(1) provides in part that 'No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.503 and 658.830.' Based upon the undisputed facts, the Forum finds that Tomas Benitez was an unlicensed person acting as a farm labor contractor in violation of ORS 658.405 to 658.503 and 658.830.

"By entering into the subcontract with Benitez, Respondent assisted him to act in violation of Oregon law. Respondent thereby violated former ORS 658.440(2)(e) (now ORS 658.440(3)(e)).

"Respondent's belief that Benitez had applied and was qualified for a license is no defense. *See In the Matter of Deanna Donaca*, 6 BOLI 212, 239 (1987) (where contractor's defense to an allegation that she had assisted an unlicensed person was that she believed the unlicensed person was exempt from the licensing requirement, the Forum held that 'the contractor is charged with knowledge of the law, and even a quick reading of [the rule], or an inquiry to the Agency, would have apprised the contractor of the fact that a subcontractor cannot qualify for this exemption'; the Forum found that the contractor violated former ORS 658.440(2)(e)); and *In the Matter of Efim Zyryanoff*, 9 BOLI 82, 87-88 (1990) (applicant for a license violated ORS 658.415(1) by bidding for reforestation contracts before he had been issued a license, despite the fact that he had applied for a license, and believed he qualified and would be issued one soon; the Commissioner held that 'this is not a defense to acting without a license'). At best, Respondent's allegations would be relevant to the appropriate sanction for the violation.

"With regard to Respondent's claim of collateral estoppel, it is immaterial here that Respondent failed to meet [his] burden of proof by a preponderance of the evidence that Benitez was an independent contractor (under ORS 656.027 and 656.029) in his hearing before DIF. Whether or not Benitez was an independent contractor is immaterial to the issue here. Benitez was, by definition, acting as a farm labor contractor when he subcontracted with Respondent for forestation/ reforestation work, and he had no license."

In denying Respondent's motion for reconsideration, the Hearings Referee

* Note that the rule refers to an "issue of genuine fact." The Forum finds that this phrase was intended to have the same meaning as "a genuine issue as to any material fact," as is customary in civil procedure. *See* ORCP 47.

further explained his ruling on paragraph three:

> "What the Hearings Referee found in his ruling on paragraph three was that it was immaterial whether or not Tomas Benitez was an independent contractor. That is because it is not a material issue in this case whether Benitez was Respondent's employee or an independent contractor. Respondent admitted that he entered into a subcontract agreement with Benitez. Even if he was Respondent's employee, Benitez's action of subcontracting with Respondent for forestation or reforestation activities made him, by statutory definition, a farm labor contractor. The fact that Respondent failed to prove that Benitez was an independent contractor under DIF's statutory definitions is immaterial here. DIF's statutory definitions and its underlying policies are different from the Agency's in this area. Thus, DIF's determination has no collateral estoppel effect on paragraph three of the charging document."

With regard to paragraph four, the Hearings Referee ruled as follows:

"Paragraph Four

> "In paragraph four of the Notice, the Agency alleges that, during the period 1986 to 1988, Respondent accrued approximately $600,000 in unpaid workers' compensation insurance premiums, due to unremitted payroll reports and/or failure to make monthly premium payments to its workers' compensation insurance carrier (SAIF). The Agency alleged that such action demonstrates that Respondent's character, reliability or competence make him unfit to act as a farm labor contractor. OAR 839-15-520 (3)(j). In its motion for summary judgment, the Agency asserts that the doctrine of collateral estoppel applies, in that Respondent had fully litigated the existence of and the amount of the unpaid workers' compensation premiums before DIF, which issued a Final Order on December 31, 1990, finding Respondent owed workers' compensation insurance premiums for the years 1986 to 1988. The Agency requested summary judgment under OAR 839-30-070(6)(a)(A).
>
> "Respondent denied the allegation in his answer, and offered the affirmative defense that the DIF Final Order was being appealed regarding the alleged unpaid premiums. Respondent argued that, by raising this issue here, the Agency was denying Respondent his rights of due process and access to the courts. In his memorandum in opposition to the motion, and in his supporting affidavits, Respondent argued that there was no final determination on the claims regarding workers' compensation insurance premiums, and the matter was on appeal. He argued that he was entitled to the benefit of a hearing on the issue, pursuant to ORS 183.415(1) and (3), that the matter was on appeal, and that '[p]articularly where enforcement of the assessment claim has been stayed, that claim may not be indirectly enforced through this proceeding.'
>
> "The Forum finds that collateral estoppel is applicable in this administrative proceeding. OAR 839-30-070(6)(a)(A); *North Clackamas School Dist. v. White*, 305 Or 48, 750 P2d 485 (1988). The pendency of an appeal does not prevent a judgment from acting as res judicata or collateral estoppel. *Ron Tonkin Gran Turismo, Inc. v. Wakehouse Motors, Inc.*, 46 Or App 199, 611 P2d 658, 662 (1980); *Community Bank v. Vassil*, 280 Or 139, 144, 570 P2d 66, 68-69 (1977). Contrary to Respondent's argument, this Forum is not attempting to enforce the DIF order. The Forum is applying collateral estoppel to prevent the relitigation of an issue that Respondent has had a full and fair opportunity in a previous proceeding to litigate. The issue in the DIF case was whether Respondent made sufficient workers' compensation insurance payments during 1986 to 1988. Following audits, SAIF had billed Respondent approximately $750,000 for unpaid premiums during 1986 to 1988, and Respondent appealed those billings. DIF fully and fairly heard Respondent's evidence and legal arguments on whether premiums were owed, and, through its Final Order, required Respondent to pay premiums in the approximate amount of $600,000. The Court of Appeals permitted all but ten percent of that Order to be enforced while the appeal is pending, stating that 'even if [Respondent] prevails on the portions of the order as to which [the insurance companies] make concessions, that is likely to reduce the amount due under the order, at a maximum, by 10%.' The issue in this case is whether Respondent failed to make workers' compensation insurance payments when due. OAR 839-15-520(3)(j); ORS 658.417(4). The Forum finds that the evidence is sufficient to establish that the identical issue was actually decided in the DIF hearing, and that the DIF Final Order should have conclusive effect here. Accordingly, the Agency's motion for summary judgment is granted with regard to paragraph four."

The Forum hereby adopts and affirms those rulings.

Refusal to Renew License

The Agency proposed to refuse to renew a farm and forest labor contractor license to Respondent because he violated former ORS 658.440(2)(e) and failed to make workers' compensation insurance premium payments when due, which actions demonstrate that his character, reliability, or competence make him unfit to act as a farm or forest labor contractor. *See* ORS 658.445(1) and (3); OAR 839-15-145 (1)(f) and (g); and OAR 839-15-520 (1)(e), (2), and (3)(j).

Section 2 of OAR 839-15-520 requires the Commissioner to propose to refuse to renew a license when the licensee's character, reliability, or competence make the licensee unfit to act as a farm labor contractor. The Agency argued that the referee had found on summary judgment that Respondent failed to make workers'

compensation insurance premium payments when due, and that action demonstrated per se that Respondent's character, competence, and reliability make him unfit to act as a farm labor contractor. OAR 839-15-520 (3)(j). The Agency then argued that, pursuant to OAR 839-15-520(2), it was mandatory for the Hearings Referee to issue a proposed order refusing to renew Respondent's license. The Forum disagrees.

The Commissioner, through the Wage and Hour Division in its role as prosecutor, complied with OAR 839-15-520(2) when the division issued its charging document proposing to refuse to renew Respondent's license. However, the Forum will not construe OAR 839-15-520 to reduce the discretion given the Commissioner as the final decision-maker for the Agency by ORS 658.445, which states that the Commissioner "may" refuse to renew a license if the licensee's character, reliability, or competence make the licensee unfit to act as a farm labor contractor. OAR 839-15-520(8) provides that "nothing in this rule shall preclude the Commissioner from imposing a civil penalty in lieu of * * * refusing to renew a license application[.]" The Commissioner may impose any sanction authorized by statute. Accordingly, the Forum interprets OAR 839-15-520(2) to give direction to the Commissioner in her role as prosecutor, but not to limit her statutory discretion in her role as adjudicator.

Based on the facts in this case, the Forum finds that Respondent's actions demonstrate that his character and reliability make him unfit to act as a farm or forest labor contractor. First, he subcontracted with a person that he knew was an unlicensed farm labor contractor, in violation of law. Second, his failure to make workers' compensation insurance premium payments when due was extreme in amount (around $600,000) and in the time period it covered (1986 to 1988). ORS 658.417 provides, in part:

> "In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:
>
> "* * *
>
> "(4) Provide workers' compensation insurance for each individual who performs manual labor in forestation or reforestation activities * * *."

Providing workers' compensation insurance coverage is a substantive matter that is influential to the Commissioner's decision to grant or deny a license. *In the Matter of Z and M Landscaping, Inc.*, 10 BOLI 174, 181 (1992). As noted above, the Agency has decided that a failure to make workers' compensation insurance premium payments when due is of such magnitude and seriousness that it "shall" propose to refuse to renew a license.

In his exceptions, Respondent argued that "the law does not prescribe 'contracting' but rather actual performance of unlicensed work." (Emphasis original.) The Forum disagrees. The statute defines a farm labor contractor as one "who enters into a subcontract with another" for forestation or reforestation activities. ORS 658.405(1). Thus, the act of subcontracting with another makes one a farm labor contractor. The law requires each person to have a license before acting as a contractor. ORS 658.410(1), 658.415 (1). The statute states no person shall "[a]ssist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830." ORS 658.440(3)(e). Taken together, the statutes proscribe subcontracting with an unlicensed person. *In the Matter of Deanna Donaca,* 6 BOLI 212, 239 (1987).

Respondent next took exception with the Forum's conclusion that "his failure to make workers' compensation insurance premium payments when due was extreme in amount (around $600,000) and in the time period it covered (1986 to 1988)."

Respondent states that the

> "opinion replicates the error in perception that workers' compensation insurance premium payments were contemporaneously billed in the disputed sums. * * * In fact, the disputed sum was asserted following [an] audit and has been and continues to be in litigation. There is no evidence on this record from which the forum may reasonably infer that Respondent has acted in bad faith with respect to his dispute with the Department of Insurance and Finance."

First, the Forum has no misperception that the premiums were contemporaneously billed. Second, the Forum understands that the premium amount found due resulted from an audit, and the amount is the subject of an appeal. Third, there is no issue in this case concerning whether the Respondent acted in bad faith. At issue here is whether Respondent's character, competence, or reliability make him unfit to act as a farm labor contractor. The Forum has found that Respondent's failure to pay some $600,000 in workers' compensation insurance premiums over a period of three years (as found by the Department of Insurance and Finance), along with his violation of ORS 658.440, demonstrate that his character and reliability make him unfit to act as a farm labor contractor. Nothing in Respondent's exceptions warrant a change in that finding.

Respondent produced evidence to show that he is fit to act as a farm labor contractor. Namely, he produced hearsay testimony from an SBA representative that some federal agencies are willing to do business with Respondent and that Respondent is competent. However, that testimony was effectively undermined by the SBA's own audit that found that Respondent engaged in practices detrimental to his business and that he had not operated in a businesslike manner. Respondent also produced evidence from his current (at the time of hearing) workers' compensation insurance carrier. The insurance company's agent testified that Respondent had been current with his premium payments since 1989, when the company was required to insure him by NCCI. That evidence, while showing Respondent's recent success in making payments on time, was undermined by the insurance company's cancellation of his insurance in December 1989, for failure to submit required payroll reports and to pay Workers' Compensation Division

taxes. In light of the fact that Respondent was in the midst of his difficulties with SAIF, and was being audited by the federal SBA at the time, the Forum finds Respondent's failure to submit required payroll reports and to pay taxes (and the 1989 insurance cancellation) particularly revealing of his inability or unwillingness to properly conduct his business affairs. The fact that he has had a good relationship with his workers' compensation insurance company since 1990 does not overcome the great weight of evidence on the record showing that Respondent's character and reliability make him unfit to act as a farm labor contractor. The Order below is a proper disposition of Respondent's application for a license.

Pursuant to ORS 658.415(1)(c), OAR 839-15-140(1)(c) and 839-15-520(4), where an application for a farm or forest labor contractor license has been denied, the Commissioner will not issue the applicant a license for a period of three years from the date of the denial.

Civil Penalty

The Agency proposed to assess a civil penalty for Respondent's assisting an unlicensed person to act as a contractor in violation of former ORS 658.440(2)(e). The Commissioner may assess a civil penalty not to exceed $2,000 for this violation. ORS 658.453(1)(c); OAR 839-15-508(1)(o). The Commissioner may consider mitigating and aggravating circumstances when determining the amount of any penalty to be imposed. OAR 839-15-510(1). It shall be the responsibility of the Respondent to provide the Commissioner with any mitigating evidence. OAR 839-15-510(2).

The Forum finds three aggravating circumstances here. First, Respondent has two prior violations of the Farm Labor Contractor Law. Second, Respondent knew that Benitez was unlicensed and knew or should have known that subcontracting with him was illegal. And third, this type of violation is particularly serious because: a) it frustrates the Commissioner's ability to implement the law's requirements and b) the requirement of being licensed is a keystone in the regulatory design.

The only evidence offered by Respondent that could serve as mitigation was: a) his belief that Benitez had applied and was qualified for a license, and b) that he signed the 1986 and 1988 Consent Orders (referred to in Findings of Fact 1 and 4) based upon his consideration of the hassle and expense to fight the alleged violations. The Forum finds neither of these circumstances mitigating.

First, Respondent knew that Benitez was not licensed, and he had a duty to check for a license before allowing work to begin on the subcontract. ORS 658.437(2). In light of the fact that Respondent had been licensed for years when he subcontracted with Benitez, and the fact that Respondent's own subcontract form included a space to write in the subcontractor's license number, the Forum finds that Respondent either knew or should have known that a subcontractor had to be licensed. Accordingly, his belief that Benitez had applied and was qualified for a license at the time he entered into the subcontract is not a mitigating circumstance.

Second, the fact that Respondent analyzed the costs and benefits of signing the 1986 and 1988 Consent Orders does not alter the fact that, with the advise of legal counsel, he admitted violations of the law and agreed both times to future compliance. It is apparent in each of those instances that the Agency likewise analyzed the costs and benefits of signing the orders, and agreed not to prosecute further other alleged violations of the law by Respondent. There is no evidence to suggest that Respondent was coerced to sign the orders or that the violations admitted did not occur.

The Agency requested and this Forum hereby assesses a $1,000 civil penalty for the violation.

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the Commissioner of the Bureau of Labor and Industries hereby refuses to renew a license to EFRAIN CORONA to act as a farm or forest labor contractor, effective on the date of the Final Order. EFRAIN CORONA is prevented from reapplying for a license for a period of three years from the date of this Final Order, in accordance with ORS 658.415(1)(c) and OAR 839-15-520 (4).

AND FURTHER, as authorized by ORS 658.453, EFRAIN CORONA is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of ONE THOUSAND DOLLARS ($1,000), plus any interest thereon, which accrues at the annual rate of nine percent, between a date 10 days after the issuance of this Order and the date Respondent complies with this Order. This assessment is a civil penalty against Respondent for violating former ORS 658.440(2)(e).

In the Matter of
SNYDER ROOFING & SHEET METAL, INC.,
Respondent.

Case Number 28-91
Final Order of the Commissioner
Mary Wendy Roberts
Issued August 19, 1992.

SYNOPSIS

Complainant reasonably refused to work when confronted with a dangerous work condition that included an imminent risk of serious bodily harm or death, and his subsequent discharge was based on his protected refusal to work, in violation of ORS 654.062 (5)(a). Respondent's claim that the discharge was based on Complainant's failure to call in properly was pretextual. The Commissioner awarded Complainant damages for lost wages of $20,123 and mental distress of $2,500. ORS 654.005(4), (5), (7); 654.062(5); 659.030(1)(f); OAR 839-06-005(1); 839-06-020(1), (2), (3), (4), (5); 839-06-040.

The above-entitled matter came on regularly for hearing before Warner W.

Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on November 19, 20, 21, and 22, 1991, in Room 311 of the State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Alan McCullough, Case Presenter with the Civil Rights Division, Bureau of Labor and Industries (the Agency), presented a Summary of the Case, argued Agency policy and the facts, interposed motions and objections, examined witnesses, and introduced documents. Snyder Roofing & Sheet Metal, Inc., an Oregon corporation (Respondent), was represented by Richard A. Van Hoomissen, Attorney at Law, Portland, who presented an earnings summary and a list of witnesses, argued the law and the facts, interposed motions and objections, examined witnesses, and introduced documents. Michael D. Mayberry (Complainant) was present throughout the hearing. James King, Respondent's president, appeared pursuant to subpoena and authenticated documents. Gerald A. (Gary) Gaffer, Respondent's superintendent, was present throughout the hearing.

The Agency called the following witnesses in addition to Complainant: John Murphy, safety supervisor with the State of Oregon Department of Insurance and Finance Occupational Safety and Health Division (OR-OSHA); Complainant's mother Joanne Mayberry; Dealer Supply Company driver Gregg C. Pratt; and Respondent's current or former employees William Donald Blaine, Daniel Hibdon, Rick Newman, Steven Mayberry, and George Slate.

Respondent called the following witnesses in addition to Gaffer: Pacific Power and Light station wireman Jimmie M. Peacock (by telephone); Complainant's current employer Ronald A. Boone; Roofer's Local 49 business agent Walter Medley; industrial safety engineer Kenneth R. Overton; and Respondent's current employees Michael Des Brysay, Jerry Garger, Harold Johnston, Ronald R. Newton, Henry E. Reed, Cecil Rinesmith, Arthur L. Slate, Jr., Donald Slate, James Tofflemire, and Dennis Vellenga.

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

FINDINGS OF FACT -- PROCEDURAL

1) On November 20, 1990, Complainant filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practice of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 654.062(5).

3) The Agency initiated conciliation efforts between Complainant and Respondent. Conciliation failed and on July 2, 1991, the Agency prepared and served on Respondent Specific Charges alleging that Respondent had discharged Complainant for opposing an unsafe practice, in violation of ORS 654.062(5)(a).

4) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On July 12, 1991, Respondent's counsel timely requested and was granted an extension of time in which to answer the Specific Charges, and on August 16, 1991, Respondent timely filed its answer.

6) On August 20, 1991, Respondent filed a motion to dismiss and a motion in the alternative to make more definite and to strike, together with a supporting memorandum. On September 16, 1991, after requesting and receiving the Agency's response to Respondent's submissions, the Hearings Referee issued a ruling denying Respondent's motions. Certain evidentiary issues surfaced in the respective comments on Respondent's motions, and the Hearings Referee ruled that Respondent might, with proper foundation, offer a videotape of the work site involved in this matter. The Hearings Referee also ruled that the result of a union grievance which might affect the remedy in this matter could be admitted, but that evidence of prior settlement negotiations would not be admitted unless an estoppel was established thereby.

7) Pursuant to OAR 839-30-071, on November 8, 1991, the Agency timely filed a Summary of the Case.

8) On November 12, 1991, Respondent submitted earnings information on Complainant and on November 15, 1991, Respondent submitted a list of witnesses together with objection to the affidavit evidence included in the Agency's case summary.

9) At the commencement of the hearing, counsel for Respondent stated that he had read the Notice of Contested Case Rights and Procedures accompanying the Specific Charges and had no questions about it.

10) Pursuant to ORS 183.415(7), Respondent and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) On the final day of hearing, in order to avoid the possibility of dealing with exceptions over the Christmas holiday, Respondent and the Agency agreed that the record herein would close as of December 1, 1991, and that the Proposed Order herein would be due under the Forum's rules 30 days thereafter. The Hearings Referee approved the agreement. Thereafter, based on workload, the Hearings Referee sought and obtained an extension of time to issue the Proposed Order, under OAR 839-30-102.

12) The Proposed Order, which included an Exceptions Notice, was issued on February 21, 1992. Exceptions, if any, were to be filed by

March 2, 1992. Prior to March 2, Respondent timely sought, and was granted, extensions of time in which to file exceptions. Respondent's exceptions were received timely on April 20, 1992. They are dealt with throughout this Order as described at the end of the Opinion section.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent was an Oregon corporation operating a residential, commercial, and industrial roofing business in the Portland, Oregon, and southwestern Washington area, which engaged or utilized the personal service of one or more employees, reserving the right to control the means by which such service was performed.

2) Complainant worked for Respondent as a teenager and joined Roofer's Local 49 (the union) at that time. He again became employed by Respondent in 1983 and rejoined the union. Respondent provided him with workers' compensation coverage as a subject worker pursuant to ORS chapter 656. He was subsequently enrolled in an apprenticeship program.

3) While employed by Respondent as a roofer apprentice, Complainant attained the status for pay of a "66 % apprentice," which entitled him to earn at least 66 percent of a journeyman roofer's wage when roofing. The journeyman rate was determined in the union's bargaining agreement with Respondent. At all times material, Complainant was a 66 percent apprentice roofer. In 1990, the journeyman rate was $16.10 per hour ($10.73 for a 66 percent apprentice). In 1991, the journeyman rate was $17.14 per hour ($11.42 for a 66 percent apprentice).

4) Sometime in 1985, Complainant began operating a truck crane used to move roofing materials onto roofs. Complainant received about two days of on-the-job training at that time from Scott King, an employee of Respondent. He had never been to a crane school and had received no other specialized truck crane instruction. At all times material, he was Respondent's most experienced and most skilled truck crane operator of the three to four truck crane operators Respondent employed.

5) "Loading" a roof involved transferring roofing materials from a truck bed or from the ground to the portion of a building roof where the material was to be applied. The loading, off-loading, and handling of roofing materials on the job came under the jurisdiction of the union and was performed by a member of the union.

6) By special agreement between Complainant and Respondent, when he was assigned as truck crane operator he earned $12.30 per hour beginning in June 1989, $12.50 per hour beginning in January 1990, and $12.75 per hour beginning in October 1990. Roofing was seasonal, and when there were few roofing jobs, Complainant worked in Respondent's warehouse at $9.50 per hour.

7) Respondent's work force included several father-son or other close family combinations. Several of the older employees had been with Respondent over 20 years. Complainant's late father, Marvin Mayberry, was a highly regarded long-time employee of Respondent, who was described as "3rd man in the company" prior to his 1990 retirement.

8) Gary Gaffer had worked for Respondent since 1964. He was Respondent's superintendent at all times material. He had been a journeyman roofer and foreman, and had been on the board of the union before becoming superintendent. He supervised all of Respondent's roofing projects but had an assistant superintendent for single-ply.

9) Ron Newton had been employed by Respondent since 1985 and since early 1989 had been Respondent's assistant superintendent in charge of foremen and crews applying single-ply roofing. At all times material, if a single-ply project required truck crane service, the crane operator reported to Newton as well as to Gaffer. Newton and Gaffer cooperated in checking on each other's projects. At all times material, Complainant was instructed to call one or the other.

10) At all times material, Respondent had a policy that when delay or stoppage of a roofing project occurred for any reason, the cognizant superintendent (Gaffer for built-up, Newton for single-ply) was to be notified. Stoppage or delay (shut down) was expensive for Respondent. Roofing foremen, as well as crane operators, were instructed to call Gaffer (or Newton) if such a problem arose. If Gaffer (or Newton) was unavailable by telephone, the employee could attempt to reach him by paging device ("beeper") or could report the work problem to Newton (or Gaffer) or to the job estimator.

11) At all times material, crane operators generally worked for Gaffer because there was less call for a crane with single-ply material. Crane operators were subject to dispatch to different jobs, depending on where loading, off-loading, transport, or delivery of roofing materials was needed. Crane operators were instructed to call Gaffer or Newton if there was a loading problem or if the crane was leaving the job. A crane operator was not required to assist in applying the roof in addition to his crane operation duties. Complainant sometimes assisted on the roof.

12) On November 12, 1990, Complainant was assigned by Gaffer to load the roof at Swift # 2, a two-turbine generator powerhouse on the Lewis River in Washington State operated by Pacific Power and Light (PP&L), an electric utility company.

13) Swift # 2 was a large rectangular metal building, approximately two stories in height, located on the shore of a lake. It was surrounded on three sides by water. On the north or land side, where the highway passed, was a transformer area which took up much of that side. The only location available from which to load the roof and which afforded adequate parking for both the supply truck and the truck crane was at the northwest corner of the building. The material was to be loaded onto the northwest corner of the roof, above the entry door.

14) There were A-frame towers above the transformers. Originating on these towers, six high-voltage electric power lines passed above the building from the north side toward the southwest across the lake and up the opposite hillside. These lines crossed above the top of the building on a diagonal, north to southwest. Each carried 230,000 volts. The lines were taut

but not horizontal; they dipped from the high point of the north towers down across the roof and lake and up to similar A-frame supports on the hillside. The towers, the building, and the surrounding fence were all grounded.

15) The truck crane in use at Swift # 2 on November 12 was a TC-175-73 RO Stinger truck crane (TC-175). The boom base was mounted on the truck. The boom could be swung from side to side 180 degrees, and could raise and lower from near horizontal to near vertical. In addition, the boom could telescope hydraulically, extending its length (to about 86 feet) and also the height to which the top of the boom (and the load) could be taken.

16) Complainant estimated that the top of the boom would have to be 10 to 12 feet above the lip of a parapet surrounding the roof in order that the load could clear the edge. A placard posted in the TC-175 specified that the crane and/or load must clear high-voltage wires by a minimum of 10 feet. Additional distance was required with higher voltage, but Complainant was not aware at the time of the specific formula for calculating the additional safety factor. He knew that the lines at Swift # 2 carried at least 100,000 volts, but he did not know the exact voltage. It was a misty day, and the lines hummed and crackled.

17) In looking up from the ground past the roof edge to the closest high voltage line, Complainant at the time estimated the distance from the roof to the nearest line to be 20 to 25 feet. He did not have instruments or equipment with which to calculate the height of the line above the roof area where he had to operate the crane. He did not have the training or education by which to calculate the height of the wire by triangulation or otherwise. He did not know how to "ground" the truck crane.

18) The roofing crew accompanying Complainant to Swift # 2 consisted of foreman George Slate, a 20-year employee of Respondent, and roofers Walter Hardy and his son Delbert Hardy.

19) Gregg Pratt was a delivery driver and warehouseman at Dealer Supply Company. On November 12, 1990, he was assigned to take a 40' Freightliner flat-bed truck loaded with roofing materials to PP&L's Swift # 2, where Respondent's crane was to load the material onto the roof of the power station.

20) The roofing material was on pallets, with insulation on some of the pallets and roll roofing on the others. The pallets were to be loaded into a fork-lift type of cage which was attached to the truck crane hoist. Each such load was at least four feet high. A pallet of roofing weighed close to a ton, much heavier than a pallet of insulation.

21) Where there was not a lift involved, Pratt unloaded the truck by conveyer, but he had no experience operating cranes. It was the truck driver's duty, when a crane was used, to set the fork of the crane under the pallet to be lifted. Whether conveyer or crane was used, safety was always considered. Because it was the crane operator's call, Pratt asked Complainant about clearing the power lines. It did not appear to Pratt that there was a lot of room for a mistake at Swift # 2. Pratt did not observe the clearance from the roof; it looked close from the ground. He had experienced arcing from a 75,000-volt line while operating a conveyor.

22) November 12, 1990, was observed by some government and private entities as Veteran's Day, a federal holiday. PP&L was on holiday operation. Respondent was not.

23) The PP&L employee present at Swift # 2 on November 12, was Terry Lowe, described as a "meter reader." Lowe stated he was not sure of the distance between the roof and the wires.

24) Complainant, George Slate, Lowe, and Walter Hardy went to the roof by way of an interior ladder and observed the distance between the high voltage lines and the roof. They discussed whether the truck crane could safely be operated. They talked about the voltage and "arcing." None were aware of the actual distance from the corner of the roof to be loaded to the nearest high voltage line. None were aware of the minimum safe distance from the lines for operating the truck crane. Slate estimated the height of the nearest line to be 30 to 35 feet above the roof, but he had no means by which to actually measure. Gaffer had told Slate several years before that the minimum safe distance to electrical equipment was 25 feet.

25) The decision on whether the truck crane could be safely operated at any particular job site was the responsibility of the truck crane operator. The roofing foreman directed all other aspects of applying a roof and was in charge "on the roof."

26) Complainant determined that he would not load the roof with the truck crane due to his concern for the safety of the operation. He was unable to determine the distance to the lines so that he could compare that with the safe operating clearance.

27) George Slate directed Complainant to load the roof. When Complainant told Slate that he would not load the roof, Slate told him to call Gaffer to report that fact and for further instructions.

28) George Slate also discussed with Lowe the possibility of turning off the power. Lowe had no authority to shut it off and told Slate that the power company would lose a lot of money by shutting down.

29) Gaffer was superintendent for the November 12, 1990, Swift # 2 job. He had a radiotelephone in the vehicle he was driving. He also carried a "beeper" so that he might be reached when not in his vehicle. On November 12, he was using the company vehicle which had been assigned to Marvin Mayberry, who was not working.

30) The "beeper" Gaffer carried was a voice pager, a device that allowed a person wishing to reach him to telephone a station and leave a voice message, which was in turn transmitted to Gaffer's pager.

31) Complainant was aware of the mobile telephone number for Marvin Mayberry's vehicle. At a telephone in the office at Swift # 2, at about 10 a.m., he attempted to reach Gaffer at that number. When he was unable to reach Gaffer, he called Respondent's headquarters office in Tigard, Oregon. He did not attempt to reach Gaffer's voice pager.

32) Complainant spoke with Scott King, an estimator. He told King that he could not reach Gaffer and was not sure it was safe to load the Swift # 2 roof. He told King that no one else at the site was sure it was safe. Complainant wanted assurance of safety. After discussion with Complainant and George Slate, King directed them to unload the roofing material at PP&L's Swift # 1 site (a few miles from Swift # 2) for temporary storage.

33) After unloading the Dealer's Supply truck at Swift # 1, Complainant returned to the Tigard shop with the truck crane, arriving between 3 and 4 p.m. After Scott King had told him how to proceed, Complainant did not try again to reach Gaffer. When he returned to the shop, he spoke again with Scott King, who stated that Complainant could have loaded the roof. Complainant repeated to King that he just wasn't sure and wanted assurance of safety. Complainant reported the situation to Newton.

34) Newton was not at the shop on November 12 when he received a call around 3 p.m. from Complainant, who had returned to the shop. Complainant told Newton that he had not loaded the roof (at Swift # 2) due to circumstances Newton knew nothing about because Newton had never seen the job. Newton called Gaffer "direct, right then."

35) On the morning of November 12, Gaffer drove from the Tigard shop to Longview, Washington, west of Swift # 2. The radiotelephone in the vehicle he was driving and his voice pager were both activated. He did not travel to any area, such as the Columbia River Gorge, where the radio signals could not be received. He learned that Complainant had not loaded the roof at Swift # 2 when Newton called him between 3 and 4 p.m.

36) Complainant called the shop at about 6 p.m. from his home for instructions for the following day. He spoke with Gaffer, who told him he was fired for failing to load the roof. He picked up his final check the next morning at the Tigard shop.

37) Rick Newman had been a roofer/crane operator for Respondent for three years at time of hearing. He had been trained on the crane by Complainant. He was assigned on November 13, 1990, to complete the loading of the material onto the roof at Swift # 2, using the TC-175. Before leaving the Tigard shop, he discussed the job with Gaffer and Scott King. He wanted a person from PP&L to evaluate the job, as he believed that each power line was over 100,000 volts. Newman had been told by Complainant that neither Complainant nor the PP&L employee present on November 12, had been sure of the voltage or the height of the lines. At Newman's request, King called PP&L He told Newman that PP&L would have an employee on site.

38) Newman met with a PP&L employee on November 13 at Swift # 2. It was raining and the lines were "crackling." Newman knew that OR-OSHA regulations stated a recommended safe distance in feet from high voltage lines. The PP&L man questioned the distance, showing Newman what Newman assumed were Washington regulations, allowing a five-foot minimum clearance from 100,000 volts. Newman thought that the PP&L man said that there were 240,000 or 250,000 volts in each of the lines. Newman was sure that each line was at least 200,000 volts. They discussed the safety of the operation for two hours.

39) The PP&L employee who met Newman was Jimmie M. Peacock, a journeyman station wireman and former US Navy electrician who had 14 years' experience with PP&L and 14 years' experience with a utility in Texas.

40) Peacock assured Newman that there was safe clearance and that other equipment and material had been placed on the roof by crane. Peacock offered to be on the roof to set each load as it arrived. He convinced Newman with the statement "If I fry, you fry." Newman was very apprehensive, but he loaded the roof, with Peacock and George Slate on the roof guiding the loads.

41) Peacock was of the opinion that the tip of the crane boom on November 13, 1990, came no closer than 20 feet (by sight) to the "energized conductor," i.e., the most westerly high voltage line.

42) Newman was instructed to call Gaffer when difficulty on a crane job developed. Gaffer was not always available. If he couldn't reach Gaffer, Newman usually called the estimator on the job or the assistant superintendent. Whomever he spoke with usually got the information to Gaffer.

43) Newman operated the TC-175 in the fall of 1991 for the purpose of making a videotape for the hearing. There were PP&L employees present with blue prints. The wires were not crackling, and Newman was told that the power was off.

44) John Murphy was a safety supervisor for the State of Oregon Department of Insurance and Finance Occupational Safety and Health Division (OR-OSHA). He had been with OR-OSHA since 1985. Before 1985, he had experience as a fire and safety officer with Foster-Wheeler, a contractor on a North Sea oil operation, with Morrison-Knudsen, a contractor in Saudi Arabia, and for four years as a firefighter in England. He was not an electrical engineer. He had not visited Swift # 2. He viewed the photographs of the site at hearing.

45) Oregon Administrative Rule 437-03-047, Department of Insurance and Finance, in effect November 12, 1990, prohibited operation of equipment such as Respondent's TC-175 within 10 feet of high-voltage (over 600 volts) lines. For every 1,000 volts over 50,000 volts, the minimum clearance increased 0.4 inches. For the 230,000 volt lines at Swift # 2, the minimum clearance was 16 feet.

46) While at OR-OSHA, Murphy had conducted approximately 20 investigations a year where the minimum clearance standard had been breached by workers or equipment. Many of those involved contact with an energized high voltage line. Because of "arcing," operation within the minimum clearance was hazardous even if there was no actual contact with the line. It was Murphy's opinion that breach of the minimum clearance standard for a 230,000-volt energized line by truck, crane, or boom of a TC-175, which he had seen operate, could result in serious injury or death to the operator and that actual contact with such a line would have such results.

47) Before beginning an operation such as Complainant was assigned on November 12, 1990, the truck crane operator should know the voltage, whether the lines were energized, whether the power company was aware of the operation, where and how the equipment was to be set up and the angle involved, and how near the line the boom or load would come during the lift. At Swift # 2, the truck crane operator would have to know the distance from the nearest high voltage line to the roof edge. Conditions of conductivity such as moisture and temperature should also be considered.

48) Knowing only what Complainant knew of voltage and distances on November 12, 1990, and having no means to measure or otherwise verify distance, Murphy would not have operated the truck crane to load the roof at Swift # 2.

49) Kenneth R. Overton was a loss prevention consultant and industrial safety engineer with 18 years' experience in industrial and labor relations, personnel, industrial safety, and quality control. He had retired after 20 years in the US Army. He had a college degree in business administration and a military science degree and extensive continuing education courses in safety, personnel, benefits, and contract administration. He had been a guest speaker and trainer in training, personnel, and safety issues, and had published programs dealing with safety, personnel matters, and management. At the time of hearing, he taught crane safety classes, including operation of the TC-175 as a contract trainer for Associated General Contractors. He had in the past operated cranes similar to the TC-175 in close proximity to high-voltage lines at a nuclear power plant in California.

50) Prior to hearing, Overton visited Swift # 2 twice and viewed the video prepared for Respondent While at the site, he took measurements and evaluated the use of the TC-175 truck crane in loading materials onto the northwest corner of the roof of the building. He did not have access to the roof itself.

51) Overton, as part of his research, learned the blueprint measurements for the building and line towers through a telephone conversation with the power company superintendent in charge of Swift # 2. He made an indirect measurement of the height of the nearest wire above the northwest corner of the building. Using a floating compass, a 50-foot measuring tape, and a handheld calculator, he "viewed an angle from the top of the parapet to the bottom of the wire, and stepped off a base and triangulated a distance." The powerline nearest the corner upon which the roofing materials had to be placed was "approximately 30 feet, plus" from the closest point on the parapet surrounding the roof.

52) On the TC-175, from the upper end of the crane boom, the "anti-two block"* mechanism extended downward 24 inches, the hook extended an additional 18 inches, a lifting bridle extended 20 inches more, and the pallet cage added 5 feet. The tip of the boom would have to be a minimum of 11 feet, 2 inches above the parapet to allow the pallet cage to clear the parapet by at least one foot.

* The "anti-two block" device shuts down the crane before the cable retracts too far. It prevents the hook from being drawn against or through the upper end of the crane arm and flipping or dumping the load and/or damaging the boom.

53) Adding the OR-OSHA safety factor of 16 feet to the 11 feet plus needed to clear the parapet (a total of 27 plus feet), Overton determined that "technically" the roof could be loaded safely with the TC-175. There would have been three or more feet to spare beyond the minimum safe distance OR-OSHA recommended for the voltage involved.

54) Relying on OR-OSHA regulations, Overton taught in his crane safety classes that the crane operator has the final authority on any lift.

55) Knowing only what Complainant knew of the voltage and distances on November 12, 1990, and having no means to measure or otherwise verify distance, Overton "probably" would not have operated the truck crane to load the roof at Swift # 2. He would have been certain that the truck was grounded.

56) During the latter part of his employment with Respondent, Complainant believed he was underpaid. He also thought that Gaffer was denying him time to complete his apprenticeship classes and had been told that he had the skills for journeyman. Complainant resented his pay and apprentice status, but denied that he had a "bad attitude" or harbored a grudge about it.

57) On at least one occasion previous to November 12, 1990, Complainant had been admonished for not trying to contact Gaffer by pager when Gaffer was not available by telephone. Gaffer did not ask him why he did not contact Gaffer on November 12.

58) After he was discharged, Complainant called the State of Washington Industrial Safety inspection office (Washington OSHA) and reported that the anti-two block device on Respondent's TC-175 crane was inoperative; he also reported that Respondent's crane operators were untrained.

59) On December 28, 1989, Complainant received a written warning letter, signed by Ron Newton, for "operating a crane in an unsafe manner * * * by lowering [another employee] to the ground while he was riding the ball." The letter was designated as a "1st warning" and was the only formal written discipline Complainant received prior to discharge.

60) Steve Mayberry had worked for Respondent almost 16 years at the time of hearing. He was a roofing foremen and Complainant's younger brother. He was aware that Complainant had developed a negative attitude toward Respondent over pay, but thought that Complainant generally did his job. He was upset and mad when Complainant was fired. He didn't discuss it immediately with Gaffer due to his anger. About a week after Complainant was fired, Gaffer wanted to explain to Steve Mayberry "why Mike was let go." Gaffer took him into a private office and told him it was because Complainant did not load the roof, that he didn't do what he was told. Gaffer stated further that neither Gaffer or Scott King were informed at the time. Gaffer said that the job wasn't done

and "he weighed everything out and had to let Mike go."

61) As a roofing foreman, Steve Mayberry was expected to call Gaffer if a problem developed. He estimated that Gaffer was unavailable as much as 70 percent of the time. He was to use his judgment whether to attempt to reach Gaffer by beeper or the alternative of calling the assistant job superintendent or the estimator. Steve Mayberry sometimes had safety violations when he neglected safety for speed. He was the employee involved in the unsafe operation incident for which Complainant received a written warning.

62) Michael Des Brysay was a journeyman roofer and foreman with Respondent for 29 years. He disliked Complainant and believed that Complainant did not like long hours and sloughed duties onto others. He recited anecdotal incidents of uncertain date wherein he believed he had to do work which Complainant should have performed. He attributed remarks to Complainant to the effect that Complainant only needed four to five hours of work a day. Des Brysay's animosity was based on Complainant's "don't give a damn attitude." He could recall no instance in which Complainant left the job early. He stated he had no difficulty reaching Gaffer when needed.

63) Donald Slate had been with Respondent 10 years at the time of hearing. As Respondent's equipment manager, he supervised three mechanics and a welder in servicing and maintaining Respondent's trucks, lifts, and cranes, a total of 72 pieces of equipment including 55 trucks. His was a safety-oriented job. He dealt with the crane operators, including Complainant, frequently. When Slate and a Washington OSHA inspector inspected the TC-175 used at Swift # 2 about November 20, 1990, they found that the anti-two block cable had been cut. It was the crane operator's responsibility to clean up the crane truck at the end of the day. Complainant usually did so. Complainant trained two of the three current crane operators. Crane operators were required to be licensed since July 1991.

64) Henry Reed had worked for Respondent almost eight years and had been a roofing foreman, reporting to Newton, for 2½ years at time of hearing. He had been a roofer, and then worked as a truck crane operator from 1985 to 1988, reporting to Gaffer. When he was a crane operator, Reed reached Gaffer through the shop, leaving a phone number. Reed thought Complainant's poor attitude toward Respondent was because Complainant didn't want to work.

65) Newton believed that Complainant had a poor work attitude. He had overheard in 1990 frequent instructions from Gaffer to Complainant for Complainant to call Gaffer when problems involving the crane occurred. He believed that Complainant slacked off on cleaning off the truck crane at the end of the day. Complainant told Newton that he didn't like to call Gaffer.

66) Jerry Garger was a 20-year employee of Respondent and was a foreman. He overheard Gaffer a number of times instructing Complainant to call Gaffer if there was a job problem. The crane operator job called for communication. Complainant had the same attitude toward the Respondent as a lot of guys, depending on whether he was mad or in a good mood. Garger had no knowledge of Complainant sometimes leaving crane jobs without informing Gaffer, although he had previously made a statement to that effect. He had also said previously that Complainant had been spoiled by being the only crane operator.

67) Harold Johnston had worked for Respondent since February 1962. He was superintendent prior to Marvin Mayberry, who was succeeded by Gaffer. He worked as an estimator at all times material. Johnston said there were times when Complainant didn't show up at work, when he left to avoid dispatch, or when the crane wasn't unloaded at night. He overheard Gaffer heatedly instruct Complainant to call Gaffer before leaving a job if there was a problem. This was prior to November 12, 1990, but he did not recall the date. He did not hear Complainant's response.

68) James Tofflemire had been employed by Respondent 25 years, 20 of which were as a roofing foreman. His jobs used the crane frequently. More than once, he heard Gaffer tell Complainant to call or use the beeper. Complainant had an attitude problem in 1990 in that he was dissatisfied with Respondent. Tofflemire overheard a "heated" exchange between Gaffer and Complainant in early 1990. He never heard Gaffer tell Complainant not to call anyone but Gaffer. He was never personally instructed to call only Gaffer and was never threatened with discipline if he didn't call Gaffer. He found that Gaffer was generally available, but when he was not, Tofflemire went "right down the line" until he reached someone else. He had shut down jobs on his own due to wind, rain, etc., without repercussions.

69) Dennis Vellenga had worked in Respondent's warehouse for 8½ years at time of hearing. Complainant worked there when there was no crane work. The warehouse was near the office at the Tigard shop. During 1989 to 1990, Vellenga frequently overheard Gaffer instructing Complainant to call Gaffer by radiophone or beeper if he had any problems on the job. Toward the end of Complainant's employment, "just like a lot of us," Complainant seemed "burned out," and had a poor attitude toward Respondent. Vellenga did not know whether Complainant refused to follow instructions.

70) William D. Blaine had worked for Respondent from June 1986 to November 13, 1991. He served on Respondent's safety committee. He quit over a contract dispute. He had completed apprenticeship, became a journeyman, and was then a foreman for over two years. He was supervised by Gaffer. If he had to dismiss a crew or shut down a job, he was to call the office and try to reach Gaffer. He made the decision and shut down before calling in on more than one occasion. Once Gaffer discussed shutting down because of picketing. Inclement weather (heavy rain) was a reason for shutdown, as was an unprepared deck.

71) Daniel Hibdon quit his employment with Respondent in June 1991 after being a single-ply foreman for four of his five years there. While employed as a foreman, he reported to Newton or Gaffer and was to contact

one of them if he encountered a problem at the job site. There were a few times he was unable to reach Gaffer. He had shut down perhaps four to five times over four years when he couldn't reach Newton or Gaffer and the job was not ready or there was something else wrong. He heard Gaffer say that crane operators couldn't be spared to attend apprenticeship classes.

72) In late 1988 or early 1989, at a job described as "Irving Street loft," the roofing foreman called Gaffer to report that Complainant had refused to load a roof. Gaffer told the foreman to have Complainant remain at the job. When Gaffer arrived, Complainant said he thought the crane boom was not tall enough. At Gaffer's direction, Complainant made an actual measurement and then completed the work.

73) In mid-1989, at a job at Sheridan federal prison, Complainant called Gaffer saying he could not position the crane close enough to load gravel onto a roof because of extreme muddy conditions. Gaffer then spoke with Reed, who was the roofing foreman. The lift was difficult and depended on placement of the outrigger for stability. Gaffer told Complainant to rely on Reed's advice and experience and load the roof. Complainant did so. Gaffer did not go to the site.

74) In late 1989 or early 1990, after Complainant had set up his crane at the Oregon Convention Center site, the general contractor, Hoffman Construction, brought a drug test trailer on site. As a subcontractor, Respondent was obligated to abide by Hoffman's test policies. Complainant shut down his crane, and the roofing foreman called Gaffer. Gaffer told the foreman to tell Complainant to leave the crane there and Gaffer would send another operator. Vellenga drove crane operator Kyle King to the site and would have given Complainant transportation back, but Complainant left for the shop within the 30 minutes it took Vellenga and King to reach the site. At the shop, Gaffer asked him why he brought the crane back, and Complainant said he thought it best. When Gaffer said that was contrary to his instructions to the foreman, Complainant acknowledged that he couldn't pass a drug test.

75) Failing a drug test was a violation of Respondent's policy. Complainant had otherwise violated Respondent's drug policy in 1988-1989 and had been counseled on three occasions regarding drugs and alcohol. In July 1990 he was dispatched to a job at Mentor Graphics at Wilsonville. The general contractor (Hoffman) wanted him to take a drug screen at Meridian Park on the way to the site. Instead, he successfully used Newman's validated drug test card at the site. When Gaffer learned of this, he warned both Complainant and Newman that they would be terminated if it happened again. It did not happen again.

76) Cecil Rinesmith had worked for Respondent as a roofer for about seven years at the time of hearing. He assisted the roofing foreman when working with a crew on built-up jobs. Otherwise, he usually applied singleply on jobs not requiring a crane. As a result, he did not often work with Complainant, but saw him frequently at the shop. He observed that Complainant's attitude toward Respondent was not good. He knew from "what I hear" and from talking with Complainant that Gaffer and Complainant disagreed, but he did not know why they did not get along. He did not know how often this occurred in 1990.

77) Rinesmith recalled concerning Complainant: "On my jobs, he did what he was supposed to do; he did his job." He worked with Complainant at Sysco in Wilsonville for about a week, then was pulled for other work.

78) In 1990, Complainant left the job at Sysco in Wilsonville because the deck to which the roofing was to be applied was not nailed. Working on such an unprepared deck was considered unsafe by the foreman. Complainant denied being threatened with termination over that job.

79) Most of Gary Gaffer's testimony was undisputed or was corroborated by other credible evidence or inference. His ongoing frustration and anger with Complainant was corroborated; his reasons were not always known to other witnesses. His testimony was generally credible except on two crucial points. Gaffer testified that on a Sysco Food Services job in Wilsonville Complainant was to load the roof and apparently decided to leave at noon, which left a crew of four there with nothing to do except for Rinesmith, who was sent to other work. Gaffer stated that Complainant was under instructions to call Gaffer or Newton, but did not do so and that Complainant never explained to him why he left. Gaffer said there was no problem with the job known to him and that he told Complainant that Complainant would be terminated "if he pulled a stunt like that again." Gaffer said that Complainant "kind of backed away, and said 'I understand.'" Gaffer stated that he was "heated" (meaning angry) at the time; he placed this conversation around October 10, 1990. But Rinesmith testified that he worked with Complainant at Sysco for about a week and that on his jobs, Complainant did what he was supposed to do; Complainant's unrefuted statement was that the roofing foreman determined that the deck at Sysco was not nailed and was unsafe. There were no witnesses to or documentation of the threat of termination. For these reasons, the Forum finds that Gaffer's description of the circumstances of his oral warning to Complainant of termination for any further failure to call in the event of a shutdown was not credible. Based on the entire record, Gaffer's assertion that the failure to notify and not the failure to load the roof was the basis of discharge also was not credible.

80) Complainant's testimony exhibited some convenient lapses of memory. However, other credible evidence or inference corroborated his testimony on the most relevant issues, and the Forum found his description of the events on November 12, 1990, to be the most credible.

81) At times material, Complainant lived with his mother and father, Joanne and Marvin Mayberry. His two daughters also lived there. He told his mother on November 12, 1990, that he had been fired because he refused to load a job that was not safe. He was very upset and in tears. The discharge made him frustrated, confused, angry, and upset. After November 12, he became depressed, quiet, and withdrawn and did not sleep well. He did not

understand why he was fired. He had devoted most of his life to the job. Joanne Mayberry was surprised by the firing; Complainant had been a loyal employee, doing more than was required and working long hours. His discharge had a negative effect on his self-esteem. He discussed his economic worries with his mother and father.

82) Prior to his discharge, Complainant had filed for bankruptcy. The loss of job was a setback to his plan of economic recovery. It was close to Christmas. His situation depressed him, and the depression continued to the date of hearing.

83) Shortly after he was fired, Complainant asked Gaffer for work as a roofer. Gaffer declined.

84) Complainant's family had a cabin on Fish Hawk Lake in western Washington County, Oregon. Complainant sometimes spent time there and at the beach following his discharge.

85) Walter Medley, a 10-year journeyman roofer, was business agent of the union at all times material. His duties included dispatching union members to roofing job openings.

86) In December 1990, and January 1991, Medley had difficulty contacting Complainant. He understood that Complainant was at the beach at the time.

87) In January, Medley informed Complainant that Arnie Schmautz of Buckaroo Roofing would put him to work as a roofer at 66 percent apprentice wage until Buckaroo had an opening on a truck crane. No date of availability for the crane was mentioned, and no specialized wage rate for crane work was discussed. Complainant did not contact Schmautz and did not consider this to be a firm job offer. At the time, he told Medley that both his back and his knees bothered him and he did not think he would be able to handle hard (uninterrupted) work on the roof. Crane operation was more mental than physical.

88) As a result of Complainant's grievance under the union collective bargaining agreement with Respondent over his discharge, Respondent paid him back pay computed at $12.75 an hour for three 40-hour weeks, or $1,530, less normal deductions.

89) Complainant sought employment following his discharge. He looked in newspaper want ads. He submitted résumés to various employers. He focused his effort on crane operator jobs. He drew unemployment compensation from November 1990 until June 1991. He found work about July 12, 1991, as a carpet installer with Boone Carpeting in Aloha, owned by Ronald A. Boone. He earned between $1,100 and $1,200 per month on a piecework completion basis. Between July 1, 1991, and the time of hearing, Complainant earned $4,153.11 there.

90) From time to time, Respondent's regular employees, including Complainant, did small roofing jobs on their own time ("moonlighting"). He participated in at least two such jobs with his brothers after his discharge and before going to work for Boone. Complainant, his brothers, and Art Slate, Jr., among others, were able to charge materials at Dealer's Supply Company on Complainant's father's account. The statement of that account from November 1990 to November 1991 contained items charged to the account by others as well as Complainant. He did not have records of what he made on the "moonlight" jobs, or of whether they were accomplished during Respondent's regular work week.

91) Arthur L. Slate, Jr. was a journeyman roofer for Respondent. He had access to Marvin Mayberry's materials account with Dealer's Supply with which to obtain roofing materials for "moonlight" jobs. He used the account between November 1990 and November 1991 at least once, in July 1991. He usually charged $12.00 per square of roofing applied on such jobs, which he believed were easily obtained in 1990-1991.

92) As an estimator, Johnston was knowledgeable about materials, labor, equipment costs, competition, and the roofing market. In his opinion, there was always roofing work available in recent years, and an individual roofer could charge $12.00 to $15.00 a square to apply three tab, the most common residential roofing, and should be able to apply 1½ to 2 squares per hour. At times material, he bid on commercial jobs and had not personally bid on residential jobs since the early 1980's.

93) In the 12 months immediately preceding his discharge, Complainant earned an average weekly wage of $486.90. If Complainant had remained employed by Respondent after November 12, 1990, he would have earned a minimum of $25,806 up to the time of hearing.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent operated a roofing business in Oregon which utilized the personal service of one or more employees.

2) At all times material, Complainant was employed by Respondent and had been a crane operator handling roofing materials on Respondent's roofing projects since 1985. He worked out of Respondent's shop in Tigard, Oregon, and was covered by Oregon workers' compensation under ORS chapter 656.

3) At all times material, Gary Gaffer was Respondent's superintendent, and Complainant's direct supervisor, Ron Newton, was Gaffer's assistant superintendent. George Slate was a roofing foreman for Respondent, and Scott King was a roofing job estimator for Respondent.

4) The handling of roofing materials was union work. Complainant was a 66 percent apprentice roofer and a member of Roofer's Local 49. He received wages above his apprentice rate when operating the crane.

5) At all times material, Respondent had a policy regarding work stoppage that required the roofing foreman, and/or the crane operator if a crane was in use, to report any delay or shutdown to Gaffer or Newton, who both carried pagers and had mobile telephones in their vehicles. If they were unavailable, the employee sometimes discussed the problem with a job estimator.

6) During 1989 and 1990, Complainant did not always abide by the call-in policy; he sometimes shut down

the crane (and the job) without Respondent's knowledge or consent.

7) During 1989 and 1990, Complainant was repeatedly reminded of the need to call over delay or shutdown. He had refused to move materials onto a roof because he thought the crane wouldn't reach, had refused to move materials onto a roof because of mud conditions, and had removed the crane from a job site and returned it to the shop to avoid a drug test.

8) Complainant called Gaffer in the first two instances; the roofing foreman reported the third instance.

9) Complainant received one written disciplinary warning for unsafe crane operation in 1989. Complainant received no formal written discipline of any kind in connection with the shutdowns described herein or for using a co-worker's drug test card.

10) Foremen shut down jobs on their own when they could not reach the superintendents or an estimator and the problem involved unchanging conditions such as inclement weather, unprepared deck, and the like. None were disciplined for shutting down under such circumstances.

11) On November 12, 1990, roofing foreman George Slate told Complainant to load the roof at a power plant in Washington State. Complainant refused. His refusal was based on his reasonable belief that the danger of serious injury or death would be real and immediate if he did the work, that there was insufficient time or opportunity to seek effective redress from Respondent or a regulatory agency, and that Gaffer was not available.

12) Complainant called Gaffer's radiophone on November 12, 1990. When he did not reach Gaffer, Complainant called the shop and advised Scott King of the danger he saw in attempting the task at the power plant. He was directed to and did offload at another location. Scott King did not notify Gaffer.

13) Later on November 12, 1990, Complainant advised Newton of the danger he saw in attempting the task at the power plant. Newton notified Gaffer.

14) In the evening of November 12, 1990, Gaffer discharged Complainant because Complainant failed to load the roof at the power plant.

15) Respondent's claim that Complainant's discharge was due to his failure to call Gaffer by radiophone or pager was pretextual.

16) As a result of his discharge, Complainant lost earnings and suffered emotional upset, embarrassment, and financial distress.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110, 654.001 to 654.295, and 654.750 to 654.780.

2) ORS 654.005 provides, in pertinent part:

> "As used in this chapter, unless the context requires otherwise:
>
> "* * * *
>
> "(4) 'Employee' means * * * any individual * * * who is provided with workers' compensation coverage as a subject worker pursuant to ORS chapter 656 * * *
>
> "(5) 'Employer' means any person who has one or more employees, * * *
>
> "(7) 'Person' means one or more * * * corporations * * *."

ORS 654.062(5) provides, in pertinent part:

> "(a) It is an unlawful employment practice for any person to bar or discharge from employment * * * any employee * * * because such employee has opposed any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780 * * * or because of the exercise of such employee on behalf of the employee * * * of any right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780.
>
> "(b) Any employee * * * who believes that the employee has been barred or discharged from employment * * * by any person in violation of this subsection may * * * file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659.040. Upon receipt of such complaint the commissioner shall process the complaint and case under the procedures, policies and remedies established by ORS 659.010 to 659.110 and 659.505 to 659.545 and the policies established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age under ORS 659.030(1)(f). * * *"

ORS 659.030(1)(f) provides that it as unlawful employment practice for an employer to retaliate against an employee for opposing the employer's unlawful employment practice or for filing a complaint, testifying, or assisting in a proceeding regarding the employer's unlawful employment practice or for attempting to do so.

The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter herein related to the alleged violation of ORS 654.062.

3) OAR 839-06-005 provides, in pertinent part:

> "(1) ORS 654.062(5) of the Oregon Safe Employment Act (OSEA) generally provides that no person can * * * discharge an employee * * * because that employee * * *:
>
> "* * * *
>
> "(e) Exercised, on his/her own behalf * * * any right afforded by OSEA."

OAR 839-06-020 provides, in pertinent part:

> "(1) ORS 654.062(5) prohibits discrimination against an employee because he/she 'opposed' * * * safety hazards in the workplace. * * *
>
> "(2) * * * the protection of ORS 654.062(5) does not, under usual circumstances, cover an employee who opposes * * * safety hazards by refusing to work or by walking off the job. * * *

"(3) However, there may be occasions where an employee may be confronted with a choice of either refusing to do assigned tasks or risking serious injury or death because of a hazardous condition at the workplace.

"(4) An employee can refuse to expose himself/herself to the dangerous condition and be protected from subsequent discrimination, if:

"(a) The employer requires the employee to work under conditions which the employee reasonably believes pose an imminent risk of serious injury or death (imminent risk means that a reasonable person, under the circumstances then confronting the employee, would conclude that the danger of serious injury or death would be real and immediate if the employee did the work) and

"(b) The employee has reason to believe that there is insufficient time or opportunity to seek effective redress from the employer or to resort to regular statutory enforcement channels (for example, the employer refuses to correct the hazard, denies that the danger exists, or is not available; * * *).

"(5) ORS 654.062(5) protects employees who oppose 'any practice forbidden by' OSEA. 'Any practice forbidden by' OSEA is not limited to practices specifically forbidden by OSEA or the rules promulgated under OSEA by [OR-OSHA]. It includes opposition to any condition which, in the judgment of a reasonable person, makes the workplace or the performance of assigned tasks unsafe * * * those conditions which are unsafe * * * only because of unique individual fears * * * are not forbidden by OSEA." (Emphasis original.)

OAR 839-06-040 provides, in pertinent part:

"* * * ORS 654.062(5) also protects employees * * * from discrimination because they have exercised 'any right afforded by' the act. Certain rights are directly provided by the act. * * * Certain other rights exist by necessary implication. * * *"

Complainant was entitled to the protection of ORS 654.062.

4) The conduct of Snyder Roofing and Sheet Metal, Inc., in discharging Complainant on November 12, 1990, was a violation of ORS 654.062(5).

5) The actions, inactions, statements, and motivations of Gary Gaffer, Scott King, George Slate, and Ron Newton are properly imputed to Respondent.

6) Pursuant to ORS 654.062, 659.010(2), and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award to this Complainant money damages for wage loss and emotional distress sustained, and to protect the rights of Complainant and of others similarly situated. The sums of money awarded and the other actions required of Respondent in the Order below are appropriate exercises of that authority.

OPINION

The Specific Charges alleged that Respondent violated ORS 654.062(5) by discharging Complainant on November 12, 1990. The evidence established to the Forum's satisfaction that Complainant refused to work based on a reasonable perception of imminent risk of serious injury or death. The statute makes it an unlawful employment practice for an employer to discharge an employee because the employee has opposed a practice forbidden by the Oregon Safe Employment Act (the Act) or because the employee has exercised a right afforded by the Act. This Forum has previously dealt with the definition of opposing a practice forbidden by the Act in the context of a refusal to work. The Forum has noted that, absent an outrageous expression of complaint or outright insubordination, there can be no distinction for purposes of the Act between terminating a worker for complaining of an unsafe condition and terminating a worker for the manner in which such a complaint is made. The Forum has also observed that the strongest complaint of unsafe practice an employee can make is withdrawal from an unsafe area. *In the Matter of Oregon Metallurgical Corporation,* 2 BOLI 73 (1981); *In the Matter of Veneer Services, Inc.*, 2 BOLI 179 (1981), *aff'd without opinion, Veneer Services, Inc. v. Bureau of Labor and Industries,* 58 Or App 76, 648 P2d 426 (1982).

Since the facts in those cases arose, the Commissioner has promulgated rules addressing specifically ORS 654.062, as well as the Act in general. Those rules, as quoted in the Conclusions of Law herein, provide that in situations in which a worker is confronted with a dangerous work condition that includes an imminent risk of serious injury or death (as seen by a reasonable person), the worker may refuse to subject himself to the dangerous condition (by refusing to work) and be protected. This protection is conditioned upon the objective reasonableness of the employee's evaluation of the risk and also upon the absence or unavailability of means of redress from the employer or a regulatory agency.

In this case, the evidence was overwhelming concerning the reasonableness of Complainant's stated perception that, under the circumstances as he saw them on November 12, 1990, the imminent risk described in the rules existed. No one present on November 12 could ascertain how much clearance, if any, would exist between the crane boom and the high-voltage lines if the roof were loaded, and no one present knew with any precision how far it should be. Complainant attempted to call Gaffer's radiophone number without success. He admitted he did not try the pager, but he did call the shop and spoke to an estimator, Scott King. While King seemed to be of the opinion that the job could be done safely, no measurements or distances were communicated to Complainant or Foreman Slate. Gaffer was not notified by anyone until Complainant reached Newton later in the day.

Further bolstering the reasonableness of Complainant's caution was Newman's experiences at the site and the testimony at hearing of the two safety consultants. Newman insisted upon a knowledgeable power company employee being present and then had a lengthy discussion even after receiving assurances of safety

before he proceeded to load the roof. He also was told that the power was off when the video was made. Murphy and Overton, both knowledgeable about the electrical hazard and about truck cranes, both testified to the effect that they would not have proceeded on November 12 with Complainant's limited knowledge and means of determining safety.

Respondent objected to evidence of Newman's observations and the relevance of the actual measurements. But the fact-finder was not present at the scene and despite pictorial representations of the site and testimony regarding appearances of heights and distances, precise measurements not only assisted the fact-finder in "seeing" the situation, but also were of assistance in evaluating the reasonableness of Complainant's concerns. If his refusal to load the roof was unfounded, it would not be necessary to even consider whether his subsequent behavior in regard to communicating his refusal to Respondent might have provided grounds for termination.

Any evidence tending to establish that Complainant, either through bitterness against Respondent for slights in his status or because of a propensity to avoid work, failed to call Gaffer in the face of a final warning to do so or be fired simply did not preponderate. Complainant was far from being a perfect employee. Respondent had problems with him. But the seriousness of those problems was belied by Respondent's lack of documentation and the almost total absence of prior sanction. It is not a prerequisite to statutory protection against discrimination that a complainant be a superior, error-free worker. If a worker has performance deficiencies, those should be dealt with as they arise and not as an afterthought as a defense to a charge of an unlawful practice.

The Forum infers form the record that had any foreman or crane operator other than Complainant attempted to reach Gaffer, been unsuccessful, and then called the shop for advice from an estimator, no discipline would have been forthcoming. The Forum will not allow Respondent to deprive Complainant of statutory protection by a claim of prior poor performance. The purposes of the Act could too easily be frustrated and chilled if employees reported unsafe conditions or avoided life and limb threatening hazards in the workplace only at risk of being right, of being procedurally correct, and of "deserving" recognition of their concerns.

Remedy

Respondent attempted to show that work as a roofer on an individual basis was available while Complainant remained unemployed. Complainant had been working on an hourly rate basis as Respondent's full-time employee. In mitigating any wage loss, he was entitled to seek an equivalent position from another employer. There was no requirement that he go into business for himself. Even the evidence that he may have had earnings from moonlighting was inconclusive, since there was no showing that whatever work he did was done during hours that he would have been working on a regular job. Several full-time employees testified that they did such work outside their regular employment hours. As to wage loss generally, see *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989); *Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189 (1985), *reversing on damages Ogden v. Bureau of Labor*, 68 Or App 235, 682 P2d 802 (1984); *In the Matter of Lucille's Hair Care*, 5 BOLI 13 (*Order on Remand*, 1985). Under the facts of this case, Respondent is entitled to a reduction of the $1,530 paid as a result of the union grievance, and of $4,153 interim earnings, from the amount found to be lost wages.

Complainant suffered economic dislocation and emotional distress and upset due to the unlawful discharge. While much of his economic distress predated the discharge, some was attributable to the job loss. He became withdrawn and lost self-esteem. The Forum is awarding $2,500 to compensate for this distress.

Respondent's Exceptions

Respondent filed numerous and lengthy exceptions to the Hearings Referee's Proposed Order. Many suggested the language that Respondent believed should have been used and are largely conclusory and speculative as a result. The Forum has inserted some of the suggestions for clarity or accuracy, such as more complete or correct descriptions where Respondent's suggested wording is supported by the record. The Forum has rejected as argumentative and unproven Respondent's suggested inferences regarding Complainant's motivations.

Regarding liability, Respondent misses the point that an actual unsafe practice is not required for a worker to be protected under ORS 654.062. It is sufficient that the worker harbor a reasonable belief that the work is unsafe. *See* OAR 839-06-020. Because of this, the observations of others present on November 12, 1990, as well as of other crane operators, far from being "irrelevant" as suggested in Respondent's exceptions, are relevant to establish that Complainant's refusal to work was reasonable. The Forum does not agree that the Agency was attempting to prove a code violation as to the loading of the roof or that the Agency needed to do so. Such a violation is not an element of an unlawful practice under ORS 654.062; retaliation for a reasonable refusal to work due to safety concerns is a necessary element of the unlawful practice. The finding here is that Respondent's discharge of Complainant on November 12, 1990, was based on the refusal to work. That refusal was effectively communicated to Respondent through its agents, and Complainant received alternate instructions, which he carried out. A finding in this case that the manner of reporting the refusal was inadequate would engraft onto the statute an unintended and undesirable standard.

Regarding remedy, Respondent suggests that the Forum find that Complainant made no effort to mitigate his wage loss following his discharge, in that he failed to seek alternative employment. Complainant testified to a job search. In addition, Complainant drew unemployment compensation. This Forum has previously observed that continued eligibility for ongoing unemployment benefits requires that the claimant actively seek work. ORS 657.155; *In the Matter of German Auto Parts, Inc.*, 9 BOLI 110 (1990), *aff'd, German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 384,

812 P2d 1026 (1992). Complainant met that minimum standard, and Respondent failed to affirmatively show the availability of suitable employment for which Complainant might have applied. The position with Buckaroo was not the same job, and there was no other evidence of attempts to dispatch Complainant through his union.

Respondent's exceptions also argue for offset of the unemployment benefits against the lost wage award, with payment of the offset to the Employment Division. This would be contrary to the present state of the law, as Respondent acknowledges. *Colson v. Bureau of Labor and Industries*, 113 Or App 106, 831 P2d 706 (1992); *German Auto, supra; Employment Division v. Ring, et al*, 104 Or App 713, 803 P2d 766 (1990).

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondent, SNYDER ROOFING & SHEET METAL, INC., is hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for MICHAEL MAYBERRY, in the amount of:

a) TWENTY THOUSAND ONE HUNDRED TWENTY-THREE DOLLARS ($20,123), representing wages Complainant lost between November 13, 1990, and November 19, 1991 (less $1,530 previously paid and less $4,153 interim earnings), as a result of Respondent's unlawful practice found herein; PLUS,

b) INTEREST AT THE ANNUAL RATE OF NINE PERCENT , on each week's average wage of $486.90 as it became due between November 13, 1990, and November 19, 1991, beginning with the week of December 11, 1990, computed and compounded annually; PLUS,

c) TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

d) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of this Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any employee exercising that employee's rights and obligations under chapter 654, Oregon Revised Statutes, the Oregon Safe Employment Act.

In the Matter of
RENÉ GARCIA,
Respondent.

Case Number 43-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued August 19, 1992.

SYNOPSIS

Respondent acted as a farm labor contractor without a license, in violation of ORS 658.410(1) and 658.415(1), by bidding on a contract to supply farm labor and by recruiting and employing workers to fulfill the contract. The Commissioner considered previous warnings to Respondent regarding acting as a farm labor contractor without a license, and assessed a $500 civil penalty for each of ten days that Respondent so acted, for a civil penalty of $5,000. ORS 658.405(1); 658.410(1); 658.415(1); 658.453(1); OAR 839-15-505(2); 839-15-507; 839-15-508(1); 839-15-510(1) and (2).

The above-entitled case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon, on July 14, 1992, in the Bureau of Labor and Industries conference room, 3865 Wolverine Street NE, Salem, Oregon. Lee Bercot, Case Presenter for the Wage and Hour Division of the Bureau of Labor and Industries (the Agency), represented the Agency. René Garcia (Respondent) was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses the following: Compliance Specialist Gabe Silva of the Agency's Farm Labor Unit; Albany area farmer Larry Langmade; Joan Butler, Langmade's bookkeeper (by telephone); and Compliance Specialist Raul Pena of the Agency's Farm Labor Unit (by telephone). Although given the opportunity to do so, Respondent called no witnesses and did not testify.

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

FINDINGS OF FACT – PROCEDURAL

1) By a document entitled "Notice of Intent To Assess Civil Penalties" (Notice of Intent), the Agency informed Respondent under date of March 5, 1992, that the Agency intended to assess civil penalties based on certain violations of Oregon Revised Statutes chapter 658. The Notice of Intent alleged the following bases for the civil penalties sought:

> In October 1991, Respondent acted as a farm labor contractor in violation of ORS 658.410(1) and 658.415(1) by bidding upon a contract to supply farm labor to farmer L. Langmade of Albany, Oregon, and thereafter recruiting, soliciting, supplying and/or employing farm workers for Langmade to perform farm labor in exchange for an agreed remuneration or rate of pay

when Respondent had not first been licensed by the Commissioner. The Agency alleged that the violation was aggravated due to prior warnings to Respondent about contracting without a license. The Agency sought Civil Penalty of $500 for each day's occurrence for a total Civil Penalty of $5,000.

2) The Notice of Intent was to become final 21 days after Respondent's receipt thereof unless Respondent requested a contested case hearing within that time.

3) By letter dated March 20, 1992 (postmarked March 28, received by the Agency March 30), Respondent filed a written denial that he had acted as a contractor in October 1991, or at any other time, stating that he had worked with other workers as an interpreter, and had not recruited, solicited, supplied, or employed any farm workers.

4) On April 1, 1992, the Agency allowed Respondent until April 10 to advise whether he was requesting a contested case hearing.

5) By letter received April 13, 1992, postmarked April 9, Respondent requested a contested case hearing.

6) On June 8, 1992, the Forum issued to Respondent and the Agency a notice of the time and place of the requested hearing and of the designated Hearings Referee.

7) With the hearing notice, the Forum sent to Respondent a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process -- OAR 839-30-020 through 839-30-200.

8) On July 6, 1992, the Agency timely filed a Summary of the Case. Although permitted to do so under the Forum's rules, Respondent did not file a Summary of the Case.

9) At the commencement of the hearing, Respondent was not present. He arrived in the hearings room within three to five minutes, and the Hearings Referee began the hearing again. Respondent had recently received a letter from the Agency showing the hearing as located in Portland. The Agency acknowledged that the letter was in error. Respondent had verified with the Agency that the case was set in Salem and acknowledged that the erroneous letter did not adversely affect his defense.

10) Pursuant to ORS 183.415(7), the Hearings Referee orally advised Respondent and the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) During the presentation of the Agency's evidence, Respondent was given opportunity to object to the Agency's evidence and to cross-examine Agency witnesses. He questioned some witnesses.

12) At the close of the Agency's case, Respondent was given opportunity to present evidence, including his own testimony. He declined to do so without first consulting counsel. The Hearings Referee explained that under the rules of the Forum, the hearing would not be delayed for Respondent to consult an attorney, Respondent having had over three months to do so prior to hearing. The Referee suggested that if Respondent consulted an attorney, the attorney should contact the Agency Case Presenter. Respondent chose to present no evidence.

13) The Proposed Order, which included an Exceptions Notice, was issued on July 23, 1992. Exceptions, if any, were to be filed by August 3, 1992. No exceptions were received.

FINDINGS OF FACT-- THE MERITS

1) At all times material, Respondent René Garcia was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

2) At all times material, Raul Pena was a Compliance Specialist with the Farm Labor Unit of the Agency. In April 1990, Pena learned from Joel Garcia and Espedito Roberte that Respondent had not paid them and about 10 other workers for work training caneberries near Independence, Oregon. As a result, a number of wage claims were filed by the workers. Respondent later paid them in cash, obtaining receipts. Respondent told Pena that he had acted only as an interpreter and that the funds came from Blackpatch (Sonny Hayes). Respondent did not tell the workers that he was not their employer or that he was acting for Blackpatch. Pena cautioned Respondent that he appeared to be acting as a farm labor contractor and that he must be licensed to do so.

3) In November 1990, Pena wrote to Respondent about the wage claim of Ruperto Ascencio, who had been employed training caneberries by Respondent and had not been paid when he quit.

4) Respondent paid the amount claimed to be due, but told Pena he had only acted as interpreter. Pena again cautioned Respondent that he appeared to be acting as a farm labor contractor and that he must be licensed to do so.

5) In March 1991, Pena again wrote to Respondent regarding wage claims of five workers who worked tying caneberry vines on the farm of James Towery near Marion, Oregon.* Respondent paid the workers in cash for piece work. The total paid each worker was less than minimum wage for the hours worked. Pena's letter to Respondent outlined multiple violations of the Oregon wage and hour and farm labor contractor laws, including failure to pay minimum wage, failure to be licensed, failure to pay in full on termination, illegal deductions from wages, and failure to furnish itemized statements of earnings. Pena's letter also noted that Respondent was not licensed and that recruiting, soliciting, and supplying workers to another was farm labor contractor activity for which a license was required.

6) Pena made demand on Respondent on behalf of the workers for the difference between the amounts they initially received and the minimum wages due. Respondent sent a check to Pena for the difference and told Pena that the funds came from Towery.

* The name "Cowery" appears in error in Pena's file; the farmer, whose true name is Towery, became the subject of investigation for hiring an unlicensed contractor.

7) At all times material, Gabe Silva was a Compliance Specialist with the Farm Labor Unit of the Agency. On October 23, 1991, he was contacted by farm workers who had problems with pay at the farm of Larry Langmade in the Albany, Oregon, area.

8) In late September 1991, Respondent gave Langmade a bid for tying caneberries, which Langmade accepted. The total bid was $4,410. Respondent gave Langmade a written memorandum of the bid and terms. On or about October 4, 1991, Respondent brought to Langmade's farm 33 workers who tied up the berries.

9) Respondent had hired the workers in Independence, Oregon, for work on Langmade's farm.

10) Langmade dealt only with Respondent as to the work. He saw no one else exercise any authority over the workers. Respondent was not his employee.

11) On October 7, 1991, Respondent requested a draw against the agreement to cover the workers' expenses. Langmade paid him $300 by check. On October 16, 1991, Respondent requested another draw. Langmade gave him a check for $1,500.

12) The workers tied up berries on Langmade's farm between October 4 and October 18, 1991, when the work was completed. They worked at least 10 days between those dates.

13) Langmade paid each of the 33 workers $79.10, the amount he calculated was owing to each after Respondent paid each one a pro rata share of the $1,800 previously drawn. ($4,410 ÷ 33 = $133.64; $1,800 ÷ 33 = $54.54; $133.64 - $54.54 = $79.10.)

14) Respondent told Silva that the 33 workers knew independently about the work at Langmade's farm and that he merely acted as interpreter and Langmade's employee. On October 23, 1991, he stated that the workers had not received itemized statements of earnings because they had not yet been paid.

15) On October 25, upon learning that some of the workers were claiming to have been underpaid, Langmade requested that Silva assist in determining and making proper payment. Langmade paid additional sums to some of the workers.

16) Joan Butler was Langmade's bookkeeper. She observed that in addition to interpreting, Respondent kept a list of workers and the hours they worked and that he distributed the checks. Her records showed that all October 18 checks were cashed.

17) Langmade computed that the additional checks, together with the cash payments he made on October 25, totaled $608.60 above Respondent's bid price

18) Respondent signed an "I. O. U." to Langmade in the amount of $608.60 on October 25, 1991. Respondent had made no payment thereon as of the date of the hearing.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent René Garcia was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

2) On or about September 30, 1991, Respondent bid to supply labor to tie caneberries for Larry Langmade near Albany, Oregon, for a total price of $4,410.

3) On or about October 1, 1991, Respondent hired, solicited, or employed workers to perform the labor in connection with the Langmade agreement.

4) From approximately October 4 through October 18, 1991, Respondent, not being an employee of Langmade, supervised the tying of the Langmade berries, kept the workers' hours, and drew portions of the contract proceeds to distribute to the workers.

5) Twice in 1990 and once in 1991 prior to October, Respondent had been warned by the Agency against acting as a farm labor contractor while he had no valid license to do so.

CONCLUSIONS OF LAW

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

2) ORS 658.405 provides, in pertinent part:

> "(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in * * * the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in those activities; * * * or who bids or submits prices on contract offers for those activities; * * *"

ORS 658.410 provides, in pertinent part:

> "(1) * * * no person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries. * * *"

ORS 658.415 provides, in pertinent part:

> "(1) No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.503 and 658.830. * * *"

Respondent, on or about September 30, 1991, by submitting a price on contract to supply workers for another to work in connection with the production of farm products, acted as a farm labor contractor without first being licensed by the Commissioner in violation of ORS 659.410(1) and 658.415(1). Respondent, from on or about October 1 to October 18, 1991, by recruiting and supplying workers to perform labor for another to work in connection with the production of farm products for an agreed remuneration, acted as a farm labor contractor without first being licensed by the Commissioner in violation of ORS 659.410(1) and 658.415(1).

3) ORS 658.453 provides, in pertinent part:

> "(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries * * * may assess a civil penalty not to exceed $2,000 for each violation by:
>
> "(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.503 and

658.830, recruits, solicits, supplies or employs a worker."

OAR 839-15-505 provides, in pertinent part:

"As used in OAR 839-15-505 to 839-15-530:

"* * *

"(2) 'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-15-507 provides:

"Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation."

OAR 839-15-508 provides, in pertinent part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(a) Acting as a farm or forest labor contractor without a license in violation of ORS 658.410."

OAR 839-15-510 provides, in pertinent part:

"(1) The Commissioner may consider the following * * * aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:

"(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude or seriousness of the violation;

"(d) Whether the contractor or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor or other person to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed."

Based on the applicable statute and rules and on the whole record herein, the Commissioner of the Bureau of Labor and Industries of the State of Oregon is authorized to assess civil penalties, and the penalties assessed in the Order below are a proper exercise of that authority.

OPINION

The record herein clearly demonstrates Respondent's violations of the farm labor statutes. Respondent was not a licensed farm labor contractor. He was not a farmer and was not the employee of a farmer. He engaged in activities which by statutory definition were those of a farm labor contractor. He gave a farmer, Langmade, a bid on work in the production of farm products, the tying of caneberries. In Independence, he recruited workers whom he then supplied to Langmade to work in production of farm products. In furtherance of his enterprise, he kept a list of the workers, the time each worked, and distributed their pay, however inaccurately. Any activity as an interpreter was incidental to his interest in advancing his own contract with Langmade. The overwhelming weight of the evidence shows that Respondent, without a license issued by the Commissioner, acted as a farm labor contractor from late September through mid-October 1991. He thus violated the statute, subjecting him to civil penalties.

In assessing civil penalties for those violations, the Commissioner is authorized to consider Respondent's history including prior violations, the seriousness of the current violations, and whether Respondent knew he was violating the law. The record reflects that on at least three occasions less than 18 months before dealing with Langmade, Respondent had been warned by the Agency that his activities were those for which a farm labor contractor license was required, and that he was thus violating the statute. Each time, he stated that he was merely an interpreter, apparently between the workers and the farmer. But the workers in each instance believed that Respondent was the employer, and Respondent in each instance came up with the worker's pay, at least twice in the form of his own check. Respondent thus acted as a farm labor contractor previously, without a license, and knew that his activities at the Langmade farm were another series of similar violations.

Respondent's violations, both previously and currently, were serious as demonstrated by the necessity in each instance for the Agency to demand the proper pay for the workers involved. Respondent's distribution of the draws he obtained from Langmade left some workers unpaid, some underpaid (and perhaps some overpaid), and eventually resulted in Langmade paying a portion of the contract price again. This Forum cannot assist Langmade in collecting the IOU: he dealt with an unlicensed contractor. But this Forum can attempt to gain Respondent's attention, and thus protect farm workers' rights in the future, by assessing civil penalties.

Respondent acted as a farm labor contractor without a license on each of a minimum of 10 days in September and October 1991 at the Langmade farm. The penalties assessed below at $500 per day reflect those violations.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, RENÉ GARCIA is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FIVE THOUSAND DOLLARS ($5,000), plus interest thereon at the annual rate of nine percent between a date 10 days after the issuance of this Order and the date RENÉ GARCIA complies with this Order.

In the Matter of

OREGON DEPARTMENT OF TRANSPORTATION,

Motor Vehicles Division,

Respondent.

Case Number 19-92

Final Order of the Commissioner

Mary Wendy Roberts

Issued October 13, 1992.

SYNOPSIS

Respondent's refusal to allow Complainant to use accrued sick leave for parental leave was an unlawful employment practice in violation of ORS 659.360. The Commissioner held that the Bureau was not estopped from enforcing the parental leave law, and rejected Respondent's attempt to disqualify the Hearings Referee. The Commissioner awarded Complainant $364 for leave denied, ordered Respondent to adjust Complainant's leave accrual, found emotional distress damages available to a parental leave law complainant, and awarded Complainant $5,000 for emotional distress. ORS 659.360, 659.365; OAR 839-07-805, 839-07-820, 839-07-825, 839-07-840, 839-07-845, 839-07-850(1), 839-07-865.

The above-entitled matter came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on March 17, 1992, in the Rainbow Room of the offices of the State of Oregon Employment Division, 605 Cottage Street, NE, Salem, Oregon. Alan McCullough, Case Presenter with the Civil Rights Division, Bureau of Labor and Industries (BOLI or the Agency), represented the Agency. The Motor Vehicles Division, State of Oregon Department of Transportation (MVD or Respondent), was represented by Josephine Hawthorne, State of Oregon Assistant Attorney General. Owen Gest-Herzberg (Complainant) was present throughout the hearing.

The Agency called as witnesses Complainant, Complainant's co-worker Robert H. Wilson, and Complainant's spouse Marlene J. Gest-Herzberg. Respondent called as witnesses former State of Oregon Executive Department labor negotiator Darlene Livermore and MVD Personnel Manager Linda Nealy.

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 Rulings on Motion and Objections, Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS ON MOTION AND OBJECTIONS

Respondent's Motion to Disqualify Hearings Referee

At the commencement of the hearing, Respondent's counsel moved to disqualify the Hearings Referee based upon the Referee's membership in the bargaining unit and alleged resultant status as a third-party beneficiary to the collective bargaining agreement between the bargaining unit and the State of Oregon as employer, which agreement counsel suggested that the Hearings Referee must necessarily construe. The Hearings Referee reserved ruling on the motion until the Proposed Order, OAR 839-30-160(1), where it was denied as untimely under OAR 839-30-065(1) and (2). That ruling is confirmed. The issue of the Hearings Referee's alleged conflict of interest was again raised in Respondent's written closing argument and is dealt with in the Opinion section of this Order.

Respondent's Objections to Case Presenter Interrogating Witness

During the hearing, Respondent's counsel objected to the Agency Case Presenter examining the witness Livermore, who had testified regarding the collective bargaining process. Respondent's objection was based on the restrictions imposed on lay agency representatives by the Administrative Procedures Act and by the Forum's rules restricting the Agency Case Presenter from making legal argument. ORS 183.450(7) and (8); OAR 839-30-059(1) and (2). The Hearings Referee overruled Respondent's objection, and Respondent's counsel interposed what was denominated as a "continuing objection" to any questions of the witness Livermore by the Case Presenter, arguing that the Case Presenter is limited by the rule to issues related to ORS chapter 659, and that Respondent's examination dealt with issues arising under a totally different statutory scheme, ORS chapter 240. Respondent's counsel argued that the Case Presenter thus lacked authority to question the witness and also that the bargaining issue was a legal issue into which the Forum's rules did not allow the Case Presenter to inquire. The Hearings Referee pointed out that the rule prohibited the Case Presenter from argument on the Forum's jurisdiction, on the constitutionality of a statute or rule or the application of a constitutional requirement to the Agency, and/or on the application of court precedent to the facts of a particular case before the Forum. ORS 183.450(7) and (8); OAR 839-30-095. The Hearings Referee again overruled Respondent's objection.

The limitation on legal argument by the Agency's lay Case Presenter prohibits only legal argument. It does not limit the Agency representative's inquiry into factual issues arising in a contested case, including factual issues touching upon the administration of law not directly connected to ORS chapter 659. The ruling upholding the Case Presenter's ability to pursue relevant factual inquiry is hereby confirmed.

FINDINGS OF FACT – PROCEDURAL

1) On April 19, 1991, Complainant Owen Gest-Herzberg filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practice of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 659.360(3) and 659.360(1)(a).

3) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on

January 16, 1992, the Agency prepared and served on Respondent Specific Charges, alleging that Respondent had denied Complainant the use of accrued sick leave during a period of parental leave in violation of ORS 659.360(3) and 659.360(1)(a).

4) With the Specific Charges, the following were served on Respondent: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On February 4, 1992, Respondent timely filed its answer.

6) On February 18, 1992, the Agency filed a motion for summary judgment in part, asking that the Forum grant summary judgment in the Agency's favor on the issue of liability with specific damages to be established at hearing. On February 26, 1992, Respondent filed a motion to postpone the hearing pending resolution by the Oregon Court of Appeals of *Portland General Electric Company v. Roberts*, CA 2 A51280 (*sub nom, In the Matter of Portland General Electric Company*, 7 BOLI 253 (1988)).

7) On February 27, 1992, the Agency responded to Respondent's motion to postpone. On March 4, 1992, the Hearings Referee denied Respondent's motion to postpone and requested that Respondent address the Agency's pending summary judgment motion. In a telephone conference, the Hearings Referee waived the necessity for the participants* to file case summaries and directed that each identify to the Forum and to each other witnesses to be called.

8) On March 9, 1992, Respondent submitted its response to the Agency's motion for summary judgment in part, and on March 11, 1992, Respondent filed its first amended answer to the Specific Charges.

9) On March 13, 1992, the Agency filed an objection to Respondent's amended answer, and on March 13, 1992, Respondent filed its "First Modified Amended Answer," together with a witness list in lieu of a case summary.

10) On March 13, 1992, the Agency submitted a witness list in lieu of case summary.

11) On March 16, 1992, the Hearings Referee issued a prehearing ruling advising the participants that the Hearings Referee would rule on amendments and clarify stipulations at the commencement of the hearing, which had been relocated to an Employment Division office in Salem.

12) At the commencement of the hearing, counsel for Respondent stated that she had received the Notice of Contested Case Rights and Procedures with the Specific Charges and had no questions about it.

13) Pursuant to ORS 183.415(7), Respondent and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures

* "Participant" or "participants" includes the charged party and the Agency. OAR 839-30-025(17).

governing the conduct of the hearing. The Hearings Referee's oral advice included a recitation of facts alleged by the Agency and admitted by Respondent in its First Modified Amended Answer, which amendment the Hearings Referee allowed.

14) At the close of the hearing, the Hearings Referee requested that Respondent witness Nealy provide information regarding Complainant's hourly rate of pay at times material. That information was received by the Forum on March 24, 1992, and admitted into evidence.

15) On March 18, 1992, the Hearings Referee wrote to the participants verifying the schedule for briefs and responses discussed at hearing. Under that schedule, the Agency timely filed its Statement of Policy and Respondent timely filed its initial written argument and a response to the Agency's statement. The record closed April 24, 1992.

12) The Proposed Order, which included an Exceptions Notice, was issued on July 2, 1992. Exceptions, if any, were to be filed by July 13, 1992. Respondent's exceptions were received timely on July 13, 1992. They are dealt with throughout this Order as described at the end of the Opinion section.

FINDINGS OF FACT– THE MERITS

1) At times material, Respondent was a state agency of the State of Oregon, engaging or utilizing the personal services of 25 or more employees.

2) Complainant was first employed by Respondent as a hearings referee in May 1984, and was so employed as a regular, permanent employee of Respondent at times material.

3) At times material, Complainant and Marlene Jo Gest-Herzberg had been married for six years and were childless. Complainant and Ms. Gest-Herzberg wished to adopt a child. Through a friend, Complainant learned on or about February 21, 1991, of a child which would be available for adoption at birth. The child was expected around April 1, 1991.

4) Complainant and his wife were thrilled upon learning of the availability of a child for adoption. Complainant discussed the impending adoption with co-workers and supervisors who in turn were happy for him. He discussed his plans for parental leave with Regional Hearings Manager Randy Fraser, his immediate supervisor.

5) Complainant planned to take six weeks of parental leave, using accrued sick leave. His wife, also a state employee, was to take the second six weeks, for a total of 12 weeks of parental leave. Complainant was to take his leave first because he had some experience caring for young children and his wife did not. Also, she has a congenital disability in one leg and was apprehensive about providing proper care until after a routine had been established.

6) On the weekend of March 9 and 10, 1991, Marlene Gest-Herzberg suffered a stress fracture to her leg, and Complainant took some sick leave to attend her.

7) The baby which Complainant and his wife planned to adopt was born a few weeks early on March 10, 1991.

They took physical custody of Mallory Mercedes Gest-Herzberg on March 11, 1991.

8) Complainant wrote a brief interoffice memo to Fraser on or about March 11 advising that he wanted six weeks of parental leave and planned to use accrued sick leave for that purpose.

9) Complainant received a telephone call at home on or about March 14 from Fraser who stated that the request to use sick leave for parental leave could not be approved. Fraser suggested modifying the request to mention Complainant's wife's broken leg, so that Complainant could have some sick leave.

10) By letter dated March 21, 1991, Fraser allowed Complainant to use accrued sick leave for his absence from work beginning at noon on March 11, 1991, due to his wife's broken leg, and continuing on March 18, due to his own illness, through noon March 20, 1991. Fraser also verified that Respondent would approve parental leave "as long as you do not use sick leave."

11) Complainant made written request for a parental leave of three weeks on March 18, 1991, to begin March 20, 1991, utilizing accrued vacation. In an accompanying note dated March 18, he advised Respondent that he believed he was entitled to use sick leave, that he was taking vacation leave under protest, that he was filing with the Agency, and that if his position on the issue was upheld, he requested "that the vacation time used be converted to sick time with pay."

12) As of March 11, 1991, Complainant had accrued approximately 500 hours of sick leave.

13) March 20 to April 12, 1991, was within a 12-week period beginning March 11, 1991.

14) Complainant took parental leave from noon March 20 through April 12, 1991, using 122.5 hours of vacation leave and 17.5 hours of leave without pay. He was allowed to use his accrued sick leave, a total of 56 hours, only while he or his spouse were temporarily disabled by illness or injury. He was not allowed to use his accrued sick leave solely for parental leave. His hourly rate of pay was $20.80; the period of leave without pay cost him $364.

15) A period of six weeks beginning on March 11, 1991, ended on April 21, 1991. Complainant's pay for one work week (40 hours) was $832.

16) Marlene Gest-Herzberg began six weeks of parental leave from her employment with the State of Oregon Department of Human Resources Office of Medical Assistance Programs on or about April 15, 1991, returning to work in early June. She used accrued vacation time.

17) Respondent's refusal to allow Complainant to use accrued sick leave during parental leave "devastated" Complainant. He had planned on being with his new daughter for six weeks and on drawing his regular salary in the form of accrued leave. He did not have sufficient accrued vacation to cover the period and could not afford economically to take leave without pay for the balance of his parental leave. His disappointment triggered a "gamut of emotions." He was angry, frustrated, upset, confused, and driven to tears. He was anxious, agitated, and hurt by what he saw as a lack of support from his employer and an intrusion into his personal life. He became moody, depressed, and despondent, with a sense of failure. He felt he had no control over the situation and that he had been forced to break emotionally charged promises to his family. He felt that Respondent's denial of sick leave usage, which he discussed often with his spouse, undermined what should have been an otherwise happy time. It was a major source of stress. He resented returning to work earlier than he had planned and believed he had been unlawfully denied an entitlement. His emotional upset continued up to the date of the hearing.

18) At work prior to March 1991, Complainant was a positive, energetic, empathetic, and upbeat person who was eagerly anticipating the adoption and time with his new child. When he was denied a portion of the requested time, he became morose, appeared depressed and upset, and was less talkative. He complained about coming back to work earlier than he had planned because he couldn't afford to be on unpaid leave. His depression appeared to continue into mid-1991.

19) The Oregon Parental Leave law, chapter 319, Oregon Laws 1987, since codified as ORS 659.360 to 659.370, was signed by the Governor on June 12, 1987, and became effective by its own terms on January 1, 1988. Oregon Administrative Rules 839-07-800 to 839-07-875, the Agency's rules under ORS 659.360, *et seq.*, were filed with the Secretary of State December 14, 1987, to become effective January 1, 1988.

20) Effective June 28, 1988, the permanent rules of the State of Oregon Executive Department Personnel and Labor Relations Division, OAR 105-70-016(8), covering state employees not subject to collective bargaining, provided:

> "The period of parental leave shall be without pay unless a parent elects to use accrued paid sick leave, vacation leave, personal leave, administrative leave, or compensatory time off."

That rule was repealed in December 1989.

21) On August 18, 1988, the Oregon Attorney General issued Attorney General Opinion No. 8195 regarding ORS 659.360, *et seq.*, in response to an inquiry by then State Representative Kopetski. The opinion stated in essence that an employer was not required to grant accrued sick leave during parental leave unless the employee otherwise qualified for sick leave use in accordance with employer policy, with an agreement between the employer and the employee, or with a collective bargaining agreement.

22) On December 28, 1988, pursuant to hearing held August 30, 1988, this Forum issued a Final Order *In the Matter of Portland General Electric Company,* 7 BOLI 253 (1988), wherein the Commissioner held that the employer violated ORS 659.360 by refusing to allow a parent to use accrued sick leave during parental leave even though he was not ill or disabled.

23) Darlene Livermore functioned as labor relations manager or as chief

negotiator and supervisor of collective bargaining for the State of Oregon Executive Department, Personnel and Labor Relations Division, Labor Relations Unit (Exec) from April 1987 to mid-December 1991. Exec represents the employer interests of state agencies including MVD and BOLI. Her duties included advising management on labor relations issues, including the inclusion of policy provisions in labor agreements and the supervision of the negotiation function for all labor agreements, including direct negotiation. She was familiar with bargaining processes in general and in Oregon in particular.

24) Oregon Public Employees Union (OPEU) is part of Service Employees International Union, AFL-CIO. It is the largest of several unions which bargain collectively with Exec. OPEU is the recognized bargaining agent for the classified employees of over 50 state agencies, including MVD and BOLI.

25) Negotiations of the OPEU agreement usually take place each fiscal biennium, coincident with the state's regular legislative convenement. The agreement is effective from July 1 of its initial year to June 30, two years later. In addition to a central bargaining table, there are several "coalition" tables at which agencies are loosely grouped by agency function. MVD is with the Department of Transportation coalition. BOLI is with the Special Agencies coalition. Some provisions of the agreement, called "central articles," apply to all agencies; others may include special subsections for members of a particular coalition. The central table coordinates the coalition tables, including approving new or revised provisions for the contract, and approves new subject matter for bargaining.

26) Once an agreement is signed off on by labor and management, it is considered binding on both. An employing agency's failure to follow the agreement may generate an unfair labor practice charge, an employee grievance, a past practice claim, or mid-biennium bargaining. Exec may reprimand a non-complying agency. If the noncompliance is to the employees' advantage, however, Exec may not learn of it.

27) Article 56 of the bargaining agreement between OPEU and Exec addresses sick leave benefits. Article 56 limits use of sick leave to illness, injury, pregnancy disability, medical or dental care of the employee, or attendance upon members of the employee's immediate family, as defined, due to illness or death. It provides for medical certification of illness and of return to work. With minor changes, it read substantially the same in the 1985-1987, the 1987-1989, and the 1989-1991 agreements.

28) Article 63 of the bargaining agreement between OPEU and Exec addresses parental leave. The 1985-1987 agreement allowed a "reasonable" period of parental leave and conditioned the leave on the employee's work load assignment. The 1987-1989 agreement acknowledged that parental leave could be up to 12 weeks, but conditioned the leave on work load assignment. The 1989-1991 agreement clarified the 12-week language and removed the work load condition. Neither the 1987-1989 nor the 1989-1991 agreement acknowledged that sick leave might be used, except for a reference to pregnancy under Article 56.

29) Exec interpreted the parental leave statute as leaving the use of sick leave for parental leave to collective bargaining, relying on Attorney General Opinion No. 8195.

30) The 1987-1989 OPEU-Exec bargaining agreement was signed by all parties as of October 19, 1987. The 1989-1991 agreement was signed by all parties as of July 21, 1989.

31) Linda Nealy was Respondent's personnel manager at times material. The decision regarding Complainant's parental leave request was referred to her. Complainant's leave request form was delivered to her office on March 18, 1991. She knew that Complainant was entitled to parental leave. She knew he was entitled to use accrued paid leave, but under Respondent's policy she believed he was not entitled to use sick leave. Because she understood that Complainant had been otherwise informed by BOLI, she directed her assistant to check with the Attorney General's office, which upheld her interpretation. In her view, allowing the use of sick leave for parental leave when the employee was not sick, disabled, or required to attend upon a family member did not comply with the bargaining agreement.

32) At times material, Respondent did not give notice of its intent to limit or delay Complainant's total statutory parental leave.

33) The Bureau of Labor and Industries did not point out any conflict between its parental leave rules and the bargaining agreement provisions on parental leave and sick leave use at any OPEU-Exec collective bargaining negotiations from 1987 through 1991.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Complainant had been employed for over 90 days by Respondent, an employer with over 25 employees, and was a classified member of a bargaining unit represented by Oregon Public Employees Union, the recognized bargaining agent.

2) At times material herein, Randy Fraser was Respondent's regional hearings manager and Complainant's immediate supervisor. Linda Nealy was Respondent's personnel manager.

3) On or about February 21, 1991, Complainant and his wife learned of the availability for adoption of a child to be born April 1, 1991.

4) Complainant informed Fraser that he planned to take the first six weeks of a 12-week parental leave period, that his wife would be taking the second six weeks, and that he planned to use accrued sick leave during his parental leave. Complainant did not initially use a parental leave request form in advising Fraser of his leave plans.

5) Complainant's adoptive child was born a few weeks early on March 10, 1991, and Complainant and his wife took physical custody of the child on March 11, 1991.

6) Fraser advised Complainant by telephone on March 14, that Complainant could not use accrued sick leave during his parental leave except for periods of his or his wife's illness or

disability. Complainant submitted a parental leave request form on March 18, 1991, requesting three weeks of parental leave, utilizing accrued vacation "under protest." He reduced the length of leave requested because he could not afford unpaid leave. Complainant's wife took six weeks of parental leave, using accrued vacation leave, after Complainant returned from leave.

7) Complainant did not give Respondent notice of his request for parental leave 30 days in advance of the anticipated date of delivery. Complainant took physical custody of his newly adopted child at an unanticipated time. Complainant gave Respondent written notice of leave within seven days after taking custody.

8) By letter dated March 21, 1991, Fraser granted Complainant parental leave from noon, March 20, 1991, through April 12, 1991. The letter verified that sick leave was available during parental leave only during periods of the illness or disability of Complainant or his wife. March 20 to April 12, 1991, was within a 12-week period beginning March 11, 1991.

9) Respondent gave no notice within seven days of Complainant's parental leave request that Respondent considered the request untimely.

10) Fraser's refusal to allow Complainant to use accrued sick leave solely for parental leave was in consultation with Nealy and in accordance with Respondent's interpretation of the effect of the OPEU collective bargaining agreement on statutory parental leave.

11) Complainant used 122.5 hours of vacation leave and 17.5 hours of leave without pay between March 20 and April 12, 1991. He used 56 hours sick leave due to his wife's broken leg and to his own respiratory illness between March 11 and March 20, 1991. Complainant's pay for the unpaid 17.5 hours would have been $364.

12) Complainant suffered serious and long-lasting emotional upset characterized by anger, moodiness, depression, frustration, and anxiety as a result of the denial of the use of paid sick leave during parental leave and the shortening of his time with his new daughter.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons, entities, and the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. The remedies awarded in the Order herein are a proper exercise of that authority. ORS 659.365, 659.040, 659.050.

2) ORS 659.360(10) provides that to be eligible for parental leave, an employee must be a regular employee for 90 or more days of an employer with 25 or more employees, in other than a seasonal or temporary position and not subject to a nondiscriminatory cafeteria benefit plan.

OAR 839-07-805 provides:

> "As used in these rules, unless the context requires otherwise:
>
> "* * *
>
> "(5) 'Parent' means an employee with parental rights and duties as defined by law who is responsible for the care and nurturance of a child, * * *
>
> "* * *
>
> "(7) 'Parental leave of absence' or 'parental leave' means an employee's absence from work, paid or unpaid, allowed under ORS 659.360 and these rules based on the employee's status as a parent * * *."

Respondent was an employer subject to the provisions of ORS 659.360 to 659.370, and Complainant was eligible for parental leave at times material herein.

3) ORS 659.360 provides:

> "(1) It shall be an unlawful employment practice for an employer to refuse to grant an employee's request for a parental leave of absence for:
>
> "* * *
>
> "(b) All or part of the 12-week period following the date an adoptive parent takes physical custody of a newly adopted child under six years of age.
>
> "* * *
>
> "(3) The employee seeking parental leave shall be entitled to utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during the parental leave. The employer may require the employee seeking parental leave to utilize any accrued leave during the parental leave unless otherwise provided by an agreement of the employer and the employee, by collective bargaining agreement or by employer policy."

OAR 839-07-850(1) provides:

> "The statute anticipates unpaid parental leave, but gives the employee the right to use accumulated leave of any kind. It also provides that the employer may require the parent to use accumulated leave in accordance with a bargaining agreement or established policy. Use of leave is subject to OAR 839-07-865."

In refusing to allow Complainant to utilize his accrued paid sick leave during parental leave, Respondent was guilty of an unlawful employment practice in violation of ORS 659.360.

4) ORS 659.360 provides:

> "(4) The employer may require an employee to give the employer written notice at least 30 days in advance of the anticipated date of delivery, stating the dates during which each parent intends to take parental leave. * * * Both parents shall adhere to the dates stated in the notice unless:
>
> "* * *
>
> "(c) The employee takes physical custody of the newly adopted child at an unanticipated time and is unable to give notice 30 days in advance; * * *
>
> "(5) In cases of * * * unanticipated taking of custody referred to in subsection (4) of this section, the employer may require the employee to give notice of revised dates of parental leave within seven days after * * * taking of custody.
>
> "* * *
>
> "(9) If the employee fails to give the notice that may be required by

subsection (4) of this section, the employer may require the parental leave to commence up to three weeks from the date of notice and may reduce the parental leave required by this section by three weeks."

OAR 839-07-805 provides, in pertinent part:

"As used in these rules, unless the context requires otherwise:

"* * *

"(13) 'Timely request' means a written notice to a covered employer that the parent intends to take parental leave beginning on a date certain more than 30 days from the date of the request. The request shall state:

"* * *

"(b) The anticipated date that the parent will obtain physical custody of a newly adopted child under six years of age; and

"(c) The dates when the parent, or if both parents request parental leave the dates when each parent, will commence and terminate her or his portion of the parental leave.

"* * *

"(20) 'Unanticipated time' means a time less than 30 days before the taking of physical custody."

OAR 839-07-825 provides:

"(1) * * * a timely request shall be in writing * * * [and] shall include information set out in [the Parental Leave Request form].

"(2) Where a parent intends adoption of a child under six years of age, a letter or other certificate from an adoption agency stating that the placement with the parent is approved, that the parent is on a waiting list, and the tentative date of the parent's physical custody or that the agency is unable to give a specific date of physical custody shall, together with the information outlined in section (1) of this rule, satisfy the 30-day written request requirement. The parent shall then comply with OAR 839-07-840 (1) when the date of the taking of physical custody is determined."

OAR 839-07-845 provides:

"(1) Where the parent fails to make timely request, the employer may reduce the total parental leave required by the statute by a total of three (3) weeks. The employer may also delay the parental leave for up to three (3) weeks from the date of any late request; * * *

"(2) Where the employer chooses to reduce or delay the commencement of parental leave under this rule, it shall provide written notice of such action to the parent within seven (7) days of the receipt of the untimely parental leave request.

"(3) In the event of an untimely request, total leave for both parents combined may be limited to nine (9) weeks by the employer. * * *"

Having failed to give timely notice of an intent to reduce or delay parental leave, Respondent could not thereafter reduce the total length of Complainant's parental leave.

5) ORS 659.360(2) provides:

"The employer is not required to grant to an employee parental leave which would allow the employee and the other parent of the child, if also employed, parental leave totaling more than the amount specified in paragraphs (a) and (b) of subsection (1) of this section nor to grant to an employee parental leave for any period of time in which the child's other parent is also taking parental leave * * *."

OAR 839-07-865 provides:

"It shall not be a violation of any statute or rule under ORS Chapter 659 for a covered employer to count any period of sick, disability, vacation or other leave taken by either parent during the parental leave period towards the parental leave required by ORS 659.360 and these rules."

Respondent could count Complainant's sick leave between March 11 and March 20, 1991, and the six weeks taken by Complainant's wife, as portions of the allowable 12 weeks of parental leave, dating from March 11, 1991.

6) The actions, inactions, knowledge, and motivation of Randy Fraser and Linda Nealy, Respondent's managers, are properly imputed to Respondent.

OPINION

The Agency's Specific Charges herein alleged that Respondent's refusal to allow Complainant to use accrued sick leave during his parental leave was an unlawful employment practice in violation of ORS 659.360. Respondent's First Modified Amended Answer admitted Respondent's refusal to allow Complainant to use accrued sick leave during his parental leave, but denied that it constituted an unlawful employment practice in violation of ORS 659.360.

Complainant was a member of Respondent's bargaining unit. Respondent's defenses generally revolved around its interpretation of the parental leave statute and the effect of collective bargaining on parental leave rights, and in particular around the Agency's allegedly inconsistent position as signator to the same collective bargaining agreement as Respondent. Respondent also asserted by way of defense that it relied on an Attorney General opinion in denying Complainant the use of sick leave for parental leave, and that the Agency's parental leave rules do not compel Respondent to grant Complainant the use of sick leave for parental leave. Respondent further asserted that, in any event, Complainant failed to comply with various of the Agency's parental leave rules and therefore was not entitled to parental leave, and that the Agency consequently should be barred from requiring Respondent to comply with the parental leave law and rules as to this Complainant.

At hearing, Respondent expanded its collective bargaining estoppel argument to include the alleged conflict of interest of the Hearings Referee as a member of the bargaining unit. Respondent's motion to disqualify the referee was untimely, but the theme thereof resurfaced in Respondent's final written argument. Respondent's final argument also rejected as

inappropriate any damages requested by the Agency for Complainant's pain, humiliation, and suffering, and gathered the alleged rules violations under the heading of a faulty request. The Forum will deal with the various arguments in the sequence presented by Respondent.

1. Equitable Estoppel

Respondent argued that because the Agency was a party to the same collective bargaining agreement as Respondent it was unfair for the Agency to impose liability on a co-party to the agreement, and that the Agency should be estopped from imposing liability on Respondent. Respondent relied in part on the failure of the Agency to raise to the Executive Department any concerns about the legality of Article 63, the parental leave article, during any collective bargaining period since passage of the statute. Respondent argued further that the Agency's rules "in no way state its position that ORS 659.360 requires the granting of requested paid sick leave for parental leave" and quoted OAR 839-07-850(1):

> "The statute anticipates unpaid parental leave, but gives the employee the right to use accumulated leave of any kind. It also provides that the employer may require the parent to use accumulated leave in accordance with a bargaining agreement or established policy. Use of leave is subject to OAR 839-07-865."

ORS 659.360(3) deals with the use of accrued leave as follows:

> "The employee seeking parental leave shall be entitled to utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during the parental leave. The employer may require the employee seeking parental leave to utilize any accrued leave during the parental leave unless otherwise provided by an agreement of the employer and the employee, by collective bargaining agreement or by employer policy."

An equitable estoppel may exist when one party (1) has made a false representation; (2) the false representation is made with knowledge of the facts; (3) the other party is ignorant of the truth; (4) the false representation is made with the intention that it should be acted upon by the other party; and (5) the other party is induced to act upon it, to that party's detriment. *DeJonge v. Mutual of Enumclaw,* 104 Or App 296, 800 P2d 313 (1990); *Oregon Bank v. Nautilus Crane & Equipment Corp.,* 68 Or App 131, 683 P2d 95 (1984); *Hess v. Seeger,* 55 Or App 746, 760-761, 641 P2d 23, *rev den,* 293 Or 103, 648 P2d 851 (1982); *Dobie v. Liberty Homes, Inc.,* 53 Or App 366, 632 P2d 449 (1981); *Bash v. For Grove Cemeteries Co.,* 282 Or 677, 581 P2d 75 (1978); *Donahoe v. Eugene Planing Mill,* 252 Or 543, 450 P2d 762 (1969).

In this case, for Respondent to establish an equitable estoppel, BOLI must have made a false representation while in possession of the true facts and with the intention that Respondent, while ignorant of the truth, would act upon the representation, and Respondent must in fact have been induced to act upon it to Respondent's detriment. The facts in this case simply do not support such a defense.

Respondent's argument depends at bottom on it being misled by BOLI's failure to point out the difference in its interpretation of the parental leave law and the content of the collective bargaining agreement. But no estoppel is created by silence unless there was a legal duty to speak, *Earls et ux v. Clarke et al,* 223 Or 527, 355 P2d 213 (1960), and such a duty does not arise unless the party against whom the estoppel is urged knew or should have known that a failure to speak would probably mislead the other party to act to its own detriment. *Knapp v. Daily,* 96 Or App 327, 772 P2d 1363 (1989). The facts not only do not support the ascription of such knowledge to BOLI, they establish clear notice to Exec of BOLI's position.

Whatever semantic difference Respondent may detect between ORS 659.360(3) and OAR 839-07-850(1) (both quoted above), the Oregon Court of Appeals has held that the rule "on its face * * * does nothing more than paraphrase the statute. * * * The rule, on its face, is valid." *Oregon Bankers Association v. Bureau of Labor and Industries,* 102 Or App 539, 544-45, 796 P2d 366 (1990). The statute grants an entitlement in the initial sentence. The second sentence allows the employer to require leave use. "Subsection (3) does not restrict the employee's right to paid leave, rather it limits the employee's option to choose unpaid leave." *Portland General Electric Company, supra.*

Respondent acknowledged *Oregon Bankers*, but argued that the rule preserves any ambiguity or confusion existing in the statute, and that the Agency did not take the opportunity in fashioning its rules to state clearly that the statute requires employers to grant requested paid sick leave for parental leave regardless of a collective bargaining agreement. In view of the history of this issue, such an argument is meritless, if not disingenuous. Respondent's counsel's office was on record as "Intervenor-Respondent" in *Oregon Bankers*, and should not be heard to support a claim that Respondent was deliberately misled by the Agency. Any basis for claimed ambiguity or confusion on the issue disappeared as early as December 1988, with the issuance of the Commissioner's Order in *Portland General Electric, supra,* which clearly articulated the supremacy of the statute over private agreement. Thus, in the course of a contested case, the Commissioner interpreted a legislative policy already expressed in the statute and applicable to cases of like nature, a legitimate way to adopt policy. ORS 183.355(5).

Respondent argued that the Agency's conduct was misleading in not availing itself of the "numerous opportunities" to advise Exec that Article 63 of the bargaining agreement "does not accord with the statute" and that the Agency should be prohibited from imposing liability on a "co-party" to the agreement. Respondent asserted that it relied upon the agreement and upon the Agency's failure to point out the alleged discrepancy between the agreement and the statute.

Respondent's argument is without merit. There can be no estoppel if the reliance is not coupled with a right to

rely, and there is no such right where a party has knowledge to the contrary of the fact or representation allegedly relied on. *Shaw v. Northwest Truck Repair,* 273 Or 452, 457, 541 P2d 851 (1982), cited in *Oregon Bank v. Nautilus, supra.* After *Portland General Electric,* Respondent or its representative (Exec) was on notice of the Commissioner's interpretation and could itself have introduced the issue in the employer's preparation for the bargaining process.

Respondent also asserted that it also relied on Attorney General Opinion No. 8195 (1988). The Commissioner, and therefore the Agency, declined to follow that opinion in the *Portland General Electric* order. As the public official designated by statute to enforce the parental leave law and policy, the Commissioner determined that the statute meant that a parent was entitled to the use of other types of leave during parental leave and that that entitlement was not subject to collective bargaining. Respondent's supposed reliance on the Attorney General's opinion is no more supportive of estoppel than BOLI's alleged failure to repudiate Articles 63, and for the same reason: Respondent was well aware of BOLI's position.

2. The Hearings Officer's Conflict of Interest (Bias)

Respondent did not show or attempt to show actual bias against Respondent as an entity or against any administrator or representative of Respondent. The Forum assumes that conflict of interest, rather than bias, is what Respondent has alleged and that the alleged conflict is of a pecuniary nature.

Respondent suggested that the fact that the Hearings Referee in this case was a classified employee and a third-party beneficiary of the collective bargaining agreement violated Respondent's right to an impartial hearings officer. Respondent argued that since the Hearings Referee could rule in a manner benefiting the Referee or fellow members of the Referee's bargaining unit by allowing the use of paid sick leave during parental leave, the Hearings Referee could not be impartial, thereby violating due process.

Without determining whether a state agency is entitled to due process under the 14th Amendment to the US Constitution, the Forum rejects Respondent's argument. In fashioning the parental leave law, the Legislature deliberately placed its enforcement with BOLI and directed that it be accomplished in the same manner as for other unlawful employment practices. The legislature determined the law's coverage, which included state agencies, and that the procedures to be used for enforcement were to include investigation and possible hearing before the Commissioner's staff referees or other designees. The parental leave statute does not suggest a need for an enforcement process different from that required for other unlawful employment practice statutes, and the Forum will not create one.

Respondent's suggestion that this supposed conflict of interest could be avoided by using a contract referee, or by postponing this matter pending appellate resolution of *Portland General Electric,* is neither necessary nor practical. The Referee earlier rejected Respondent's postponement motion:

> "The possibility of further appeal or ultimate reversal is present in all litigation, particularly in enforcement of a new statute. As the elected official specifically charged with administration and enforcement of Oregon's unlawful employment practice laws, including the Parental Leave Law, the Commissioner cannot cease enforcement activity each time the Agency's position or policy is opposed by an accused Respondent through appeal or otherwise."

Finally, as the Hearings Referee observed at hearing, in this Forum it is the Commissioner, not the Hearings Referee, who makes the ultimate determinations of law and fact. Even if Respondent had demonstrated bias on the part of the Referee, it did not even attempt to show bias on the part of the Commissioner. Accordingly, Respondent has not succeeded in establishing that the Hearings Referee's bias, if it existed, in any way prejudiced Respondent.

3. Damages for Pain, Humiliation, and Suffering

Respondent suggested that in order for Complainant to be entitled to a remedy for emotional upset, the employer must have intentionally singled him out because he requested paid sick leave for parental leave and discriminated against him in denying the request, thus exhibiting a discriminatory *animus* toward Complainant. Respondent argued further that the benefit sought by Complainant was contractual in nature and that its denial does not rise to the level of adverse treatment exhibited in cases of discrimination based on sex or race or other traditional protected class status.

Respondent has misperceived the nature of the Commissioner's remedial authority. Under ORS chapter 659, the Commissioner is authorized to eliminate the effects of any unlawful practice found. ORS 659.060(3), 659.010(2). The statute does not restrict this authority to certain types of discrimination, but rather speaks in terms of "any unlawful practice." ORS 659.365 provides that violation of ORS 659.360 subjects the violator to the same civil remedies and penalties as other unlawful practice violations under ORS chapter 659.

If an employer's proscribed action deprives an employee of a right or benefit, the Commissioner is authorized to eliminate the effects of the deprivation. Where an adverse employment decision causes Complainant mental suffering, this Forum may award compensation. *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564, *rev den,* 287 Or 129 (1979); *Holien v. Sears Roebuck and Co.,* 298 Or 76, 689 P2d 1292 (1984); *Portland General Electric, supra,* citing *In the Matter of Boost Program,* 3 BOLI 72 (1982). In this instance, Complainant was seriously upset by the denial of what he correctly considered to be an entitlement, one which he particularly valued for the opportunity it afforded him to bond with his first child. The effects were lengthy, and the Forum is awarding $5,000 to Complainant as a result.

4. Complainant's Request for Parental Leave

Respondent asserted that Complainant did not make a timely parental

leave request under OAR 839-07-825 and 839-07-840(1). Respondent then appeared to argue with the facts of the case in order to support its assertion of noncompliance. In the context of the chronology of events surrounding the taking of custody of a newly adopted child under the age of six, the Proposed Order found that Complainant made a timely request for parental leave because he was unable to give notice 30 days in advance of the actual taking of custody. That was an incorrect interpretation of ORS 659.360 (4)(c). The notice called for in ORS 659.360(4) is of the anticipated date of delivery. That date in this case was April 1, 1991, and was known to Complainant on February 21, 1991, when he learned of the availability of the child. Complainant's request was untimely.

However, after taking custody on March 11, Complainant did give notice within seven days after that unanticipated date of taking of custody. ORS 659.360(5); OAR 839-07-840(1). March 18 is within seven days of March 11. ORS 174.120. Complainant knew by that time that Respondent would not honor his request to use accrued sick leave. He specified vacation, on a parental leave form, but it was clear from his accompanying note what he ultimately intended.

Respondent seemed to suggest that Complainant's failure to request parental leave at least 30 days prior to the anticipated date of delivery worked a total forfeiture as to his parental leave entitlement. As the Agency statement of policy pointed out, such was not the case. Both statute and rule provide that a parent's failure to give required timely notice permits the employer to delay and/or reduce the parental leave period, provided that the employer gives notice of its intent to do so within seven days, but does not eliminate the right to parental leave. ORS 659.360(9); OAR 839-07-845. Respondent did not invoke its right to 30 days' advance notice, and thus did not delay or reduce or attempt to delay or reduce his statutory leave period. Complainant's eligibility for his portion of the 12-week period was affected only by the parental leave taken by the other parent within the 12 weeks immediately following the taking of physical custody. OAR 839-07-820.

The 12-week window for parental leave for Complainant opened March 11, 1991, the date of the taking of physical custody. Complainant was on sick leave March 11, as was the other parent. Accordingly, Complainant's parental leave started on March 20. Had he been able to take the six weeks he had intended, he would have returned to work after April 19, 1991, a full week later than his economic situation allowed.

In conclusion, ORS 659.360 gives the employee-parent the unrestricted right to use accrued leave of any kind, including accrued paid sick leave, during the parental leave, regardless of collective bargaining provisions limiting the use of such paid leave to specific situations.

Respondent's Exceptions

Respondent timely filed exceptions to the Proposed Order. Resulting changes in this Final Order are made in Finding of Fact 24, in Ultimate Findings of Fact 7 and 9, and by expanding the Opinion on estoppel and on the so-called "bias" issue. The erroneous interpretation regarding the timeliness of Complainant's leave request has been corrected.

The Forum has also reconsidered the damages award. The Proposed Order awarded one week's pay for a week that Complainant was not absent from work. Although he was there because of Respondent's refusal to allow him to be on paid sick leave during his parental leave, he was paid for time worked. The only recompense available to Complainant for this early termination of leave is the award of emotional damages.

ORDER

NOW, THEREFORE, as authorized by ORS 659.365, 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent, OREGON DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLES DIVISION, is hereby ORDERED to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for OWEN GEST-HERZBERG, in the amount of:

a) THREE HUNDRED SIXTY-FOUR DOLLARS ($364), less legal deductions, constituting the value of 17.5 hours of accrued sick leave denied to Complainant while he was on parental leave from April 10 to April 12, 1991; PLUS,

b) INTEREST AT THE ANNUAL RATE OF NINE PERCENT on the amount in paragraph a from April 30, 1991, until paid, computed and compounded annually; PLUS,

c) FIVE THOUSAND DOLLARS ($5,000), representing damages for the emotional distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

d) Interest on the damages for emotional distress, at the legal rate, accrued between the date of this Order and the date Respondent complies herewith, to be computed and compounded annually.

2) a) Restore to Owen Gest-Herzberg's vacation leave account 122.5 hours of vacation leave;

b) Deduct from Owen Gest-Herzberg's accrued sick leave account 17.5 hours awarded in paragraph 1a above;

c) Deduct from Owen Gest-Herzberg's accrued sick leave account 122.5 hours as replacement for 122.5 hours vacation leave restored in paragraph 2a above.

3) Cease and desist from refusing to allow employees to utilize accrued leave of any kind, and particularly sick leave, when requested in connection with parental leave for which they otherwise qualify.

In the Matter of
JOSE L. RODRIGUEZ,
dba J & J Farm Labor Contracting,
Respondent.

Case Number 11-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued October 22, 1994.

SYNOPSIS

The Commissioner found Respondent unfit to act as a farm labor contractor and denied Respondent's farm labor contractor application, prohibiting him from reapplying for three years, based upon failure to pay workers in accordance with state law relating to wages, as well as upon numerous violations of the farm labor contractor law, including repeatedly acting as a farm labor contractor without a valid license. The Commissioner also assessed civil penalties totaling $7,500 for the various violations. ORS 652.110; 653.025; 658.405(1); 658.410(1); 658.415(1), (3), (4); 658.420; 658.440(1)(a) and (e); 658.453(1); 658.715(1)(a); 658.735(1), (8); 658.750(1); 658.755 (1)(c), (3)(a); OAR 839-15-505; 839-15-512; 839-15-520(1)(k), (2), (3)(a), (d) and (l).

The above-entitled case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on January 28 and 29, 1992, in Room 311 of the State Office Building, 1400 SW Fifth Avenue, Portland. Lee Bercot, Case Presenter for the Wage and Hour Division of the Bureau of Labor and Industries (the Agency), represented the Agency. Jose L. Rodriguez, dba J & J Farm Labor Contracting (Respondent), was present throughout the hearing and was represented by Andrew P. Ositis, Attorney at Law, Salem.

The Agency called as witnesses the following: Sandra Sterling and Lucretia Elders of the Agency's Licensing Unit; William Pick, Vasili Shimanovsky and Raul Pena, of the Agency's Farm Labor Unit; Maria Cazares, formerly of the Agency's Farm Labor Unit; Michael Padilla, former compliance officer for the Occupational Safety and Health Division, Oregon Department of Insurance and Finance (OR-OSHA); Respondent Jose Rodriguez; Respondent's son Jaime Rodriguez; Willamette Egg Farms, Inc. office manager Karen Bernard; Kevin Crosby Farms, Inc. secretary Jennifer Crosby; Woodburn City code enforcement officer Michael Culver; Woodburn Independent newspaper reporter Nikki DeBuse; Salem area vineyard operator Joseph Olexa; Satrum Farms of Woodburn partner Myron Satrum; Gervais area farmer John Zielinski; and (by telephone) Hopper Bros. farming partnership partner Douglas Hopper.

Respondent called as a witness, in addition to himself, his son Jaime Rodriguez. At various times during the proceeding, Agency employee Raul Pena and Respondent's son Jaime Rodriguez, under proper affirmation, acted as interpreter for Respondent.

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

RULING ON MOTION

During the presentation of evidence at the hearing, Respondent's counsel moved to strike Allegation 8 of the Notice of Intent, Failure to Comply with Applicable Building Code And Health And Safety Laws. Counsel argued that finding Respondent guilty of such a violation and imposing a civil penalty would be akin to double jeopardy because the evidence adduced by the Agency established that Respondent had already paid a fine to the City of Woodburn for the Woodburn City Code violation upon which this allegation was based. The Hearings Referee denied the motion for purposes of the hearing, took the matter under advisement, and made a formal ruling in the Proposed Order. For reasons more fully set out in the Opinion section below, Respondent's motion to strike is denied.

FINDINGS OF FACT – PROCEDURAL

1) By a document entitled "Notice of Intent to Deny a Farm Labor Contractor License and to Assess Civil Penalties" (Notice of Intent), the Agency informed Respondent under date of June 28, 1991, that the Agency intended to deny his application for a farm labor contractor's license and to assess civil penalties based on certain violations of Oregon Revised Statutes chapter 658. The Notice of Intent alleged the following bases for the intended denial and/or for the civil penalties sought:

1. In March 1990 near Gervais, Oregon, acting as a farm labor contractor without a valid license, violating ORS 658.410(1) and 658.415(1);

2. In March 1990 on Windsor Island Road in Salem, Oregon, operating a farm-worker labor camp without a valid farm labor contractor license with farm-worker camp endorsement, violating ORS 658.715(1)(a); civil penalty $500;

3. In March 1990 on Windsor Island Road in Salem, failing to post notice of surety bond or cash deposit in a farm-worker camp, violating ORS 658.735(8); civil penalty $1,000;

4. In April 1990 near Canby, Oregon, acting as a farm labor contractor without a valid license, violating ORS 658.410(1) and 658.415(1);

5. In May 1990 near Woodburn, Oregon, acting as a farm labor contractor without a valid license, violating ORS 658.410(1) and 658.415(1);

6. In June 1990 at 276 East Lincoln, Woodburn, Oregon, operating a farm-worker labor camp without a valid farm labor contractor license with farm-worker camp endorsement, violating ORS 658.715(1)(a); civil penalty $1,000;

7. In June 1990 in Woodburn, Oregon, failing to register a farm-worker camp with the Bureau of Labor and Industries, violating ORS 658.750(1) and 658.755 (3)(a); civil penalty $1,000;

8. In June 1990, in Woodburn, Oregon, failing to comply with

applicable building code and health and safety laws, violating ORS 658.755(1)(c); civil penalty $1,000;

9. From January 31 through July 3, 1990, at or near Gervais, Canby, and Woodburn, Oregon, failing to maintain a surety bond or cash deposit required of a person acting as a farm labor contractor, violating ORS 658.415(3) and (4); civil penalty $1,000;

10. In July 1990 in Salem, Oregon, failing to carry a farm labor contractor license at all times and to exhibit the license upon request during an interview by the Agency's agent about allegations 1, 4, and 5 above, violating ORS 658.440(1)(a);

11. In May 1991 in Woodburn, Oregon, through his employee or agent, operating a farm-worker labor camp without a valid farm labor contractor license with farm-worker camp endorsement, violating ORS 658.715(1)(a);

12. In May 1991 in Woodburn, Oregon, failing to register a farm-worker camp with the Bureau of Labor and Industries, violating ORS 658.750(1) and 658.755 (3)(a); civil penalty $2,000;

13. In March and June 1990 and May 1991, in or near Salem and Woodburn, Oregon, failing to maintain a surety bond or cash deposit required of a person operating a farm-worker camp, violating ORS 658.735(1); civil penalty $2,000;

14. In March 1991, near Salem and Woodburn, Oregon, failing to comply with state law relating to the payment of wages, violating ORS 653.025(3) and 652.110, and demonstrating Respondent's unfitness to act as a farm labor contractor pursuant to ORS 658.420(1) and (2) and OAR 839-15-520(3)(d);

15. In March 1991 near Salem and Woodburn, Oregon, acting as a farm labor contractor without a valid license, violating ORS 658.410(1) and 658.415(1);

16. In 1990 and 1991, in or near the locations mentioned above, failing to file with the Bureau of Labor and Industries information relating to work agreements between Respondent and farmers, violating ORS 658.440 (1)(e).

The total of all civil penalties sought under the allegations of the Notice of Intent was $9,500.

2) The Notice of Intent was issued by the Agency on June 28, 1991, and would become final 60 days after Respondent's receipt thereof unless Respondent requested a contested case hearing within that time.

3) By letter received August 27, 1991, Respondent through counsel filed an answer, affirmative defense, and request for hearing on the Agency's intended action. Thereafter on October 29, 1991, the Forum issued to Respondent and the Agency a notice of the time and place of the requested hearing, and of the designated Hearings Referee.

4) With the hearing notice, the Forum sent to Respondent a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.

5) On December 16, 1991, the Forum notified the Agency and Respondent of a change of Hearings Referee.

6) On January 15, 1992, the Agency filed a motion to amend the Notice of Intent in several particulars.

7) On January 17, 1992, the Hearings Referee granted the Agency's motion, finding that the proposed amendments made more definite allegations 1, 2, and 4, and added an aggravation factor to allegation 6 of the Notice of Intent. None of the amendments enhanced the penalties sought, and all required a more specific level of proof on the part of the Agency.

8) On January 17, 1992, Respondent timely filed a Summary of the Case, and on January 21, 1992, the Agency timely filed a Summary of the Case.

9) At the commencement of the hearing, the Agency moved to exclude Jaime Rodriguez from the hearing except during his testimony for the reason that Jaime Rodriguez was not a charged party but would be a fact witness and should not be allowed to hear the testimony of others regarding events about which he would also testify. Respondent's counsel pointed out that Respondent's command of English was limited and counsel needed Jaime Rodriguez present to translate English into Spanish for Respondent and Respondent's Spanish into English for counsel. Noting that any prejudice to the Agency from not excluding Jaime Rodriguez would be outweighed by the prejudice to Respondent in being unable to effectively communicate with his counsel, the Hearings Referee denied the Agency's motion.

10) The Proposed Order, which included an Exceptions Notice, was issued on August 25, 1992. Exceptions, if any, were to be filed by September 4, 1992. Respondent's sole exception was received timely and is dealt with as described at the end of the Opinion section.

FINDINGS OF FACT– THE MERITS

1) Respondent Jose L. Rodriguez was licensed by the Bureau of Labor and Industries as a farm labor contractor in 1989 and in years prior as owner of J & J Farm Labor Contracting, Woodburn, and at times material was an applicant for such a license for 1990.

2) Jaime Rodriguez, Respondent's son, provided transportation, payroll, bookkeeping, and interpreting services for Respondent at times material.

3) Respondent had lived in or near Madeira, California, for approximately 30 years, and operated J & J Farm Labor Contracting in California as a partnership with Jaime Rodriguez for several years prior to times material. He had three years of formal schooling in Texas around 1950. Jaime Rodriguez had a BS degree from Fresno State and attended one year of law school at Willamette University.

4) In its 1989 session, the Oregon Legislature amended the Oregon farm labor contractor law in several particulars. Beginning in 1990, the law

required that the contractor, whether a sole proprietor, a partner, or the principle of a corporation, pass a written examination to qualify for a farm labor contractor license, and required that a contractor, in order to operate a farm labor camp on another's land, obtain an indorsement under rules prescribed by the Commissioner. The amendment also raised the bond or security requirement for a farm labor contractor from $5,000 to $10,000, for a farm labor contractor indorsement to operate a labor camp on another's land to a total of $15,000, and provided that a farm labor contractor license expire one year following the date issued.

5) Prior to the statutory amendment, the farm labor contractor license year ran from February 1 to January 31 of the next year. For the license year beginning in 1990, the Agency extended by administrative rule the expiration of a 1989 license until the birthday of a sole proprietor licensee, or until the birthday of the oldest partner of a partnership licensee, or until the anniversary date of the incorporation of a corporate licensee, and pro-rated the fee in order to implement the new staggered expiration/renewal date.

6) In December 1989, the Agency notified Respondent of the new requirements, and of the proposed extension of Respondent's 1989 license to June 30, 1990, conditioned upon Respondent submitting an application therefor, paying a prorated fee, submitting proof of an increased bond, and certifying continuing compliance with farm labor contractor requirements regarding insurance and notices to workers.

7) Respondent received the December notification of the licensing changes.

8) Respondent submitted an application together with a check for $8.33 to the Agency prior to January 31, 1990. Respondent had previously deposited $5,000 as proof of financial ability with the Commissioner. He did not increase the deposit to $10,000 and did not obtain a corporate bond for $10,000 at that time.

9) Respondent left the technicalities of complying with the December notice to Jaime Rodriguez, who claimed some confusion as to the meaning of the notice relative to the total bond required. He did not obtain clarification at the time from the Agency or consult legal counsel.

10) The Agency notified Respondent by letter dated February 14, 1990, to PO Box 992, Woodburn, that an additional bond or other surety was needed by February 26, 1990, before the Agency could proceed in processing the January application.

11) The Agency notified Respondent by letter dated February 28, 1990, to PO Box 922, Woodburn, that an additional bond or other surety was needed, together with a completed Licensing Unit certification form which was enclosed, by March 9, 1990, before the Agency could proceed in processing the January application.

12) The Agency notified Respondent by letter dated April 11, 1990, to 1288 E Lincoln, Woodburn, that an additional deposit, a completed trust agreement form, and a completed certificate of compliance, as previously requested on February 14 and February 28, was needed by April 25, 1990. That letter noted that acting as a farm labor contractor without a license is unlawful and subject to penalty. It concluded by stating that the Agency would assume that Respondent had withdrawn his application if the requested documents were not received by April 25, 1990.

13) At times material, Respondent received mail at PO Box 922, Woodburn, as well as at his residence at 1288 E Lincoln, Woodburn.

14) The Agency had no record of any response from Respondent to its February or April letters. None were returned by the US Postal Service.

15) During the months of January through June 1990, and particularly in April 1990, for an agreed rate of pay Respondent employed and supplied workers, including among others José Castrejon and Fermin Quevedo, to Willamette Egg Farms, Canby, Oregon (Willamette Egg), for various duties in connection with the raising and production of poultry. Respondent provided labor under the agreement with Willamette Egg and received compensation therefor in January through June 1990.

16) At times material, John J. Zielinski was a farmer in the Gervais, Oregon, area. On March 23, 1990, Respondent entered into a written agreement with Zielinski to provide labor for the picking and hoeing of strawberries, the moving of irrigation pipe, and the training of cane berries for certain agreed upon compensation. Respondent provided labor under the agreement with Zielinski and received compensation therefor in May, June, and July 1990.

17) Also on March 23, 1990, Respondent leased from Zielinski a building in Marion County, Oregon, at 6845 Windsor Island Road, NE, Salem, for an agreed rate payable contingent on the labor agreement. The building was to be used as a farm labor camp.

18) Respondent operated the Windsor Island Road camp from March, prior to any attempted certification, through June and July 1990. Workers staying there were employees of Respondent and had been transported to Oregon from Madeira, California, by Tomas Gonzalez. Gonzalez, who had no Oregon farm labor contractor license, was employed by Respondent in 1989 and 1990.

19) During April 1990, for an agreed rate of pay Respondent employed and supplied workers to Kevin Crosby Farms, Inc., Woodburn, Oregon (Crosby), for the "shovel-crowning" of hops. Respondent provided the agreed upon labor and received compensation therefor.

20) In late May 1990, Respondent submitted a labor camp registration fee and application for labor camp certification for 6845 Windsor Island Road to the Agency and applied for a farm-worker camp indorsement. He had no farm labor contractor license at the time. The Agency issued its certificate to Zielinski, the camp owner.

21) Jaime Rodriguez told the Agency on May 6, 1990, that the Windsor Island camp was registered to Respondent. There was no notice posted at the camp regarding Respondent's compliance with the farm labor camp operator bonding requirement.

22) In July 1990, OR-OSHA inspected the Windsor Island camp for worker safety and sanitation on a referral from the Marion County Health Department. Respondent was identified to OR-OSHA as the operator. OR-OSHA cited Respondent for serious violations involving wiring and sanitation. Jaime Rodriguez dealt with OR-OSHA as contractor.

23) Respondent leased 276 E Lincoln, Woodburn, a house owned by Yakov Ovchinikov, Woodburn, in April 1989. Respondent knew that the Woodburn City Code restricted occupancy to a single family or a maximum of five unrelated adults. Respondent had difficulty controlling the number of occupants.

24) In February 1990, OR-OSHA sent a certified letter to Respondent regarding conditions at 276 E Lincoln. The letter was received by Respondent and answered by Jaime Rodriguez, who acknowledged that the location was a labor camp, that the occupants were vacating, and that repairs had been started in order to correct the deficiencies.

25) Woodburn City Code Enforcement Officer Michael Culver inspected 276 E Lincoln on June 18, 1990, accompanied by employees of the Agency and a Woodburn newspaper reporter, and found 14 occupants not of the same family. The house was used as multiple sleeping quarters. The occupants stated that Respondent, to whom they paid $2.50 per day, was their landlord and also their employer.

26) Officer Culver issued a citation to Respondent on June 18, 1990, and Respondent was found guilty of violation of a city of Woodburn zoning ordinance and fined $250 in August 1990.

27) In June 1990, Respondent did not have a farm labor camp indorsement to a valid farm labor contractor license for the premises at 276 E Lincoln. The premises at 276 E Lincoln were not registered by Respondent as a farm worker labor camp in June 1990.

28) On July 3, 1990, the Agency received from Respondent an application for a farm labor contractor license, which Respondent called a renewal application, together with the proper surety bond and other required documents. He could obtain a license when he passed the required written examination.

29) Because Respondent's proof of financial ability was not increased prior to January 31, 1990, or in accord with the Agency's written promptings thereafter, the Agency considered Respondent's farm labor contractor license to have expired on January 31, 1990, and treated the July application as a new application.

30) Respondent took the farm labor contractor examination on July 3 and July 10, 1990, and failed to pass each time. He successfully passed the examination on July 24, 1990.

31) On or about July 6, 1990, Respondent was interviewed by the Agency in the Agency's Salem office in connection with the Zielinski, Willamette Egg, and Crosby labor contracts. He stated he was licensed, but did not produce and display a farm labor contractor license when requested to do so by the Agency.

32) By July 1990, the Agency was investigating Respondent concerning possible labor contractor activity and labor camp violations during a period when he was unlicensed. The Agency issued to Respondent a 60-day temporary permit No. 90-072 on August 3, 1990.

33) The temporary permit was valid for a maximum of 60 calendar days and would expire immediately if the July application was rejected.

34) At times material, Douglas Hopper was a partner in Hopper Bros., a farming partnership near Woodburn, Oregon. Hopper Bros. hired Respondent for an agreed rate of pay to provide labor for the harvesting of strawberries in June 1990. Hopper Bros. hired Respondent for an agreed rate of pay to provide labor for the harvesting of cucumbers in July 1990. Respondent employed and supplied workers as agreed under both contracts and was paid by Hopper Bros. Jaime Rodriguez signed the written agreements together with Respondent.

35) At times material, Myron Satrum was a partner in Satrum Farms, an egg farm in Woodburn, Oregon. Satrum hired Respondent for an agreed rate of pay per worker to obtain a crew to move poultry in October 1990. Respondent employed and supplied workers as agreed and was paid by Satrum.

36) In February and March 1991, Satrum again hired Respondent for an agreed rate of pay per worker to obtain a crew to move poultry. Respondent employed and supplied workers as agreed and was paid by Satrum.

37) At times material, Joseph Olexa operated Ankeny Vineyards near Salem, Oregon. Olexa hired Respondent for an agreed rate of pay to provide a pruning crew in March 1991. Respondent employed and supplied workers as agreed and was paid by Olexa.

38) In March 1991, the Agency received wage claims from 10 workers who stated they were paid less than minimum wage for working for Respondent and were not paid all wages due when they were discharged. The Agency's investigation showed that the labor was performed at Ankeny Vineyards and Satrum Farms. On April 4, 1991, the Agency wrote to Respondent listing the claimants and amounts.

39) On April 10, 1991, Respondent replied to the Agency's demand with check number 2137 for $664.80 payable to the Agency together with copies of Respondent's records for the workers. Respondent's letter complained that the Agency was disregarding the employer's rights and stated that the workers had been discharged because they failed to produce proper employment authorizations.

40) The Agency interviewed the workers and verified hours with Olexa and Satrum. The workers acknowledged receiving certain draws, but the Agency questioned other deductions claimed on Respondent's records. The Agency found that there was an additional $356.04 due in wages unless Respondent could document the other deductions and so advised Respondent on April 17, 1991.

41) As business manager, Jaime Rodriguez sent Respondent's check

number 2159 for $356.04 payable to the Agency on April 30, 1991.

42) Respondent's check number 2159 was twice returned by Respondent's bank because of insufficient funds. Respondent's bond finally provided a cashier's check to replace it in early July 1991.

43) The wage claimants received funds from Respondent's check number 2137 on or about May 2, 1991. The funds represented by Respondent's check number 2159 and finally paid by cashier's check were not disbursed to the claimants until after July 3, 1991.

44) On May 9, 1991, Code Enforcement Officer Culver received information that Woodburn City Police were investigating a crime at 276 E Lincoln. He again inspected 276 E Lincoln, accompanied by an employee of the Agency and by Woodburn City building official Robert Arzoian, and found 10 occupants. The premises were used as multiple sleeping quarters.

45) With the Agency employee translating, Culver obtained statements from several of the occupants. They stated that they were employed at Willamette Egg by Jaime Rodriguez and that they paid him $60.00 per month rent and $3.00 a day transportation.

46) Ovchinikov leased 276 E Lincoln to Gustavo Castillo and Jaime Rodriguez in April 1991.

47) In May 1991, neither Jaime Rodriguez nor Respondent had a farm labor camp indorsement to a valid farm labor contractor license for the premises at 276 E Lincoln. The premises at 276 E Lincoln were not registered by Jaime Rodriguez or Respondent as a farm worker labor camp in May 1991.

48) Respondent did not maintain the required surety bond, cash deposit, or cash equivalent in a total of $15,000 as required for a farm labor contractor indorsement to operate a labor camp on another's land in connection with the Windsor Island camp in 1990, or in connection with 276 E Lincoln in June 1990.

49) Respondent did not file with the Agency by April 30, 1990, information relating to Respondent's agreements with Zielinski, Willamette Egg, or Crosby. Respondent did not file with the Agency by April 30, 1991, information relating to Respondent's agreements with Willamette Egg, Satrum, Olexa, or Hopper.

50) Except for the August 3, 1990, temporary permit, the Agency did not at any time after January 31, 1990, advise Respondent or Jaime Rodriguez that Respondent could operate after January 31, 1990, as a farm labor contractor.

51) The testimony of Jaime Rodriguez was not totally credible. He testified that he merely signed the April 1991 lease on 276 E Lincoln because he knew Castillo and Ovchinikov wanted his assurance that Castillo was dependable. Ovchinikov told the Agency the same thing, but statements from the workers employed by Respondent suggest that Jaime Rodriguez exhibited a continued proprietary interest in the property. Contrary to the workers' statements, Jaime Rodriguez also denied collecting rent in 1991 for the premises, except maybe once, and denied charging the workers for transportation to Willamette Egg. He stated that Respondent had cautioned him against signing the lease, wanted nothing to do with the property, and that he and Respondent had a falling out over the matter and that he was not as involved in helping run the business in 1991. The record suggests that his actions as agent for his father continued in 1991. He claimed he misunderstood the Agency's letter regarding the license extension requirements, but could not explain the failure to act on the Agency's subsequent mailings or why he or Respondent had not consulted anyone as to the requirements. He told the Agency in May 1990 that Respondent operated the Windsor Island camp and that the proper posting of the bond information was in place when in fact no bond existed for the camp. He told OR-OSHA that he personally was the contractor in regard to the Windsor Island camp. He testified that the second check given to the Agency for the wage claims failed to clear due to a late deposit, despite the bank record that it was returned twice over a 10-day period. For these reasons, the Forum has credited his testimony only where it was confirmed by credible evidence or inference on the record.

52) The testimony of Respondent was not totally credible. He testified that he left the licensing matters to his son, that he thought he was properly licensed, and that the Agency had assured him he could continue to operate. But he knew he had no camp indorsement, had not increased his bond, and that his workers were occupying the Lincoln Street house in 1990. He stated that he told his son not to rent that property in 1991, but the Forum infers that he was aware that his workers were living there and that his son was operating the house. His testimony suggested that all of the later violations were attributable to his son. He could not explain how he believed he was properly bonded before July 1990. He stated that an Agency employee told him he could continue working on his prior license, but could not recall when the alleged conversation, which the Agency employee denied, took place. For these reasons, the Forum has credited his testimony only where it was confirmed by credible evidence or inference on the record.

ULTIMATE FINDINGS OF FACT

1) Respondent did not have a valid farm labor contractor license or temporary permit from February 1 to August 2, 1990.

2) Respondent did not have a valid farm labor contractor license or temporary permit at any time after October 4, 1990.

3) Respondent did not have an indorsement to a valid farm labor contractor license to operate a farm labor camp at any time in 1990 or 1991.

4) Between February 1 and August 1, 1990, Respondent contracted with and employed and supplied workers to Zielinski in connection with the production of farm products.

5) During March through July 1990, Respondent operated a farm labor camp at 6845 Windsor Island Road, Salem, Oregon.

6) The occupants of the farm labor camp on Windsor Island Road were

Respondent's employees recruited by an unlicensed person.

7) The camp on Windsor Island Road was cited for safety and health violations in July 1990.

8) There was no notice of compliance with the statutory surety bond or cash requirements posted at times material at the Windsor Island Road camp.

9) Between February 1 and August 1, 1990, Respondent contracted with and employed and supplied workers to Willamette Egg Farms, Inc., in connection with the production of farm products.

10) In May 1990, Respondent contracted with and employed and supplied workers to Kevin Crosby Farms, Inc., in connection with the production of farm products.

11) During June 1990, Respondent operated a farm labor camp at 276 E Lincoln, Woodburn, Oregon.

12) Respondent's farm labor camp at 276 E Lincoln was not registered with the Bureau of Labor and Industries in 1990 and was not so registered in 1991.

13) Respondent did not comply with the Woodburn City Code regarding occupancy of a single-family residence in connection with the camp at 276 E Lincoln in June 1990.

14) Respondent did not produce and display a farm labor contractor license on or about July 6, 1990, when requested to do so by the Agency.

15) Between February 1 and August 1, 1990, Respondent did not maintain a surety bond, cash deposit, or cash equivalent of $10,000 for the purpose of paying workers or indemnifying advances from farmers.

16) During May 1991, Respondent operated a farm labor camp at 276 E Lincoln, Woodburn, Oregon.

17) On or after February 1, 1990, Respondent did not continuously maintain a surety bond, cash deposit, or cash equivalent of $15,000 for the purpose of paying sums or damages in connection with the operation of a farm labor camp.

18) In March 1991, Respondent contracted with and employed and supplied workers to Satrum Farms and Joseph Olexa in connection with the production of farm products.

19) In March 1991, in connection with the Satrum and Olexa contracts, Respondent failed to pay workers minimum wage, failed to pay workers all sums due at termination of employment, and attempted to pay such wages through the Agency with a non-negotiable check.

20) Respondent did not timely file information with the Bureau of Labor and Industries regarding work agreements with any of the farmers to whom he bid and supplied labor during times material.

CONCLUSIONS OF LAW

1) ORS 648.405 to 658.503 and 658.705 to 658.805 provide that the Commissioner of the Bureau of Labor and Industries of the State of Oregon shall administer and enforce those sections. As a person applying to be licensed as a farm labor contractor with regard to the production of farm products in the State of Oregon, Respondent was and is subject to the provisions of ORS 658.405 to 658.475, and the Commissioner has jurisdiction over Respondent and the subject matter herein.

2) Because Jaime Rodriguez was either Respondent's employee or agent during all times material herein, and his actions, inactions, and statements were made in the course and within the scope of that employment or agency, the actions, inactions, statements, and motivations of Jaime Rodriguez are properly imputed to Respondent.

3) ORS 658.405 provides, in part:

> "As used in ORS 658.405 to 658.485 and 658.991(2) and (3), unless the context requires otherwise:
>
> "(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in * * * the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; or who, in connection with the recruitment or employment of workers to work in these activities, furnishes board or lodging for such workers * * *."

Under the facts and circumstances of this case, Respondent acted as a farm labor contractor from February 1, 1990, through May 1991.

4) ORS 658.410(1) provides in part:

> "[N]o person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries."

ORS 658.415(1) provides, in part:

> "No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.485."

Respondent violated ORS 658.410(1) and 658.415(1) by acting as a farm labor contractor with regard to the production of farm products without a valid license issued to him by the Commissioner in the following particulars:

a) By contracting with and supplying workers to Zielinski from March to July 1990;

b) By furnishing lodging in connection with employment of workers for Zielinski from March to July 1990;

c) By contracting with and supplying workers to Willamette Egg from March to July 1990;

d) By furnishing lodging in connection with employment of workers for Willamette Egg from March to July 1990;

e) By contracting with and supplying workers to Crosby in May 1990; and

f) By contracting with and supplying workers to Olexa and Satrum in March 1991

5) ORS 658.415 provides, in part:

> "(3) Each applicant shall submit with the application and shall continuously maintain thereafter, until excused, proof of financial ability to promptly pay the wages of employees and other obligations specified in this section. The proof required in this subsection shall be

in the form of a corporate surety bond * * *, a cash deposit or a deposit the equivalent of cash. * * *

"(4) The amount of the bond and the security behind the bond, or of the letter of credit shall be $10,000."

Respondent violated ORS 658.415(3) and (4) in failing to maintain a required surety bond or cash equivalent in connection with:

a) The contracting with and supplying of workers to Zielinski from March to July 1990;

b) The contracting with and supplying of workers to Willamette Egg from March to July 1990;

c) The contracting with and supplying workers to Crosby in May 1990.

6) ORS 658.715 provides, in part:

"(1) No person shall operate a farm-worker camp unless:

"(a) The person is a farm labor contractor licensed under ORS 658.405 to 658.503 and 658.830, and the contractor first obtains an indorsement to do so as provided in ORS 658.730 * * *."

Respondent violated ORS 658.715 (1)(a) by, without being licensed as a farm labor contractor and without having obtained an indorsement to operate a farm labor camp:

a) Operating a farm labor camp at 6845 Windsor Island Road, Salem, Oregon, during March through July 1990;

b) Operating a farm labor camp at 276 E Lincoln, Woodburn, Oregon, during June 1990;

c) Operating a farm labor camp at 276 E Lincoln, Woodburn, Oregon, during May 1991.

7) ORS 658.735 provides, in pertinent part:

"(1) Each applicant [for farm labor camp operator indorsement] shall submit with the application and shall continually maintain thereafter a bond approved by the commissioner. The amount of the bond and the security behind the bond shall be $15,000. This bond shall satisfy the bond required by ORS 658.415. * * *

"* * *

"(8) Every indorsee required by this section to furnish a surety bond, or make a deposit in lieu thereof, shall keep conspicuously posted in * * * the camp * * * a notice * * * specifying the indorsee's compliance with the requirements of this section and specifying the name and Oregon address of the surety on the bond or a notice that a deposit in lieu of the bond has been made with the commissioner, together with the address of the commissioner."

Respondent violated ORS 658.735 by failing to post a notice of surety or deposit at the Windsor Island camp during times material.

8) ORS 658.750(1) provides, in part:

"Every farm-worker camp operator shall register with the bureau each farm-worker camp operated by the operator."

ORS 658.755 provides, in pertinent part:

"(3) No farm-worker camp operator shall:

"(a) Operate a camp which is not registered with the bureau as required by ORS 658.750."

Respondent twice violated ORS 658.750(1) and 658.755(3)(a) by failing to register with the Bureau of Labor and Industries Respondent's farm labor camp at 276 E Lincoln in June 1990 and again in May 1991.

9) ORS 658.755 provides, in pertinent part:

"(1) Every farm-worker camp operator shall:

"* * * *

"(c) Comply with all applicable building codes and health and safety laws."

Respondent twice violated ORS 658.755(1)(c) by failing to comply with the Woodburn City Code regarding occupancy of a single-family residence in connection with the camp at 276 E Lincoln in June 1990, and in May 1991.

10) ORS 658.440 provides, in part:

"(1) Each person acting as a farm labor contractor shall:

"(a) Carry a labor contractor's license at all times and exhibit it upon request to any person with whom the contractor intends to deal in the capacity of a farm labor contractor."

"* * * *

"(e) File with the Bureau of Labor and Industries, as required by rule; information relating to work agreements between the farm labor contractor and farmers * * *."

Respondent violated ORS 658.440 (1)(a) by failing to carry and exhibit on request a labor contractor's license in July 1990.

11) Respondent violated ORS 658.440(1)(e) by failing to file with the Bureau of Labor and Industries information concerning the work agreements with Zielinski, Willamette Egg, Crosby, Satrum, Olexi, and Hopper in 1990 and/or 1991.

12) ORS 653.025 provides that after December 31, 1990, the minimum wage in Oregon was $4.75 per hour. ORS 652.330 authorizes the Commissioner to collect unpaid wages. ORS 652.110 prohibits any employer from giving a non-negotiable or insufficient fund check or other evidence of debt as payment of wages and provides that the employer must pay any such check or evidence of debt issued immediately upon demand in lawful money of the United States.

ORS 658.420 provides, in part:

"(1) The Commissioner of the Bureau of Labor and Industries shall conduct an investigation of each applicant's character, competence and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor.

"(2) The commissioner shall issue a license within 15 days after the day on which the application therefor was received in the office of the commissioner if the commissioner is satisfied as to the applicant's character, competence and reliability."

OAR 839-15-520 provides, in part:

"(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny * * * a license application * * *

"* * * *

"(k) Acting as a farm * * * labor contractor without a license.

"* * * *

"(2) When the applicant for a license * * * demonstrates that the applicant's * * * character, reliability or competence makes the applicant * * * unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the license application be denied * * *.

"(3) The following actions of a Farm or Forest Labor Contractor license applicant * * * demonstrate that the applicant's * * * character, reliability or competence make the applicant * * * unfit to act as a Farm Labor Contractor:

"(a) Violations of any section of ORS 658.405 to 658.485.

"* * * *

"(d) Failure to comply with federal, state or local laws or ordinances relating to the payment of wages * * *

"* * * *

"(l) Failure to maintain the bond or cash deposit as required by ORS 658.405 to 658.485."

Respondent violated ORS 653.025 and 652.110 when he failed to pay minimum wage in March 1991, and attempted to make part payment with a non-negotiable insufficient funds check. In addition, there were numerous serious violations of the farm labor contractor laws. Respondent's violations demonstrate his unfitness to act as a farm labor contractor. 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 deny a license to Respondent to act as a farm labor contractor.

13) ORS 658.453(1) provides, in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries, in the same manner as provided in ORS 183.310 to 183.550 for a contested case proceeding, may assess a civil penalty not to exceed $2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.485, recruits, solicits, supplies or employs a worker.

"* * *

"(c) A farm labor contractor who fails to comply with ORS 658.440(1) * * *."

OAR 839-15-505 provides, in part:

"(2) 'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-15-508 provides that the Commissioner may impose a civil penalty for certain violations, including those found herein.

OAR 839-15-512 provides, in part:

"(1) The civil penalty for any one violation shall not exceed $2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and seriousness that a minimum of $500 for each repeated violation will be imposed when the Commissioner determines to impose a civil penalty.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm * * * labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) $500 for the first offense;

"(b) $1,000 for the second offense;

"(c) $2,000 for the third and each subsequent offense."

Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondent. The assessment of the civil penalties specified in the Order below is an appropriate exercise of that authority.

OPINION

The Agency's Notice of Intent in this case seeks to deny Respondent's application for a farm labor contractor's license and to impose civil penalties for a number of violations of Oregon's farm labor contractor law. Respondent's answer to the Notice of Intent denied the Agency's allegations or sought to avoid their impact by claiming a misunderstanding or to have been misled by the Agency.

Specifically, Respondent denied contracting with Zielinski or that any work was performed. Respondent denied operating a labor camp on Zielinski's farm, at least until after he registered the camp. Respondent admitted supplying workers to Willamette Egg and Crosby after he was assured by the Agency that his 1989 license was good through June 1990. Respondent denied operating a labor camp on E Lincoln in Woodburn in 1990 or 1991, stating that it was not under his control and that his son was a mere co-signer on the lease. Respondent denied any failure to comply with the city code at that address. Respondent denied a failure to maintain a required bond, stating it was procured in June 1990. Respondent denied a failure to display a farm labor contractor license in July 1990 and denied the necessity for registering or bonding the house on E Lincoln as a farm-worker labor camp. Respondent denied any violation or adverse inference in connection with the "inadvertent" issuance of an NSF check for wages, denied acting without a license at that time, and asserted that he had in fact filed some farmer agreements.

This record shows, by a preponderance of evidence, Respondent's failure to maintain his farm labor contractor license when the licensing requirements changed in the beginning of 1990. The change involved a change in licensing year coupled with an increase in the required deposit or bond needed to qualify as a farm labor contractor. There was also a new bond requirement for the operation of a

farm-worker labor camp. Respondent paid a pro rata fee for a license extension through June 1990, but failed to submit any other item required for the extension despite the Agency's repeated attempts to have him do so. Only the letter of February 14 may have been incorrectly addressed. Two others, one to his post office box and one to his residence, requested the items necessary to complete the extension of his 1989 license.

The record clearly indicates that Respondent continued operating his farm labor contractor business as if the statutory changes, of which he was informed and of which he is conclusively presumed to be aware, did not exist. He acted repeatedly as a farm labor contractor during the period after the 1989 license had expired and again during the period when a temporary permit had expired. He acted as a farm-worker labor camp operator even though he had no valid farm labor contractor license and could not obtain the proper indorsement to operate a camp. In other instances, he acted as a farm-worker labor camp operator without acknowledging the need for an authorization to do so and attempted to obscure his interest in the camp. He violated wage laws regarding payment of workers, making collection action by the Agency necessary, and then attempted to pay the wages due with an NSF check. And finally, he failed to file farmer agreements with the Agency.

Far from illustrating an inept and allegedly forgivable attempt at compliance, Respondent's actions show that he repeatedly ignored the laws and regulations. Oregon's Farm Labor Contractor Law exists, at least in part, for the protection of the workers. Respondent's actions show little concern for that aspect, particularly in the matter of wages. The wage violation seriously suggests Respondent's unfitness to act as a farm labor contractor. The other violations remove any doubt. Respondent's application of July 1990 will be denied.

Respondent's Motion to Strike Allegation 8

Even if the violation of an ordinance were considered to be a "crime," it is not double jeopardy for a defendant to also incur a civil liability for the same act for which defendant was convicted. The record of conviction was received without objection as to its relevance or authenticity. ORS 658.755(1)(c) requires compliance by a farm-worker camp operator with applicable local codes. The evidence showed that Respondent was in fact operating a farm-worker camp. His record of conviction of the city code violation showed his noncompliance.

Civil Penalties

The Notice of Intent sought civil penalties of a specified amount on several counts, including enhanced penalties for aggravating circumstances. The Forum imposes the following penalties:

Allegation 2: Operating a Farm-Worker Camp Without First Being Licensed by the Commissioner in May through July 1990, at 6845 Windsor Island Road, in violation of ORS 658.715(1)(a). The Agency cited and proved aggravating factors, including citation for OSHA violations and using an unlicensed person as a recruiter. The Agency sought a penalty of $500. Penalty: $500.

Allegation 3: Failure to Post Notice of a Surety Bond or Cash Deposit in a Farm-Worker Camp, a violation of ORS 658.735. The Agency sought a penalty of $1,000. Penalty: $500.

Allegation 4: Operating a Farm-Worker Camp Without First Being Licensed by the Commissioner in June 1990, at 276 E Lincoln, Woodburn, in violation of ORS 658.715(1)(a). The Agency cited an aggravating factor involving recruitment of workers in the camp by Guadalupe Rodriguez, an unlicensed person, and sought a penalty of $1,000. There was a failure of proof as to the recruitment, but it is a second offense of operating a camp. Penalty: $1,000.

Allegation 7: Failure to Register a Farm-Worker Camp, at 276 E Lincoln, Woodburn, with the Bureau of Labor and Industries in June 1990, in violation of ORS 658.750(1) and 658.755(3)(a). The Agency sought a penalty of $1,000. Penalty: $500 for a first offense. While Respondent also failed to register Windsor Island, the Agency did not charge that offense.

Allegation 8: Failure to Comply with Applicable Building Code and Health and Safety Laws in June 1990, at 276 E Lincoln, Woodburn, in violation of ORS 658.755(1)(c). The Agency sought a penalty of $1,000. Penalty: $1,000.

Allegation 9: Failure to Maintain the Surety Bond or Cash Deposit Required of a Person Acting as a Farm Labor Contractor while acting as a farm labor contractor in connection with the Zielinski, Willamette Egg, and Crosby contracts from February 1 through July 1990, in violation of ORS 658.415(3) and (4). The Agency sought a penalty of $1,000. Penalty: $1,000, although the violations proved under subsection (3) would support a higher penalty, had the Agency asked for it.

Allegation 12: Failure to Register a Farm-Worker Camp at 276 E Lincoln, Woodburn, with the Bureau of Labor and Industries in May 1991, in violation of ORS 658.750(1) and 658.755(3)(a). The Agency sought a penalty of $2,000. Penalty: $1,000 on this second Failure to Register offense.

Allegation 13: Failure to Maintain the Surety Bond or Cash Deposit Required of a Person Operating a Farm-Worker Camp, at 6845 Windsor Island Road in July 1990, at 276 E Lincoln, Woodburn, in June 1990 and in May 1991, as set forth in ORS 658.735(9), a violation of 658.735(1). The Agency sought a penalty of $2,000. Penalty: $2,000 because of the repetitious nature of the offenses.

Respondent's Exception

Respondent excepted to the failure of the Proposed Order to recite an exact date of denial of Respondent's application so that Respondent would know when the three-year prohibition from reapplying begins. The Order below specifies this denial date.

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503 and 658.705 to 658.830, the Commissioner of the Bureau of Labor and Industries hereby denies Jose Rodriguez a license to act as a farm or forest labor contractor, as of this date. In

accordance with ORS 658.415(1)(c) and OAR 839-15-520(4), Jose Rodriguez is prevented from reapplying for a license for a period of three years from the date of denial, that is, three years from this date.

FURTHER, as authorized by ORS 658.453, Jose Rodriguez is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon St #32, Portland, Oregon 97232, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500), plus any interest thereon, which accrues at the annual rate of nine percent, between a date 10 days after the date of this Final Order and the date Respondent complies herewith.

In the Matter of
Chuck R. Sleeper, dba
MICROTRAN SMART CABLE,
Respondent.

Case Number 37-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued November 18, 1992.

SYNOPSIS

Respondent, who defaulted by failing to appear at hearing, acted as a representative of a corporation in employing the wage Claimants; evidence did not establish that he was an owner of that corporation or of other corporations he represented in his dealings with the Claimants and others. Even though the corporation was an inactive shell at the time of investigation and hearing, there was insufficient evidence to "pierce the corporate veil" and hold Respondent personally liable for the wages paid from the Wage Security Fund. ORS 60.001(8) and (15); 60.151 (former 57.131); 652.110; 652.140; 652.310; 652.332; subsection (2), section 7, chapter 409, Oregon Laws 1985, as amended; OAR 839-30-185(2).

The above-entitled matter came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 11, 1992, in Room 1004 of the State Office Building, 800 NE Oregon, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Lee Bercot, an employee of the Agency. Chuck R. Sleeper (aka Charles R. Sleeper) (Respondent) did not attend the hearing and was not represented by counsel. Claimants Lynn D. Lent and Lindy E. Lindberg were present throughout the hearing and were not represented by counsel.

The Agency called the following as witnesses (in alphabetical order): Salinas Investments, Inc. bookkeeper Mary Bulletset (by telephone); Agency Compliance Specialist Lora Lee Grabe; Kelly Services employee Mary Harvey; Agency Apprenticeship Consultant Roger Honig (by telephone); Claimants Lynn D. Lent and Lindy E. Lindberg.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about July 26, 1990, Claimant Lindy Eugene Lindberg filed a wage claim with the Agency, alleging that he had been employed by "MICROTRAN SMART CABLE, MICROCOM, CHUCK R. SLEEPER, OWNER,* Route 2, Box 123, Gaston, Or, 97119" and that he had not been paid wages earned and due to him.

2) On or about August 1, 1990, Claimant Lynn D. Lent filed a wage claim with the Agency, alleging that she had been employed by "MICROTRAN SMARTCABLE, OR: MICROTRAN OR: SMARTCABLE OR: MICROCOM, CHARLES R. SLEEPER, PRESIDENT, 10220 SW Nimbus K-6, Portland, OR, 97223 OR/ Rt. 2, Box 123, Gaston, Or, 97119" and that she had not been paid wages earned and due to her.

3) At the same time they filed their wage claims, Claimants assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from the employer.

4) On January 19, 1991, the Agency served on Respondent as Chuck R. Sleeper, dba Microtran Smart Cable, at Route 2, Box 123, Gaston, Oregon, through the Sheriff of Washington County, Oregon, Order of Determination No. 90-180 (Determination 90-180), which was based upon the wage claims filed by Claimants and upon the Agency's investigation.

5) Determination 90-180 found that Respondent had owed Claimants a total of $1,467.36 in wages, which amount had been paid to them from the Wage Security Fund (the Fund) under subsection (1) of section 7, chapter 409, Oregon Laws 1985 (as amended). The Order of Determination found further that the Commissioner was entitled by chapter 409, Oregon Laws 1985 (as amended) to recover from Respondent the amount paid from the Fund, together with a penalty of 25 percent of said amount, or $367.00. The Order of Determination required that, within 20 days, Respondent either pay said sums to the Commissioner or request an administrative hearing and submit an answer to the charges.

6) On January 23, 1991, Respondent filed an answer signed "Charles Sleeper" to Determination 90-180 and requested a contested case hearing. The answer stated that Chuck R. Sleeper was an incorrect name,

* The capitalization of letters, the spelling and the spacing of the words or syllables in the various corporate names and personal names in this Order repeat, for the most part, the manner in which the names appear on referenced documents. Usually, the corporate names appear in official records in upper case, and also when hand printed appear to be all capitals. Lower case is used where it was so used in the original.

denied that he had done business as "Microtran Smart Cable," denied that he had employed Claimants in any capacity, admitted that he had not paid to Claimants the sums alleged to be owed, and denied that he owed or agreed to pay Claimants $1,467.36.

7) On April 3, 1992, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to Respondent (as Charles Sleeper, Route 2, Box 123, Gaston, Oregon, 97119), to the Agency, and to the Claimants indicating the time and place of the hearing. With the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200.

8) On April 24, 1992, the Hearings Unit received US Postal Service form "Change of Address Card for Outside Correspondents" in the name of Charles Sleeper, Route 2, Box 123, Gaston, Oregon, 97119, listing a new address of 6617 SE 115th Ave., Portland, Oregon 97266. The card referenced "case #37-92" and was signed "Microtran Smart Cable."

9) On June 1, 1992, the Hearings Unit received a hand-written letter dated April 30, 1992, postmarked May 30, 1992, and signed "Charles Sleeper." The letter repeated the denials of the answer and further denied that either Claimant had ever been paid with a check "with my name or doing business as Microtran Smart Cable, Employer." He denied that either Claimant had worked for him at any time "under a dba name" (emphasis original) and asked "that the charges be dismissed and the hearings terminated based on false accusations and lack of evidence."

10) On August 3, 1992, the Agency submitted a Summary of the Case pursuant to OAR 839-30-071. Although permitted to do so by said rule, Respondent did not submit a Summary of the Case.

11) No mailing initiated by the Hearings Unit to Respondent, including the Notice of Hearing, was returned by the US Postal Service. At the commencement of the hearing, at the time and place set forth in the Notice of Hearing, Respondent was not present nor had he contacted the Agency or the Hearings Unit regarding any inability to attend. The Hearings Referee, after waiting a reasonable time, declared Respondent in default under OAR 839-30-185(2) as to Determination 90-180 and proceeded with the hearing.

12) At the commencement of the hearing, pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

13) The Proposed Order, which included an Exceptions Notice, was issued on October 8, 1992. Exceptions, if any, were to be filed by October 19, 1992. On October 16, 1992, based on the resignation of the Case Presenter, the Agency timely requested an extension of time to October 31, 1992, in which to consider exceptions. The Forum was orally advised on October 22, 1992, that the Agency would not file exceptions herein. No exceptions were received.

FINDINGS OF FACT -- THE MERITS

1) Respondent's true name is Charles R. Sleeper.

2) Roger Honig is an Apprenticeship Consultant with the Apprenticeship and Training Division (ATD) of the Agency. In 1989 he was assigned as staff liaison to the Communications Technicians Joint Apprenticeship and Training Committee (JATC), which dealt with the apprenticeship of low-voltage electricians. Low-voltage electricians install, interconnect, and functionally test electronic wiring for telephone, television, and related low-voltage systems.

3) In October 1989, Respondent applied to become a training agent for the Communications Technicians JATC. He listed his firm name as "MICRO TRAN, INC." at 4900 SW Griffith Dr., Suite 249, Beaverton, Or 97005, and signed the application for approval as training agent in Honig's presence as "Charles Sleeper, President."

4) Claimant Lindy E. Lindberg applied with ATD for the Communications Technician Apprenticeship program in January 1990. He called employers from a list of low-voltage training agents supplied by ATD. He spoke with a receptionist when he called Respondent's office, was referred to job site foreman Gary Lohkamp, and was hired on or about January 30, 1990.

5) Claimant Lindberg performed installation of computer cables at One Jefferson Park Place, Lake Oswego, through July 18, 1990. He usually reported to Respondent's office at 10220 SW Nimbus, Portland, before going to the job site. He submitted an Apprentice Monthly Progress Record for each month from February through June 1990.

6) Progress Records include space for employer name and comment. The February and March Records list "MICRO TRAN/SMART CABLE" as employer. The April and May records list "MICRO TRAN, INC." and "MICROTRAN, INC." and are signed by Respondent. The June report was unsigned by the employer.

7) Claimant Lindberg initially understood he was working for "Microtran Smart Cable." Respondent signed Claimant Lindberg's paychecks "Charles R. Sleeper." Respondent presided at company meetings. In early July, a check to Claimant Lindberg in the amount of $536.85 drawn on a "MICROTRAN" account was returned. It was replaced on July 25, 1990, by a check signed by Respondent on United States National Bank account number [redacted] in the name of "MICROCOM, INC., Route 2, Box 123, Gaston, OR, 97119." It was noted "Pay/MT INC." by Respondent.

8) July 18, 1990, was the last day Claimant Lindberg worked with Respondent, who had mentioned that he might have to temporarily delay paychecks due to cash problems. Claimant Lindberg was not paid for July 9 through 18, 1990, during which time he worked 65 hours at $7.70 an hour and incurred travel expense of $8.16. He was paid $508.66 from the Wage Security Fund in November 1990 on his wage claim against "MICROTRAN SMART CABLE."

9) Honig became concerned over the differing employer names because

only "Micro Tran, Inc." was an approved training agent. The JATC requested that he clarify the discrepancy. He was unable to contact Respondent. The telephone number he had for Respondent was not a working number. At about this time, he learned that Claimant Lindberg was no longer working and had not been paid. He referred Claimant Lindberg to the Wage and Hour Division of the Agency.

10) Claimant Lynn D. Lent was working for Kelly Services, a supplier of temporary help, in early 1990. She was dispatched on a job order from "Microtran, Inc." and began working for Respondent at 10220 SW Nimbus, Portland, about March 8, 1990. At the Nimbus address, Claimant Lent functioned as secretary to Respondent, who signed himself as President of "Microtran Smart Cable." She also did technical writing, translating technical manuals from Dutch to English. In early May 1990, she became a permanent employee of Microtran Smart Cable.

11) While she worked with Respondent, Claimant Lent noted that he dealt variously as "Microtran (or Micro Tran) Smart Cable," as "Microtran (or Micro Tran), Inc.," as "Smart Cable," and as "Microcom." She made $9.00 an hour as his secretary and $12.00 an hour for document translation and technical writing.

12) Claimant Lent's last day of work with Respondent was July 20, 1990. When she arrived at the Nimbus office at about 7:45 a.m. on July 23, she found Respondent loading computers, software and computer parts, and other equipment into his car. He told her and a salesman that he would be back, but the company was closed. Respondent drove off saying he would be sending money. Claimant Lent and the salesman found the office empty.

13) Respondent signed Claimant Lent's pay checks as "Charles R. Sleeper." On or about June 26, 1990, she received a check from Respondent intended as a paycheck for "Wages/Fees" in the amount of $841.56. It had "MicroTran SmartCable, 10220 SW Nimbus K-6, Portland OR, 97223" typed on it and purported to be drawn on the Delaware Trust Company, Wilmington, Delaware, with a written account number [redacted].

14) Claimant Lent was present when Respondent signed the name "Jay Penne" on the June 26 Delaware Trust check. She asked him why he used that signature. Respondent replied that it was common business practice to use an assumed name. The described Delaware Trust check was returned unpaid and was never replaced.

15) Claimant Lent did not receive a final paycheck. She was not paid for July 9 to 20, 1990, during which time she earned wages at both the secretarial rate of $9.00 an hour and the technical writer rate of $12.00 an hour. She was paid $958.70 from the Wage Security Fund in November 1990 on her claim against "MICROTRAN SMART CABLE."

16) When she did not receive a replacement for the returned June check and did not receive payment for July 1990, Claimant Lent wrote to Respondent, to Respondent's daughter Bonnie Ledford Sleeper, and to a Paul Brobbel, whom she believed was a vendor from Holland who dealt with Respondent. She listed unpaid time for July 1990 and listed "MicroTran SmartCable or MicroTran or Smart Cable or Microcom." She received no reply.

17) Kelly Temporary Services dealt with Respondent, after the initial job order from "Microtran," as "Microtran Smart Cable." Two of the weekly time cards submitted on Claimant Lent were signed for the employer as "Jay Penne, MicroTran SmartCable Pres. office" and "Jay Penne, MicroTran SmartCable." Three others were signed "Charles R. Sleeper, Micro Tran SmartCable, Office of President."

18) Lora Lee Grabe is a Compliance Specialist with the Wage and Hour Division of the Agency. At times material, she investigated the claims of Claimants Lindberg and Lent and the status of Respondent employer.

19) On January 9, 1990, Respondent, as president of "MICROTRAN, INC.," leased the space at 10220 SW Nimbus Ave., Suite K6, Portland, Oregon 97223 in the Koll Business Center from Koll Portland Associates and Petula Associates, Ltd. (Landlord), at a monthly base rent of $1,408, plus direct expenses, to begin in February 1990. Landlord subsequently sued Respondent "dba MICROTRAN, INC., an Oregon corporation," for breach of the lease agreement and damages in the District Court of Washington County. Respondent failed to answer or otherwise appear, and the court granted Landlord a default judgment on July 28, 1992.

20) In 1990, Mary Bulletset was a bookkeeper for Salinas Investments (USA) Inc. (Salinas), which was the owner of One Jefferson Parkway Apartments, Lake Oswego, Oregon. Respondent, as president of "MicroTran, Inc.," entered into a contract with Salinas to install cable TV, security, and telephone wiring at One Jefferson Parkway. MicroTran, Inc. was a subcontractor. The prime contractor was R & H Construction Co. (R & H). The value of MicroTran, Inc.'s contract was over $115,000. Respondent was active in the installation, at times using the name "MicroTran SmartCable." Salinas assumed that Respondent owned or operated several companies.

21) In connection with the Salinas contract, a liability insurance certificate was issued in August 1989 for "MicroTran, Inc., Microcomm, Inc., 4900 SW Griffith Drive, Suite 249, Beaverton, Oregon, 97005" regarding coverage with "American Star Ins. Co."

22) Salinas experienced performance problems with "Micro Tran." Sharif Sahli, Salinas Deputy General Manager, wrote to Terry Brant of R & H in May 1990 in this regard. In July, R & H checked the project, listed defects, and advised Salinas that "Microtran" was unavailable. Sahli wrote to Respondent at the Nimbus address on July 27, 1990, regarding delays traceable to "Micro Tran, Inc."

23) In an unsigned, undated response, "Charles Sleeper for The Company" explained the delay and advised that questions "should be directed to MicroTran, Inc. only at the following address, 4900 SW Griffith Drive, Suite 249, Beaverton, Oregon, 97119."

24) Salinas made periodic payments to "Microtran, Inc." or "MICROTRAN, INC." under the installation contract. Early payments were

endorsed with a stamp "Pay TO THE ORDER OF DELAWARE TRUST COMPANY, Wilmington, Delaware, FOR DEPOSIT ONLY MICROTRAN, INC." A Salinas check for $5,058.13, dated July 15, 1990, to "MICRO TRAN, INC." bore the handwritten endorsement "Micro Tran, Inc. PAY TO THE ORDER OF MICRO COM, INC." and was deposited to US National Bank account [redacted] on July 19, 1990. A Salinas check for $15,064.95, dated October 26, 1990, to "MICROTRAN, INC." bore the handwritten endorsement "endorsed over to Microcom, Inc. MicroTran, Inc." and was deposited to US National Bank on November 13, 1990.

25) Salinas received complaints from MicroTran, Inc.'s employees and from MicroTran, Inc.'s suppliers about non-payment of bills and wages. Salinas brought pressure on Respondent by withholding payment. That resulted in a check dated December 15, 1990, on a "MICROCOM, INC." US National account number [redacted] in the amount of $1,480 to Gary Lohkamp, Jr., MicroTran, Inc.'s former foreman at One Jefferson Parkway. Power and Telephone Supply Company, Inc. was also paid $2,164.19 from "MICROCOM, INC." US National account number [redacted] in November 1990. Both checks were signed "Charles R. Sleeper for the company."

26) In April or May 1990, the Oregon Construction Contractor Board (Board) received a registration application in the name of "MicroTran SmartCable, Inc.," 10220 SW Nimbus Avenue, Portland, Oregon 97223. Listed as corporate officers were Respondent and Jay Penne, both at the Nimbus address. The application, which was signed "Jay Penne, Sec. Treas.," included a Board form of surety bond in the name of "MicroTran, Inc.," which was unsigned by the principal. The Board advised "MicroTran SmartCable Inc." on June 25, 1990, that the application would not be effective without a fee, a more complete application, and a signed bond or rider for "MicroTran Smartcable Inc." The registration was not completed.

27) The records of the Oregon Secretary of State, Corporations Division, Business Registry Section (Corporations Division) show no record of "Microtran, Inc." or "MicroTran, Inc."

28) In April 1992, Corporations Division records showed "MICROCOM, INC.," apparently still active, had articles of incorporation filed in 1986 by Sathien Wonglaven of Tualatin, Oregon. In July 1992, Corporations Division records showed "MICROTRANS, INC.," incorporated in 1983, as an active corporation with Penny Buttke, Portland, as president and Carl Buttke, Portland as secretary. There was no identification of shareholders for either corporation.

29) In April 1992, Corporations Division records showed "MICROTRAN SMART CABLE, INC." as inactive, articles of incorporation having been filed on March 16, 1990, and the corporation being dissolved involuntarily on May 10, 1991, for failure to file an annual report and renewal fee. J. Milford Ford, Lake Oswego, filed articles of incorporation as agent and incorporator. Shareholders were not identified.

30) In July 1992, Corporations Division records showed "SMARTCABLE, INC.," filed July 11, 1990, and dissolved involuntarily on September 6, 1991. J. Milford Ford, Lake Oswego, filed articles of incorporation as agent and incorporator. Shareholders were not identified.

31) Ford advised the Agency that "MICROTRAN SMART CABLE, INC." and "SMARTCABLE, INC." were filed on behalf of Respondent.

32) In July 1992, the records of the State of Delaware show a certificate of incorporation of "MicroTran, Inc., A CLOSE CORPORATION," as recorded in Delaware May 5, 1988. The directors are listed as William Stay, Box 1905, Beaverton, Oregon, 97005, and Jay Penne, Route 2, Box 123, Gaston, Oregon 97119. Shareholders were not identified.

33) A United States National Bank of Oregon Business Account signature card in the name of "MICROCOM, INC." was signed "Charles R. Sleeper, President" in 1986, account number [redacted]. The account address was "MICROCOM, INC., Route 2, Box 123, Gaston, OR, 97119."

34) The Motor Vehicles Division of the State of Oregon Department of Transportation has no record of a vehicle registration or driver's license in the name "Jay Penne."

ULTIMATE FINDINGS OF FACT

1) Claimants Lindy Lindberg and Lynn D. Lent performed personal services at an agreed rate for corporations represented by Respondent and were not fully paid when Respondent gave up his office and ceased doing business there in or about July 1990. Their wages were earned after July 1, 1986.

2) Claimants filed valid wage claims for wages earned within 60 days before July 1990, which were not fully paid by their employer.

3) At times material herein, Respondent, an individual, acted as an officer or representative of various corporations, including "MICROTRAN SMART CABLE, INC." (aka "MICRO TRAN/SMART CABLE," "MICROTRAN SMART CABLE," "Micro Tran Smart Cable," "Microtran Smart Cable, Inc.," "MicroTran SmartCable," or "Micro Tran SmartCable"), "MICROTRAN, INC." (aka "MICRO TRAN, INC.," "Micro Tran, Inc.," "MicroTran," "Micro Tran," "Microtran," "MicroTran, Inc.," or "Microtran, Inc."), "MICROCOM, INC." (aka "Microcom," "Microcomm, Inc.," "Microcom, Inc.," or "MICRO COM, INC."), and "SMARTCABLE, INC." (aka "Smart Cable" or "SmartCable").

CONCLUSIONS OF LAW

1) ORS 652.310 defines employee as:

> "any individual who * * * renders personal services * * * to an employer who * * * agrees to pay such individual at a fixed rate, based on time spent in the performance of such services * * *."

Claimants Lindberg and Lent were employees.

2) ORS 652.310 defines employer as:

> "any person * * * who engages personal services of one or more employees * * *."

One or more corporations engaged the personal services of Claimants Lindberg and Lent through Respondent acting as a corporate officer and agent. A corporation is a person. ORS 60.001(8) and (15).

3) ORS 653.332 authorizes the Commissioner to collect a wage claim in an administrative proceeding. The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter of this proceeding.

4) Respondent did not attend the contested case hearing and is in default pursuant to OAR 839-30-185(2).

5) Sections 4 and 5, chapter 409, Oregon Laws 1985, as amended by chapter 412, Oregon Laws 1987, and chapter 554, Oregon Laws 1989, establish the Fund and its duration. Section 7 provides that valid wage claims for wages earned after July 1, 1986, filed with the Commissioner against an employer who has ceased doing business and is without sufficient assets to pay, may be paid by the Commissioner out of the Fund if earned within 60 days before the employer ceased doing business. The Commissioner may then recover from the employer the amounts paid, together with a penalty of 25 percent. Claimants had valid wage claims filed in 1990 against MICROTRAN SMART CABLE, INC., for sums earned within 60 days before it ceased doing business at 10220 SW Nimbus Ave., Portland, in July 1990. MICROTRAN SMART CABLE, INC., had no discovered assets and is indebted to the Commissioner in the amount of $1,467.36 paid from the Fund, plus 25 percent thereof, or $366.84. Respondent Charles R. Sleeper is not indebted to the Commissioner for the sums paid to Claimants from the Fund.

OPINION

Respondent was served with Determination 90-180 ("charging document" under OAR 839-30-025(2)(b)), requested a contested case hearing, and answered. Served with the charging document was an instruction sheet admonishing Respondent to notify the Agency of any change of address. The Notice of Hearing containing the time and place of hearing was sent by the Hearings Unit to Respondent at his Gaston address. Thereafter he notified the Hearings Unit of a change of address. The Hearings Referee found that Respondent had notice of the time and place of hearing and failed to attend. The Referee found him in default.

A respondent who fails to appear at hearing after due notice defaults as to the charges set forth in the charging document. *See In the Matter of Kevin McGrew*, 8 BOLI 251 (1990), and cases cited therein. Where a respondent fails to appear and his sole contribution to the record is the hearing request and an answer containing unsworn and unsubstantiated assertions, those assertions may be overcome wherever they are controverted by credible evidence on the record. *McGrew, supra.* In such a default situation, the Forum must decide whether the Agency has presented a prima facie case on the record to support the charging document. ORS 183.415(5) and (6), *McGrew, supra.*

To establish a prima facie case under former ORS 659.140(1) and (2),* the Agency must show that the employment of an employee without a contract for a definite period terminated with the employer owing wages to the employee, and that those wages, due immediately in the case of involuntary termination or within 48 hours in the case of a voluntary quit, were unpaid. To establish a prima facie case to enable the Commissioner to recover amounts paid from the Fund under subsection (2) of section 7, chapter 409, Oregon Laws 1985, as amended, the Agency must show that a valid wage claim was filed against an employer for wages earned within 60 days of the employer's cessation of business, that the claim cannot be paid from the employer's assets or by other means, and that the Commissioner has paid it from the Fund to the extent allowable.

The facts showed that the employment of Claimants Lindberg and Lent was involuntarily terminated on or about July 23, 1990, that they each had earned wages that were unpaid at that time, and that neither had a contract of employment for a definite period. The evidence further established that the entity employing them ceased doing business as an employer on or about July 23, 1990, that the wages of Claimants were earned within 60 days before that date, that each Claimant filed a valid claim, and that each Claimant was paid a sum from the Fund. The crucial fact not established to the satisfaction of the Forum was the identity of the employer.

Claimants each filed against Microtran Smart Cable. Their testimony and that of other witnesses, as well as documents admitted into evidence, indicated that "MicroTran, Inc." was also identified, somewhat interchangeably, to Claimants, to ATD, and to others by Respondent as the employing entity. The only known item of business during the respective tenure of Claimants was the One Jefferson Place installation, upon which Claimant Lindberg worked. The agreement for that installation was between the owner and MicroTran, Inc.

Respondent denied that he had employed Claimants, that he had paid them, or that he owed them anything. He further denied using a "dba" or signing any checks to Claimants. Evidence adduced by the Agency demonstrated that he signed all of the paychecks (either in his own name or that of "Jay Penne"), directed the Claimants and other workers in their work, and received for Microtran, Inc. (and Microcom, Inc.) the benefit of their labor in the form of contract payments from Salinas.

Respondent denied doing business as Microtran Smart Cable. He did conduct business with that name, as well as with a number of others. In a series of actions which the Forum could infer were intended to confuse creditors and others, Respondent identified himself as a corporate officer or representative of several corporations. In addition, he used another name, Jay Penne, on one known occasion in signing a check. The name or purported signature "Jay Penne" appears on other occasions under circumstances strongly suggesting that Respondent used it as his own.

But Respondent did business under the color of being a corporate officer or representative and denied that he personally did business or is personally liable. Based on the evidence

* ORS 652.140 was amended by section 1, chapter 966, Oregon Laws 1991, in provisions not essential to this case.

presented, the Forum cannot find otherwise. Neither of the Oregon corporations which Respondent started were more than corporate papers filed. They apparently did not conduct any internal meetings or business, and both failed to file annual reports or renewal fees. Respondent was not identified of record as having an interest as shareholder, director, or officer in either of them. Two of the other corporations whose names were used by Respondent, Microcom, Inc., and a Delaware corporation, MicroTran, Inc., were established by other persons. It might be inferred that Respondent "borrowed" them. On the other hand, he may have owned a legitimate interest in either one or both, or he may have been employed by either one or both. He apparently commingled the funds of at least two and probably three of the corporate entities for which he held bank signature authority, and paid obligations of one from the accounts of the others, but without more complete financial information, the Forum cannot find that such commingling was a direct cause of the non-payment of Claimants. There was some connection with the Delaware corporation, judging from the appearance of the elusive "Jay Penne" at Respondent's address of record on the certificate of incorporation and the initial use of a Delaware bank. Respondent failed to appear to explain such a connection. With the meager information before it, the Forum cannot create an explanation.

Respondent consistently dealt with others as representative of several corporations. There was insufficient evidence to conclude that he was acting as an individual or in other than a representative capacity. There was no evidence from which the Forum could find that he was the owner, or controlling shareholder, of any of the corporate entities. Even if he were sole owner, however, he still might not be personally liable.

> "Ownership of all of the stock of the corporation by one person, in and of itself, is insufficient to breach the wall of immunity created by ORS 57.131(1). Nor is the control of the corporation by a shareholder, in and of itself, sufficient to support a claim for recovery that the shareholder's immunity should be disregarded * * *." * *Amfac Foods, Inc. v. International Systems & Controls Corporation*, 294 Or 94, 654 P2d 1092 (1982).

The *Amfac* case sets a standard for what courts term "piercing the corporate veil." In order for a creditor to recover from a shareholder personally, disregarding the shareholder's corporate immunity because of the shareholder's control over the debtor corporation, the creditor must allege and prove not only actual control but also that the creditor's inability to collect resulted from some form of improper conduct on the part of the shareholder. There must be a relationship between the actual control, the improper conduct, and the creditor's injury. Limited examples of such improper conduct include inadequate capitalization for the intended business, milking (payment of excessive dividends or sale of products to shareholders at a grossly reduced price), misrepresentation and commingling or confusion of assets, and evasion of statute through a subsidiary. *Amfac, supra.*

The Agency has charged Respondent as the employer. The evidence suggests a corporate employer. *Amfac* delineates the general type of questionable circumstances which might remove shareholder immunity if Respondent were a shareholder in any of the corporations involved. His status as a shareholder in any of those corporations is unknown. The Agency's case fails for lack of proof.

Respondent was not personally liable as an employer to Claimants Lindberg and Lent and is not personally liable for the amounts paid to them out of the Wage Security Fund or for the penalty based on those amounts.

ORDER

NOW, THEREFORE, the evidence having failed to show that CHARLES R. SLEEPER was an employer as defined under ORS 652.310, and is therefore not personally liable under ORS 652.140, 652.332, and subsection (2) of section 7, chapter 409, Oregon Laws 1985, as amended, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 90-180 against Chuck (true name Charles) R. Sleeper, dba MICROTRAN SMART CABLE, be and is hereby dismissed.

* ORS 57.131(1) was repealed by sec. 181, chap. 52, Oregon Laws 1987, readopted by sec. 39, chap. 52, Oregon Laws 1987, and is now ORS 60.151.

In the Matter of
KEN TAYLOR,
fdba A-1 Cash for Cars,
Respondent.

Case Number 03-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 1, 1992.

SYNOPSIS

The Commissioner granted summary judgment to the Agency, finding that Respondent failed to compensate Claimant for overtime hours at one and one-half times his regular rate of pay. An agreement between Respondent and Claimant that Claimant would work all hours at his regular rate of pay was no defense against Claimant's claim for statutory overtime pay. Respondent's failure to pay was willful, and the Commissioner ordered Respondent to pay Claimant's overtime pay and civil penalties. Former ORS 652.140; former 652.150; 652.360; 653.055(1)(a), (c), and (2); 653.261(1); OAR 839-30-070(6).

The above-entitled matter came on regularly before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Kerry Allen Cunningham was the wage claimant (Claimant). Ken Taylor (Respondent) represented himself.

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

FINDINGS OF FACT – PROCEDURAL

1) On April 23, 1991, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

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

3) On July 8, 1991, the Commissioner of the Bureau of Labor and Industries served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondent owed a total of $422.50 in wages and $1,616 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

4) On July 18, 1991, Respondent filed an answer to the Order of Determination. Respondent's answer did not contain a request for a contested case hearing. In his answer, Respondent stated:

> "[Claimant] was fired for theft of over $1000. [Claimant] signed contract concerning overtime (copy is enclosed)[.] He was told, on several occasions, not to work overtime but but [sic] did so anyway and was paid for it as agreed in contract. He continued to work unauthorized overtime and drew pay for it according to contract. Overtime was not needed."

Respondent attached a document dated April 4, 1991, signed by Claimant, which states:

> "I wish to work extra hours of my own choosing at straight time rate of pay. A-1 CASH FOR CARS does not require me to work overtime hours. If I do so it is by my choice and I understand I will receive straight time pay for whatever extra hours I work."

5) On July 29, 1991, the Agency notified Respondent that he was granted an extension of time in which to request a hearing or court trial. On August 7, 1991, the Agency received Respondent's request for a hearing in this matter.

6) On July 28, 1992, the Agency sent the Hearings Unit a request for a hearing date. On August 10, 1992, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200.

7) On October 5, 1992, the Agency filed a motion for summary judgment with supporting exhibits.

8) On October 6, 1992, the Hearings Referee wrote a letter to Respondent regarding the motion for summary judgment. Because the hearing was scheduled for October 27, 1992, the Hearings Referee required Respondent to respond to the motion by October 19, 1992.

10) On October 8, 1992, the Hearings Referee wrote a letter to the participants reminding them of the date for hearing. Because the motion for summary judgment was pending, the Hearings Referee extended to October 23 the date for filing case summaries required under OAR 839-30-071.

11) As of October 19, 1992, and as of the date of this Order, the Hearings Unit had not received a response from Respondent concerning the motion for summary judgment.

12) On October 21, 1992, the Hearings Referee issued an order postponing the hearing indefinitely and said he had reviewed the motion for summary judgment and intended to grant it in a Proposed Order, pursuant to OAR 839-30-070(6).

13) The Proposed Order, which included an Exceptions Notice, was issued on October 29, 1992. Exceptions, if any, were to be filed by November 9, 1992. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondent, a person, did business as A-1 Cash for Cars, an auto wrecking yard located in Portland, Oregon. He employed one or more persons in the State of Oregon.

2) From February 28 to April 20, 1992, Respondent employed Claimant to dismantle cars, drive a tow truck to pick up cars, repair cars, and haul scrap metal to a scrap yard.

3) Respondent and Claimant entered into an oral agreement that Claimant would perform work for $5.00 per hour.

4) On April 4, 1991, Claimant signed a document stating:

> "I wish to work extra hours of my own choosing at straight time rate of pay. A-1 CASH FOR CARS does not require me to work overtime hours. If I do so it is by my choice and I understand I will receive straight time pay for whatever extra hours I work."

5) During its investigation of Claimant's claim, the Agency requested copies of Respondent's payroll records pertinent to this matter. At no time prior to the completion of the investigation did Respondent comply with the Agency's request.

6) Claimant's payroll records for the period between February 28 and April 20, 1991, reveal the following information, which is accepted as fact: he worked 454 total hours at the rate of $5.00 per hour; of the total hours, 306 were hours worked up to 40 per week (straight time hours); 148 were hours worked in excess of 40 hours per week (overtime hours); Claimant was paid $2,217.50 in gross wages (443.5 hours x $5.00 per hour = $2,217.50).

7) Pursuant to OAR 839-20-030 (Payment of Overtime Wages) and Agency policy, the agency calculated

the total earnings of Claimant to be $2,640. The total reflects the sum of the following:

306 Hours @ $5.00 per hour = $1,530

148 hours at the overtime rate of $7.50 (the additional one-half over the $5.00 agreed rate) = 1,110

TOTAL EARNED = $2,640

8) Claimant was fired by Respondent on April 20, 1991.

9) Civil penalty wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: $2,640 (the total wages earned) divided by 49 (the number of days worked during the claim period) equals $53.87 (the average daily rate of pay). This figure of $53.87 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of $1,616. This figure is set forth in the Order of Determination.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person doing business in the State of Oregon. He employed one or more persons in the operation of that business.

2) Respondent employed Claimant.

3) During the wage claim period of February 28 to April 20, 1991, Respondent and Claimant had an oral agreement whereby Claimant's rate of pay was $5.00 per hour.

4) Claimant's last day worked was April 20, 1991, the same day Respondent terminated Claimant's employment.

5) During the wage claim period, Claimant worked 49 days and earned $2,640. Respondent paid Claimant $2,217.50. Respondent owes Claimant $422.50 in earned and unpaid wages.

6) Respondent willfully failed to pay Claimant all wages earned and unpaid immediately upon termination of employment. More than 30 days have elapsed from the due date of those wages.

7) Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal $1,616 (Claimant's average daily rate, $53.87, continuing for 30 days).

CONCLUSIONS OF LAW

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

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) The Forum informed Respondent of his rights as required by ORS 183.413(2).

4) ORS 653.261(1) provides that the Commissioner may issue rules prescribing minimum conditions of employment, including an overtime rate of pay of one and one-half times the regular rate of pay. OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay. Respondent was obligated by law to pay Claimant one and one-half times his regular hourly rate for all hours worked in excess of 40 hours in a week. Respondent failed to so pay Claimant in violation of ORS 653.261(1) and OAR 839-20-030.

5) ORS 653.055 provides that:

> "(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:
>
> "(a) For the full amount of the wages, less any amount actually paid to the employee by the employer;
>
> "* * *
>
> "(c) For civil penalties provided in ORS 652.150.
>
> "(2) Any agreement between an employee and an employer to work at less than the wage rate required by ORS 653.010 to 653.261 is no defense to an action under subsection (1) of this section."

In addition, ORS 652.360 provides that:

> "No employer may by special contract or any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.405 or by any statute relating to the payment of wages * * *."

Therefore, an agreement between Claimant and Respondent to avoid the payment of overtime wages is no defense to this action to collect Claimant's earned, due, and payable wages. Respondent is liable for the full amount of the wages due and for civil penalties provided in ORS 652.150.

6) Former ORS 652.140(1) provided:

> "Whenever an employer discharges an employee, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately * * *."

Respondent violated former ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid immediately upon terminating him from employment on April 20, 1991.

7) Former ORS 652.150 provided:

> "If an employer willfully fails to pay any wages or compensation of any employee who is discharged or who quits employment, as provided in ORS 652.140, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

8) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable

wages and the civil penalty wages, plus interest on both sums until paid.

OPINION

Pursuant to OAR 839-30-070(6), the Agency filed a motion for summary judgment on its Order of Determination. It asserted that no issue of genuine fact existed and the Agency was entitled to judgment as a matter of law as to the charges in the Order of Determination. Subsection (c) of OAR 839-30-070(6) provides that, where the Hearings Referee recommends that the motion for summary judgment be granted, the recommendation shall be in the form of a Proposed Order and the procedure established for issuing Proposed Orders shall be followed. This Order grants the Agency's motion and has been issued according to that procedure.

Wages Due

From the pleadings in this matter, there is no dispute that Respondent operated A-1 Cash for Cars and employed Claimant. And there does not appear to be any dispute that Claimant worked in excess of 40 hours per week. ORS 653.045 requires employers to maintain payroll records. Where the Commissioner concludes that a claimant was employed and was improperly compensated, it is incumbent upon the employer to produce all appropriate records to prove the precise amounts involved. Where the employer produces no records, the Forum may rely on the evidence produced by the Agency to show the amount and extent of claimant's work as a matter of just and reasonable inference, and may then award damages to the employee, even though the result be only approximate. *In the Matter of Rainbow Auto Parts and Dismantlers,* 10 BOLI 66, 73 (1991); *In the Matter of Dan's Ukiah Service,* 8 BOLI 96, 106 (1989). Here, Respondent provided no records and did not deny that Claimant worked overtime. Respondent admits in his answer to paying Claimant at his straight time rate of pay for his overtime hours. Claimant's uncontested records were reliable and credible, and the Forum has relied upon them. Those records reflect that Claimant worked 148 overtime hours and was not compensated for those hours at the required rate of one and one-half times the regular rate of pay. The evidence shows that wages are still due and unpaid.

Respondent apparently offers two reasons in defense of Claimant's claim for wages. First, Claimant was fired for theft of over $1,000. That allegation is unsupported by any evidence except Respondent's unsworn assertion. Even if that allegation were true, ORS 652.610, concerning deductions from wages, precludes an employer from withholding an employee's wages except in certain specified circumstances, none of which apply here. ORS 652.610, together with ORS 652.360 (quoted above),

> "require that an employer pay an employe [sic] the wages that are due and seek to resolve any claims the employer may have against the employe [sic] by other means." *Garvin v. Timber Cutters, Inc.,* 61 Or App 497, 658 P2d 1164, 1166 (1983).

Second, Respondent relies on a document signed by Claimant regarding overtime, in which Claimant agreed to work overtime hours for his straight time rate of pay. An agreement between an employer and an employee to waive overtime pay is void under Oregon law. ORS 652.360; *In the Matter of John Owen,* 5 BOLI 121, 125 (1986).

> "Not only can an employer not avoid the mandate to pay overtime wages by entering into an agreement with an employee, an employee on his own behalf cannot waive the employer's statutory duty to pay overtime. ORS 653.055(2) explicitly states that an employer cannot use as a defense to a wage claim the fact that there was an agreement between the employer and employee to work for less than the wage rate, including the overtime rate required by ORS 653.261.
>
> "There are obvious public policy reasons for the statutory prohibition against an employer using as a defense to an overtime claim the fact that the employee agreed to forego overtime compensation. If such an agreement were a defense an employer could require an employee to 'agree' to waive overtime as a condition of employment and the purposes of the overtime wage laws would be frustrated." *Id.* at 125.

Respondent also asserts that Claimant was not authorized to work overtime. This unsubstantiated assertion, even if true, is not a defense to Respondent's failure to pay all wages earned, or his failure to pay Claimant at the legally required overtime rate of pay. If an employer has such a problem with an employee, the employer may discipline the employee. The employer may not try to correct the problem by paying an unlawful rate for overtime hours worked.

Civil Penalty

Respondent violated ORS 652.140 (1989) by failing to immediately pay Claimant all wages earned and unpaid at the time Claimant was discharged. Respondent has still not paid those earned wages, and more than 30 days have passed.

Awarding a civil penalty turns on the issue of willfulness. The Attorney General has advised the Commissioner that "willful," under ORS 652.150, "simply means conduct done of free will." A.G. Letter Opinion No. Op. 6056 (September 26, 1986). "Willfulness only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent." *In the Matter of Victor Klinger,* 10 BOLI 36, 43 (1991) (citing *Sabin v. Willamette Western Corp.,* 279 Or 1083, 557 P2d 1344 (1976)). "Willful" does not necessarily imply anything blamable, or any malice or wrongdoing toward the other party, or perverseness or moral delinquency. *State ex rel Nilsen v. Johnston et ux,* 233 Or 103, 377 P2d 331 (1962).

> "A financially able employer is liable for a penalty when it has willfully done or failed to do any act which foreseeably would, and in fact did, result in its failure to meet its statutory wage obligations." A.G. Letter Opinion, *supra.*

Here, evidence established that Respondent intentionally and knowingly paid Claimant for overtime at his straight time rate of pay. There was no

evidence that Respondent was not a free agent. Thus, Respondent must be deemed to have acted willfully under this test, and thus is liable for civil 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 KEN TAYLOR to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR KERRY ALLEN CUNNINGHAM in the amount of TWO THOUSAND THIRTY-EIGHT DOLLARS AND FIFTY CENTS ($2,038.50), representing $422.50 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by the Respondent; and $1,616 in penalty wages, plus interest at the rate of nine percent per year on the sum of $422.50 from May 1, 1991, until paid and nine percent interest per year on the sum of $1,616 from June 1, 1991, until paid.

In the Matter of
IONA POZDEEV,
dba Hilanders Reforestation,
Respondent.

Case Number 40-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued January 7, 1993.

SYNOPSIS

In her answer to the charging document, Respondent, a farm labor contractor, confirmed her failure to timely file certified payroll records in connection with a reforestation contract. Granting summary judgment to the Agency, the Commissioner found that Respondent twice violated ORS 658.417(3) and OAR 839-15-300, and imposed a civil penalty of $500 for each violation. ORS 658.417(3); 658.453(1)(e); OAR 839-15-300; 839-15-508(2)(b); 839-15-512(1) and (2).

The above-captioned matter came on regularly before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich and Lee Bercot, Case Presenters. Iona Pozdeev (Respondent) was not represented by counsel.

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

FINDINGS OF FACT – PROCEDURAL

1) By a document dated March 12, 1992, and entitled "Notice of Intent To Assess Civil Penalties" (Notice of Intent), the Agency advised Respondent under date of April 1, 1992, that the Agency intended to assess civil penalties based on certain violations of Chapter 658, Oregon Revised Statutes. The Notice of Intent alleged the following bases for the civil penalties sought:

> "On or about March 25, 1991, Molalla Reforestation Company, Inc., ('Molalla') was awarded a precommercial thinning contract by the US Bureau of Land Management ('BLM'), # H952-C-1-1074 ('1074') in the South Valley Resource Area near Eugene, Oregon. On or about March 28, 1991, Molalla jointly began performance of 1074 with Contractor.* Contractor began his performance upon 1074 with a crew or crews of at least five thinners and continued to directly employ a crew or crews throughout the performance of 1074 until completion of the contract on or about June 6, 1991. Contractor was required to submit certified true copies of his payroll records for these workers on Commissioner's form WH-141 or its equivalent at least once every 35 days beginning from the date work first began upon 1074. Submissions for 1074 should have been made on or about May 1, 1991 and again on or about June 5, 1991. Contractor made no timely submissions for 1074, in violation of ORS 658.417(3). These two violations are aggravated because Contractor performed 1074 jointly with Molalla under the subterfuge of an alleged subcontract to assist Molalla in concealing its failure to make two certified payroll filings for Molalla's crew or crews. The violations are further aggravated because Contractor failed to certify to the Commissioner all the workers he employed upon 1074. Civil Penalty of $2,000 For Each Violation or $4,000."

2) The Notice of Intent was to become final 21 days after Respondent's receipt thereof unless Respondent requested a contested case hearing within that time.

3) By letter dated April 7, 1992 (postmarked April 15, received by the Agency April 16), Respondent filed a written response stating that "All wage and hour reports regarding the work performed by Hilanders Reforestation was reported to the Bureau of Labor and Industries," and requesting a hearing on the intent to assess civil penalties.

4) On May 12, 1992, the Forum issued to Respondent and the Agency a notice of the time and place of the requested hearing, and of the designated Hearings Referee.

5) With the hearing notice, the Forum sent to Respondent a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's

* Iona Pozdeev is referred to in the Agency's process as "Contractor," and in this proceeding as "Respondent."

administrative rules regarding the contested case process -- OAR 839-30-020 through 839-30-200.

6) On August 27, 1992, the Agency filed a motion for summary judgment, and on August 31, 1992, the Agency filed an addendum to its motion. Respondent did not reply to the motion or the addendum.

7) By letter dated October 14, 1992, the Hearings Referee allowed Respondent until October 19, 1992 to comment on the Agency's motion. No reply was received.

8) On October 19, 1992, the Hearings Referee was notified by the Agency that Case Presenter Lee Bercot had resigned and that Case Presenter Judith Bracanovich, an employee of the Agency, would henceforth represent the Agency. The Hearings Referee so notified Respondent on October 20, 1992.

9) By ruling dated October 23, 1992, the Hearings Referee found that no genuine issue of fact existed as to the failure to timely file the required certifications and granted summary judgment to the Agency as to Respondent's failure to timely file certified true copies of all payroll records for work done as a farm labor contractor on BLM Contract #H952-C-1-1074.

10) The October 23 ruling further recited that the hearing scheduled for November 3, 1992, would address only the appropriate penalty, that is, whether the failures to file the required certifications were aggravated by other factors as alleged.

11) On October 23, 1992, the Agency notified the Hearings Referee that the Agency was withdrawing its claims of aggravation and asked for an appropriate penalty based on the record.

12) On October 28, 1992, based upon the Agency's letter, the Hearings Referee struck the following language from the Notice of Intent:

> "These two violations are aggravated because Contractor performed 1074 jointly with Molalla under the subterfuge of an alleged subcontract to assist Molalla in concealing its failure to make two certified payroll filings for Molalla's crew or crews. The violations are further aggravated because Contractor failed to certify to the Commissioner all the workers he employed upon 1074."

13) The October 28, 1992, ruling also notified Respondent and the Agency that the hearing scheduled for November 3, 1992, was canceled because there was no longer a need to take evidence concerning aggravation and possible enhanced penalties resulting therefrom, that the Hearings Referee would issue a Proposed Order based on the record and proposing a Civil Penalty of $500 for each violation found on summary judgment, or a total of $1,000, and that Respondent would have opportunity to except to the Proposed Order.

14) The Proposed Order, which included an Exceptions Notice, was issued on November 30, 1992. Exceptions, if any, were to be filed by December 10, 1992. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor with forest indorsement, expiring December 31, 1991.

2) At times material, Molalla Reforestation, Inc., was licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor with forest indorsement.

3) At times material, Robert Hansen was Chief of the Procurement Management Branch of the Bureau of Land Management, US Department of the Interior (BLM), in the state of Oregon.

4) On March 25, 1991, BLM awarded contract #H952-C-1-1074 (1074) to Molalla Reforestation. Respondent was expected to be a subcontractor on 1074.

5) On April 8, 1991, Respondent's crew began work on 1074 as a subcontractor.

6) Under the subcontract, Respondent was responsible for acceptable completion of certain specific units included in 1074. Respondent's crews worked on those units from April 8 through at least May 29, 1991.

7) All work on 1074 was completed by June 6, 1991.

8) At times material, Leslie Laing was the custodian of all certified payroll records filed with the Farm Labor Unit (FLU) of the Agency.

9) On July 26, 1991, FLU received from Respondent (as both "Hilanders" and "Highlander") a submission of what purported to be certified true copies of Respondent's payroll records for June 17 to 29, 1991, notated "BLM H952-C-1-1074." The submission was postmarked July 21, 1991.

10) The material received on July 26, 1991, was the only payroll submission received by FLU from Respondent on 1074.

11) May 13, 1991, was 35 days after April 8, 1991. June 17, 1991, was 35 days after May 13, 1991.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein under ORS chapter 658.

2) At all times material, Respondent was subject to ORS 658.405 to 658.503. ORS 658.417(3) required Respondent to file with the Commissioner certified payroll records for work done on a forest labor contract, in proper form in accordance with applicable Oregon Administrative Rules (OAR).

3) At all times material, Respondent was subject to OAR 839-15-000 to 839-15-610. OAR 839-15-300 required Respondent to file certified payroll records for BLM 1074 every 35 days after commencing work.

4) Respondent twice violated OAR 839-15-300 in failing to submit certified payroll records for BLM 1074 on May 13, 1991, and again thereafter upon completion of 1074 or by June 17, 1991, at the latest.

5) ORS 658.453(1)(e), OAR 839-15-508(2)(b), and 839-15-512(1) and (2) authorize the Commissioner to impose civil penalties for the violations described herein and the penalties imposed are a proper exercise of that authority.

OPINION

The Forum has granted summary judgment on two failures to file certified payroll records based upon the Agency's allegations in the charging document, upon Respondent's answer thereto, and upon the evidence submitted with the Agency's motion for summary judgment. The Agency had alleged that Respondent had failed to file certified payroll records every 35 days after beginning work on a forest labor contract. Respondent answered that "All wage and hour reports regarding the work by Hilanders Reforestation was reported to the Bureau of Labor and Industries." The Agency's records showed the only such filing to have been on July 26, 1991 (postmarked July 21, 1991), well after the completion of BLM contract 1074. It referred to payroll dates after the June 6, 1991, completion of the contract. Respondent began performance on April 8, 1991. A payroll certification would have been due May 13 (35 days after April 8) if Respondent were still working on the contract. BLM's contract diaries, together with the subcontract, made clear that work on those portions of 1074 that were under Respondent's control continued through and probably after May 29, after which a second certification was due. The certificate received was not only inaccurate as to dates, but was untimely as to Respondent's work on the subcontract. Because the evidence presented with the Agency's motion could not be disputed, summary judgment on the issue of the filing of payroll certifications was properly granted.

The Agency originally alleged that enhanced civil penalties should be assessed against Respondent because the failures to properly and timely file certified payroll records for the work done on the subcontract for BLM 1074 were aggravated violations since the subcontract was a subterfuge to cover similar failures by the prime contractor. The Agency withdrew that allegation, and there is no ground remaining for any enhanced penalty.

Because of the repeated or serial nature of the violations, the Forum is imposing a civil penalty of $500 for each of two violations for a total of $1,000 in civil penalties.

ORDER

1) NOW, THEREFORE, as authorized by ORS 658.453, IONA POZDEEV is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon St #32, Portland, Oregon 97232, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of ONE THOUSAND DOLLARS ($1,000), plus interest thereon at the annual rate of nine percent between a date ten days after the issuance of this Final Order and the date IONA POZDEEV complies herewith.

In the Matter of
Thomas H. Disch, Jr. and
Henry Spivak, Partners, dba
SUNNYSIDE INN,
Respondents.

Case Number 20-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued January 13, 1993.

SYNOPSIS

Respondents paid female Complainant less as the general manager of their restaurant than they paid males who occupied the position. Finding that the continued unequal pay was due to sex and created an intolerable working condition, the Commissioner held that Complainant's resignation over her compensation was a constructive discharge, that Respondents' reasons for the pay disparity were pretextual, and that Complainant was entitled to $8,754 in wage differential, $3,435 in lost wages after the discharge, and $7,500 for mental distress. ORS 659.030(1)(a) and (b); 659.040; OAR 839-30-070(6) and (7); 839-30-071.

The above-entitled matter came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 7, 8, 9, and 10, 1992, in the Bureau of Labor and Industries hearing room 1004, State Office Building, 800 NE Oregon, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Thomas H. Disch, Jr. and Henry Spivak, Partners (Respondents*), were represented by Edward F. Lohman and Debbie Steiner Lohman, Attorneys at Law, Portland. Mr. Disch was present throughout the hearing; Mr. Spivak did not attend. Kerrylee Harrington Faber** (Complainant), was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses, in addition to Complainant: Respondents' former employees Elizabeth Higbee, Tony Caporicci (by telephone), and Maria Caporicci (by telephone); NCR Corporation field engineer Scott Lee Hickenlooper; Agency investigator Peter Martindale; and Respondents' current employee Darlene Thomas.

Respondents called the following witnesses, in addition to Respondent: Respondents' former employees Finn Dollis, Annie Marie Moss, William Sontra, and Suzanne White; former Tee Dee's employees Susan Petersen, Dorothy Whyte and Clara Wilson; and Respondents' current employees Laine Cristofaro, Juan Diaz, Betty Garrett, Kimberly Golden, Carlys Loftis, Jill Penni, Sherri Saunders, and Deborah Thompson.

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* Throughout this Order, for brevity, "Respondents" refers to both partners; "Respondent," singular, refers to Mr. Disch.

** Since times material, Complainant's name has changed; she is referred to in testimony and in this Order as "Harrington."

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

RULING ON MOTION

Respondents' answer recited an affirmative defense as: "5. Complainant's claim should be barred by reason of equitable estoppel." At hearing, the Hearings Referee took under advisement the Agency's motion to strike that defense. Respondents based the defense on Complainant's acceptance of the job as Sunnyside general manager at an hourly wage without protest. For reasons more fully explained in the Opinion herein, the Forum rules that no estoppel could exist and the Agency's motion is allowed.

FINDINGS OF FACT – PROCEDURAL

1) On September 19, 1990, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practice of Respondents based upon her female sex.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondents in violation of ORS 659.030.

3) The Agency initiated conciliation efforts between Complainant and Respondents, conciliation failed, and on January 17, 1992, the Agency prepared and served on Respondents Specific Charges, alleging that Respondents had paid Complainant less as the manager of the Sunnyside Inn than was paid to males who occupied the position, leading to her constructive discharge, all unlawfully based on her sex and resulting in damage to Complainant.

4) With the Specific Charges, the Forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On February 6, 1992, Respondents timely filed an answer.

6) On April 17, 1992, the Agency filed a motion for postponement of the hearing set for May 5, 1992. Respondents opposed the motion. The Hearings Referee allowed the postponement and subsequently reset the hearing to July 7, 1992.

7) On May 7, 1992, Respondents moved for a discovery order requiring that Complainant authorize the Internal Revenue Service to provide copies of her federal income tax returns from 1978 to 1988, arguing that Complainant had misrepresented her prior earnings in her applications, and that her prior earnings and those of the male general managers were put in issue by the Administrative Determination. Complainant had supplied copies of returns for 1989-1991 through the Agency, which argued that earlier returns were irrelevant and that the Specific Charges, not the Administrative Determination, defined the issues for hearing.

8) On May 27, 1992, ruling that Complainant's returns for 1989-1991 were relevant to the claimed damage period, that earlier returns were too remote in time, and that the Specific Charges and answer defined the issues in the case, the Hearings Referee denied Respondents' motion except for items already supplied to Respondents' counsel.

9) On June 8, 1992, the Agency sought postponement of the hearing. The Agency cited the Case Presenter's involvement in a recently prioritized case and a shortage of Agency staff, and requested an early August hearing date. The Agency also asserted a need for a prehearing conference to clarify the relevance and admissibility of information subpoenaed by Respondents about Complainant, and to assist in structure and scheduling of the hearing due to a large number of witnesses anticipated and to questions of admissibility.

10) Citing counsel's conflict with another case in early August, Respondents opposed postponement, opposed delay to the next available date in November, submitted argument regarding the discovery subpoenas, and agreed to a prehearing conference.

11) On June 18, the Hearings Referee denied the postponement and ruled that the hearing would commence July 7, 1992. On June 22, the Referee set a prehearing conference on the mutually available date of June 29.

12) On June 22, 1992, Respondents moved for partial summary judgment, alleging that Complainant's administrative complaint with the Agency was not timely filed under ORS 659.040, and, alternatively, that Complainant's claim for damages was limited to one year under ORS 659.040. On June 23, the Referee advised the participants* that the due date for case summaries would be adjusted at the prehearing conference, and that the participants should be prepared to comment on the summary judgment motion at that time.

13) At the prehearing conference on the record on June 29, 1992, the Hearings Referee advised the participants of alternatives to filing the case summaries required by OAR 839-30-071. After hearing the contentions of the respective participants, the Referee orally advised them of his rulings, which limited Respondents' use of certain evidence and denied the summary judgment motion. Written rulings were served on July 2.

14) Later on June 29, Respondents submitted written explanation of their equitable estoppel argument.

15) At the commencement of the hearing, the Hearings Referee allowed amendment of the Specific Charges to more accurately reflect the Agency's allegations. Written charges were subsequently filed herein reflecting the approved changes.

16) At the commencement of the hearing, the Hearings Referee allowed

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* "Participant" or "participants" includes the charged party and the Agency. OAR 839-30-025(17).

the Agency's motion to strike Respondents' affirmative defense numbered six, which sought to bar Complainant's recovery based on "unclean hands," and took under advisement the Agency's motion to strike Respondents' affirmative defense numbered five, which sought to bar Complainant's claim based on equitable estoppel.

17) At the commencement of the hearing, counsel for Respondent stated that he had read the Notice of Contested Case Rights and Procedures accompanying the Specific Charges and had no questions about it.

18) Pursuant to ORS 183.415(7), the Hearings Referee orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

19) At the close of testimony on July 10, the Hearings Referee approved the submission of written closing arguments and gave the participants until July 20, 1992, to submit their respective closing arguments and until July 27, 1992, to submit any rebuttal argument. Submissions were filed timely and the record herein closed on July 27, 1992.

20) The Proposed Order, which included an Exceptions Notice, was issued on September 28, 1992. Exceptions, if any, were to be filed by October 28, 1992. Respondents' exceptions were received timely on October 28, 1992. They are dealt with as described at the end of the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondents Thomas H. Disch, Jr. and Henry Spivak were a partnership doing business as Sunnyside Inn Restaurant (Sunnyside) in Clackamas County, Oregon, and engaging or utilizing the personal service of one or more employees. In 1988 and before, Respondent Thomas H. Disch, Jr. was owner and CEO of T. H. Disch, Inc., which operated Tee Dee's Restaurant in Oregon City, Oregon.

2) Complainant, female, worked as the general manager of Tee Dee's from November 1985 to July 29, 1987, and from November 12, 1987, to August 15, 1988. At Tee Dee's, she was paid an annual salary. She became general manager at a salary of $18,000 per year three to four weeks after she was hired. Her annual salary in August 1988 was $21,060.

3) While she was general manager at Tee Dee's, Complainant usually opened in the morning. She was on the premises most of the time after that until 1:30 p.m. or later, but on some occasions she was unavailable due to personal appointments. Co-workers observed her doing her hair and makeup after she had opened for the day. She spent time after opening in the office with paperwork. Co-workers observed her reading or doing crosswords. She worked relief if someone was absent, and usually helped if asked during heavy business periods. Co-workers noted that she seemed to entertain relatives and friends for complimentary meals (paid for by Tee Dee's).

4) Respondent was made aware of some of the observations of Complainant's co-workers.

5) Respondent had discussed the turnover of general managers at Sunnyside with Complainant while she was general manager at Tee Dee's. She knew that his corporation was selling the Oregon City Tee Dee's, so she accepted Respondent's offer to work at Sunnyside "at the same rate" she was paid at Tee Dee's, but on an hourly basis.

6) The duties of the general manager at Sunnyside included responsibility for the overall operation of the restaurant at a high level of service, product, and customer satisfaction; the hiring, training, and management of staff and mid-level management; the cleanliness, repair, and maintenance of the building and equipment; the sanitation of the premises and hygiene of the staff; ordering, purchasing, inventory, and storage; security, including control over pilferage and theft, and the safeguarding of money; reports to Respondents, government, and creditors; compliance with applicable laws and regulations; menu development, advertising, and cost control over variables such as food, beverages, labor, and consumable supplies.

7) Complainant began working at Sunnyside as "assistant general manager" in August 1988. Respondent said that he would be the general manager.

8) Shortly after moving to Sunnyside, Complainant was considered to be the general manager of Sunnyside. She held the position from August 15, 1988, to July 20, 1990. The general manager duties at Sunnyside did not vary between early 1988 and early 1991. Each general manager, including Complainant, was expected to perform all of them.

9) Tee Dee's in Oregon City had a capacity of approximately 165 patrons, and was open 6 a.m. to midnight serving breakfast, lunch, and dinner with from 25 to 30 employees. Sunnyside had a capacity of approximately 330 to 380 patrons, was open 6 a.m. to midnight serving breakfast, lunch, and dinner, had a catering service, and had a cocktail lounge which was open later. Sunnyside had from 50 to 60 employees, including second level managers in the kitchen, bar, catering, and the office.

10) David Tucker, male, served as general manager of Sunnyside from February 26 to June 19, 1988, when he was terminated by Respondent. He was hired at a salary of $28,000 per year ($538.47 per week).

11) William Chinn, male, served as general manager of Sunnyside from June 20 to August 15, 1988, when he was terminated by Respondent. After one month, his salary was $30,000 per year ($576.92 per week).

12) Complainant was disappointed by her first pay check at Sunnyside. She had assumed that the hourly rate of pay offered was based on her Tee Dee salary for a 40 hour week ($10.12 per hour). Respondent had computed her hourly rate on the basis of a 55 hour week, or $6.50 an hour. Respondent told her she could make her own raises by working more overtime. She had worked long hours at Tee Dee's, but on salary.

13) Complainant understood that Respondent expected her to work approximately 55 hours per week as general manager. 55 and 2/3 hours per week at $6.50 an hour results in $260 straight time (40 X $6.50), and $144.95 overtime (15 and 2/3 x time and 1/2, or $9.25) for a total of $404.95 per week or $21,057 per year.

14) Respondent hired Complainant at Sunnyside at $6.50/hour from August 15 to October 23, 1988; $7.00/hour from October 24, 1988, to February 26, 1989; and $8.00/hour from February 27, 1989, to July 20, 1990.

15) Respondent emphasized to Complainant the necessity of cost control, particularly labor costs. The written general manager duties specified that labor should not exceed 28.5 percent of gross sales, and stated that "the labor cost includes all staff on the payroll."

16) Before Complainant became general manager, a mid-level manager on duty (MOD) would open the building and work a morning shift along with a hostess. The general manager would come in at 9 a.m. Complainant reduced labor cost by opening and eliminating the morning MOD shift.

17) Complainant held regular meetings attended by persons in charge of the kitchen, the lounge, bookkeeping, catering, and by available MOD's. Respondent often attended. Costs, sales, and personnel were among the subjects discussed.

18) Controlling labor costs was the most difficult part of Complainant's job. Respondent had definite requirements as to the number of staff needed on the floor at certain times of the business day. If fewer staff were present when Respondent visited, he became upset. If labor costs were higher than was acceptable to Respondent, he became upset. He was also concerned about food costs, supplies, and security.

19) Respondent, whom Complainant found intimidating, was a sort of father figure to her. Her efforts to please him were not always successful. At times, in front of staff and customers, he yelled at Complainant and used harsh words and accusations when he was displeased. She sometimes was in tears as a result.

20) As part of her duties of overseeing the operation, Complainant often came in to the restaurant on her days off and in the evenings to check food and service quality or to do computer work. Because of her concern about labor costs, she did not "clock in" on every such visit. If Respondent was on the premises, she would assure him that she was "off the clock."

21) Complainant usually left for the day around 3 p.m. She was available by telephone when she was not at the restaurant, even during vacation periods. She received calls from the night MOD and sometimes went to the restaurant as a result. She needed Respondent's personal approval if she was not going to be available.

22) Complainant filled in for absent employees in the kitchen and in catering and for absent MOD's.

23) In the spring of 1989, Complainant asked for more than the $8.00 an hour she was making. Respondent told her he couldn't afford it and to "hang in there." He talked about selling Sunnyside and a possible bonus for her if he did so. He also told her he would see that her pay would be recorded at a higher rate than she was actually getting, so that a new owner would pay her more.

24) In May 1989, Complainant took a vacation to California. While there, she decided to move to California and she so informed Respondent when she came back. He pointed out that living costs were higher and that it was difficult to raise children there. She gave 30 days written notice.

25) At Complainant's request, Respondent wrote a letter of recommendation. He also assisted her in drafting a letter of introduction.

26) Unknown to Complainant, Respondent monitored Complainant's activities between June 6 and June 28, noting negative observations in memo form. She saw the memo for the first time at hearing.

27) In anticipation of Complainant's departure, Respondent hired William Sontra to replace her. Sontra had previously worked for Respondent and was returning to the Portland area from living in California. Unknown at the time to Complainant, Respondent agreed to pay Sontra an annual salary of $28,000.

28) Complainant changed her mind about moving to California and Respondent agreed that she could stay on. He placed Sontra at a Tee Dee's in Hazeldell, Washington, which was smaller than the Oregon City Tee Dee's, but it baked pies in addition to the breakfast, lunch, and dinner service. Respondent paid Sontra at the rate of $28,000 a year as general manager of the Hazeldell Tee Dee's.

29) Shortly after May 1989, Complainant learned how much Chinn had made as general manager at Sunnyside ($30,000 per year). She checked other pay records and learned Tucker's salary ($28,000 per year).

30) When Complainant challenged Respondent on the pay of prior managers, he admitted paying them more, saying "look where it got me."

31) On August 29, 1989, Respondent sent to Complainant a memo regarding his evening visit to Sunnyside that date. He noted several discrepancies and gave directions for correction. On September 29, 1989, he sent to her a memo regarding his evening visit to Sunnyside on September 1, 1989. He again noted several discrepancies. Both memos suggested a closer watch by Complainant.

32) On January 8, 1990, Respondent did an "annual review of job performance" on Complainant. He noted a sales and income decline and high bar costs for 1989. Under needed improvements, he asked that Complainant cover more peak hours and be more attentive to staffing numbers and training.

33) On each occasion when Complainant asked for more money, Respondent suggested more evening hours. He never asked her to work "off the clock." She did so to keep the labor costs down. She feared she'd be "screamed at" if her overtime increased the costs. He never questioned her time cards during her employment at Sunnyside.

34) Complainant became increasingly frustrated with her level of pay, with Respondent's refusal to increase her pay, and with what she saw as his inconsistent demands. She believed she was giving dedicated service.

35) On March 26, 1990, Complainant requested in writing two days off per week, Wednesday and Sunday. She had previously had only Wednesdays off. Her request assured Respondent that she would continue to be available when needed and "to work at least 50 to 55 hours per week as stated by the owner."

36) Respondent wanted Complainant to work Sundays. He never acknowledged her March 26 request.

37) About May 25, 1990, Complainant sent to Respondent her labor cost comparisons between her managership and that of Chinn. Her computations showed savings during her tenure. In an accompanying memo, she cited wage increases as a factor in labor costs and the increased number of competitors in the area as a factor in the slight decrease in sales during her managership. She questioned Respondent's pay policies and refusal to adjust her wages, suggesting that he find another manager if she didn't merit more money.

38) Respondent visited Sunnyside early in the day on June 29, 1990. He became upset over the condition of the catering facility, which had not been cleaned up from use on the 28th. Complainant had allowed the catering manager to delay clean-up until the 29th because catering had worked late and the catering room was not to be in use on the 29th. She attempted to explain this to Respondent in the office and was "screamed at."

39) In the office, Respondent noticed some paperwork for new employees, none of whom had begun working. He noted that the US Department of Justice Immigration and Naturalization Service Form I-9 (I-9) was not complete for each applicant. He then went through all of the personnel records, looking for incomplete I-9 forms. He stated that Complainant was a "bitch" who would cost him thousands in fines.

40) Complainant was angry. She confronted Respondent stating that because of her sex, male general managers at Sunnyside were paid more than she was paid. She told him that she was done (meaning that she quit). Respondent mentioned that he might raise her $.25 an hour.

41) Betty Garrett, the bookkeeper, attempted to comfort Complainant, who was in tears. Complainant turned in her keys to Garrett and asked her to count out the safe.

42) Elizabeth Higbee, the chef, reminded Complainant of a management meeting scheduled that day. Complainant ran the meeting at which she told the managers she was quitting when a replacement was found. Respondent attended the meeting, but made no comment.

43) On June 29, 1990, Complainant submitted her formal, written resignation. She listed an intent to continue working for a minimum of two weeks up to a month to help train a replacement. She listed lack of support and appreciation from Respondent, no pay raise in the last year, and the "screaming and obsenities [sic] that frequently occur."

44) Complainant was a credible witness. She was emotionally involved in her testimony, reliving the less pleasant aspects of her job at Sunnyside. When she resigned, Complainant felt humiliated and devalued, and didn't believe that she had further opportunity at Sunnyside. She had been in tears before from Respondent's treatment of her. She felt that all she had given had been for nothing, that when she pleased Respondent he later downgraded her accomplishments. Her pride and self-esteem were gone. Her request for a second day off had been ignored. Her labor cost comparisons with Chinn had been ignored. Her request for pay parity with male general managers had been ignored. She considered the offer of $.25 an hour insulting.

45) Michael Murfin, male, replaced Complainant as general manager of Sunnyside, and worked there at a salary of $31,200 per year ($600 per week) from July 20, 1990, to February 5, 1991, when he was fired by Respondent, who then took over the general manager duties.

46) Complainant was not aware of Murfin's salary at the time Murfin was hired.

47) At Complainant's request, Respondent again gave her a letter of recommendation. It was an update of the one he created in May 1989.

48) Respondent monitored activities and occurrences at Sunnyside in July 1990, while Complainant trained Murfin. Respondent noted negative observations in memo form as "memo # 1" (July 13 to 18) and "memo # 2" (July 21 to 22). Complainant saw these memos for the first time at hearing. Her last day at Sunnyside was July 20.

49) Complainant was paid $8,275 from August 15 to December 31, 1988, a rate of $460 per week. Complainant was paid $26,689 from January 1 to December 31, 1989, a rate of $513 per week. Complainant earned $13,401 from January 1 to July 20, 1990, a rate of $515 per week.

50) If Complainant had been paid a salary of $30,000 annually (a rate of $577 per week), she would have earned $2,111 more in 1988, $3,311 more in 1989, and $3,332 more up to July 20, 1990.

51) Complainant became employed at Hallmark Inn, Portland, when she left Sunnyside in late July 1990. Her rate of pay was less than $440 per week.

52) If Complainant had remained as general manager at Sunnyside at an annual salary of $30,000 from July 20, 1990, until January 9, 1991, when she ceased working at Hallmark Inn, she would have earned $3,435 more than her actual earnings for the period.

53) Respondent is an intelligent, active individual with much ownership experience in the restaurant business. He is also a demanding, authoritarian, and opinionated employer. He testified that he hired general managers based on their restaurant and management experience and knowledge. He stated that he placed Complainant on an hourly wage because she had not always been available as general manager at Tee Dee's in Oregon City. He

stated that Complainant could have met or exceeded the earnings of the other general managers at Sunnyside by working more hours, and that he used the hourly wage to motivate her to his standard of 65 to 75 hours per week for a general manager. He stated that Chinn, Tucker, and Murfin all worked longer hours than Complainant, but there was no record or evidence other than his statement to support his observation. He denied that 55 hours a week was a standard expectation of a general manager, but acknowledged that it was an expectation for other hourly paid managers. He denied that Complainant's sex was a factor in her rate of pay or in denying her a salary, but he acknowledged that Complainant was the only hourly general manager and that he had originally told the Agency that regarding wages he operated by a maxim of "willing buyer and willing seller," or "willing employer and willing employee." He testified that Complainant agreed to the hourly rate and knew of his expectation of around 70 hours per week. He stated a calculation of 70 hours per week at $6.50 an hour being equal to $28,730 annually. He characterized Complainant's managership as satisfactory, but testified that he knew he couldn't rely on her. He was ambivalent about her job title, stating that she was hired at Sunnyside as "Assistant Manager," but testified further that she "essentially" performed the general manager duties. He offered no credible explanation for retaining her as general manager for nearly two years in the face of the performance deficiencies he described as reasons for refusing her requests for higher pay. The Forum found such testimony to be inconsistent and of doubtful credibility, and has accordingly credited only those portions of his testimony which were verified by or not inconsistent with other credible evidence or inference on the record.

54) Peter Martindale was a senior investigator for the Agency who interviewed Complainant's co-workers during his investigation of her administrative complaint. He made contemporaneous notes of each interview and transcribed them at his office. In accordance with standard Agency practice, he did not submit his interview summaries to each witness for review. There was no evidence that Martindale had any interest in the case beyond his duties as a fact gatherer. His testimony as to his methods and the accuracy of his observations was entirely credible.

55) Many of the witnesses presented by Respondents were current employees or ex-employees of Respondents or of Tee Dee's. The Hearings Referee observed that some exhibited a discernible if unexplained anger or hostility toward Complainant, which tainted their credibility (Peterson, Whyte, Cristofaro, Moss, Penni). One had been fired by Complainant (Moss), another had been passed over by Respondent when he promoted Complainant (Cristofaro). One current employee called by the Agency (Thomas) expressed a concern that this case might cause Respondent to lose the restaurant and she would be out of a job. Some tried to refute their interviews if what the Agency investigator had recorded seemed to favor Complainant's cause (White, Thomas, Cristofaro, Garrett, Diaz, Loftis). The testimony at hearing was under penalty of perjury, but the prior inconsistent statements eroded its reliability. Except where it was confirmed by other credible evidence or inference on the record, the Forum has accorded little weight to the testimony of these witnesses. Other than overwhelmingly confirming that Complainant was indeed general manager at Sunnyside, they added little beyond their personal opinions of her character or irrelevant observations of her work habits.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondents Thomas H. Disch, Jr. and Henry Spivak were a partnership doing business as Sunnyside Inn Restaurant in Clackamas County, Oregon, and engaging or utilizing the personal service of one or more employees.

2) Respondent Thomas H. Disch, Jr. was owner and CEO of T. H. Disch, Inc., which employed Complainant, female, as general manager of Tee Dee's Restaurant in Oregon City, Oregon, from November 1985 to July 29, 1987, and from November 12, 1987, to August 15, 1988, where she was paid an annual salary of $21,060.

3) Complainant was hired at Sunnyside Inn Restaurant by Respondents and worked as general manager at Sunnyside from August 15, 1988, to July 20, 1990. She was paid as general manager of Sunnyside $6.50/hour from August 15 to October 23, 1988; $7.00/hour from October 24, 1988, to February 26, 1989; and $8.00/hour from February 27, 1989, to July 20, 1990. As an hourly employee, her highest average weekly wage was $515 per week.

4) Respondents had hired David Tucker, male, as general manager of Sunnyside Inn Restaurant at a salary of $28,000 per year ($538 per week) from February 26 to June 1988.

5) Respondents had hired William Chinn, male, as general manager of Sunnyside Inn Restaurant from June 20 to August 15, 1988, at which time his salary was $30,000 per year ($577 per week).

6) Respondents hired William Sontra, male, to be general manager of Sunnyside Inn Restaurant at a salary of $28,000 per year ($538 per week) to begin in June 1989. When Complainant did not move to California as expected, Respondents placed him at a Tee Dee's in Vancouver, Washington, still at $28,000.

7) When Complainant finally left Sunnyside, Respondents hired Michael Murfin, male, as general manager of Sunnyside Inn Restaurant at a salary of $31,200 per year ($600 per week) from July 20, 1990, to February 5, 1991.

8) Complainant would have been paid at least $30,000 per year except for her sex. She was paid $8,754 less than a male would have been paid as manager of the Sunnyside Inn Restaurant from August 1988 to July 1990.

9) Complainant resigned her employment with Respondent effective July 20, 1990, because she found the working conditions created by Respondent Disch through unequal pay due to her sex and intimidation due to her sex to be intolerable.

10) Following her resignation, Complainant obtained other employment, but lost income of $3,435 from

what she should have made at Sunnyside Inn Restaurant.

11) Complainant felt insulted, degraded, demeaned, and devalued by Respondents' refusal to accord her parity because of her sex and the resulting intolerable working conditions. Her reduced self-esteem, loss of personal dignity, and emotional suffering were aggravated by the necessity to resign and continued up to the time of hearing.

12) Respondents' defenses involving Complainant's allegedly substandard performance and achieving equivalent pay at an hourly rate by increasing the number of hours worked were pretextual.

CONCLUSIONS OF LAW

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

2) At all times material herein, Complainant was an employee employed in Oregon by Respondents.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein under ORS 659.010 to 659.110, together with the authority to eliminate the effects of any unlawful practice found, and the amounts awarded below are a proper exercise of that authority.

4) ORS 659.030 provides, in pertinent part:

> "(1) For the purposes of ORS 659.010 to 659.110, * * * it is an unlawful employment practice:
>
> "(a) For an employer, because of an individual's * * * sex * * * to bar or discharge from employment such individual. * * *
>
> "(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Respondents Disch and Spivak compensated Complainant as general manager of the Sunnyside Inn Restaurant at a rate of pay which was less than the rates of pay Respondents paid to males who were general managers of said restaurant. The difference in pay was due to Complainant's sex, female, and Respondents thereby committed an unlawful employment practice in violation of ORS 659.030 (1)(b).

5) Respondent's failure to compensate Complainant because of her sex created an intolerable work condition, as did Respondent Disch's treatment of Complainant when she repeatedly sought parity, and Complainant's resignation was a constructive discharge whereby Respondents committed an unlawful employment practice in violation of ORS 659.030(1)(a).

OPINION

Ruling on Agency Motion to Strike

The Forum has allowed the Agency's motion to strike Respondents' defense of equitable estoppel, holding that no estoppel could exist.

> "An equitable estoppel may exist when one party (1) has made a false representation; (2) the false representation is made with knowledge of the facts; (3) the other party is ignorant of the truth; (4) the false representation is made with the intention that it should be acted upon by the other party; and (5) the other party is induced to act upon it, to that party's detriment." *In the Matter of Oregon Department of Transportation,* 11 BOLI 92, 104 (1992) (citing *DeJonge v. Mutual of Enumclaw,* 104 Or App 296, 800 P2d 313 (1990); *Oregon Bank v. Nautilus Crane & Equipment Corp.,* 68 Or App 131, 683 P2d 95 (1984); *Hess v. Seeger,* 55 Or App 746, 760-761, 641 P2d 23, *rev den,* 293 Or 103, 648 P2d 851 (1982); *Dobie v. Liberty Homes, Inc.,* 53 Or App 366, 632 P2d 449 (1981); *Bash v. Fir Grove Cemeteries Co.,* 282 Or 677, 581 P2d 75 (1978); *Donahoe v. Eugene Planing Mill,* 252 Or 543, 450 P2d 762 (1969)).

Respondents cite *Stovall v. Sally Salmon Seafood,* 306 Or 25, 757 P2d 410 (1988), a case involving a workers' compensation claimant's failure to disclose a prior injury or condition, which led to a subsequent claim. The Forum is unable to relate that situation with one in which an employer offers a promotion involving, according to Respondent, a different method, but not a different rate, of pay. Respondents' argument depends on them being misled to their detriment by Complainant's consent to the proffered hourly wage (about which she was misled) rather than demanding a salary. Neither the facts as alleged nor the evidence heard support such an argument. Acceptance of an unlawful wage scale does not estop an employee's claim for lawful compensation.

Disparate Pay Based on Sex

The Agency has presented a prima facie case of disparate pay based on sex. Complainant, female, worked as general manager of Respondents' restaurant. Respondents had paid previous general managers, all male, at a rate from $28,000 to $30,000 annually in the position. Respondents determined to pay Complainant, who was on a salary in a smaller facility, by the hour. Respondent assured her that her hourly rate would be based on the salary she had been making. It was, but not on the basis of 40 hours as Complainant had understood. When Complainant thought she might relocate, Respondents arranged for another manager, also male, to start at $28,000 annually. Complainant stayed, and shortly thereafter learned what others had made in her position. Her attempts to get parity from the managing partner were unsuccessful and contributed to his generally unjustified dissatisfaction with her. Nonetheless, Complainant was general manager of Respondent's restaurant for 23 months. Her immediate predecessor had lasted less than two months. The man before him was general manager for four months. Her male successor lasted 6½ months.

Respondents' defenses were varied and inconsistent. Respondents initially denied that Complainant was ever general manager, then denied that she was a full-fledged general manager. They asserted that she was closely supervised by Respondent Disch, that many general manager tasks were performed by Disch, and that her comparators had been, in contrast, largely independent. The evidence was other-

wise. Complainant was the general manager, and was originally assigned as such, regardless of paper titles or Respondents' rationale for avoidance of liability.

Respondent Disch testified that 65 to 75 hours per week was his expectation of a general manager at Sunnyside. The credible evidence did not establish that any of Complainant's male comparators consistently worked those hours. It was established that Complainant worked at least 50 to 55 hours per week "on the clock," and it was further established to the Forum's satisfaction by credible testimony that she worked additional hours each week which were not logged. The Forum finds it significant that Respondents failed to respond to Complainant's request for a second day off. That request clearly outlined her understanding, many months after she was hired, of her obligation to be on call and "to work at least 50 to 55 hours per week as stated by the owner." The Forum finds it significant that her original rate of $6.50 an hour at Sunnyside computes with overtime to approximately $21,060, her salary at Tee Dee's.

The Forum finds it entirely believable, given Respondent Disch's emphasis on controlling labor costs, that Complainant would be apprehensive about claiming all of her overtime hours. By failing to pay Complainant on a salary basis, Respondents converted a fixed managerial cost into what for Complainant would be a self-defeating earning situation. She saw her hourly wage as part of the labor costs. She could not work more hours without risking Respondent's displeasure.

But it is not her performance of the job with which this case is primarily concerned: it is the content of the job and the level of skill, effort, and responsibility which must be exercised in the job. This Forum has previously observed that alleged performance deficiencies "should be dealt with as they arise and not as an afterthought as a defense to a charge of an unlawful practice." *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61 (1992).

Respondent suggested that he based the pay for general managers on experience and knowledge. But, as pointed out by the Agency, where the skill, effort, and responsibility required are the same, it is the skills that must be exercised rather than those possessed which determine job value. *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion, West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983); *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139 (1989). Where a disparity in pay exists between employees of different gender and the job duties are the same or insignificantly different, and there is no factor other than sex to account for the discrepancy, the employer encompasses an equal compensation violation of ORS 659.030. *In the Matter of Wild Plum Restaurant, Inc.*, 10 BOLI 19 (1991) (citing *In the Matter of City of Portland*, 2 BOLI 110 (1981), *aff'd, City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475 (1984)).

Respondents argued that the Agency failed to prove "beyond a preponderance of the evidence" that there was a disparity in pay. Respondents describe an incorrect standard. All that is required in this forum is a preponderance of evidence. *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 555, 780 P2d 743 (1989), *rev den* 308 Or 660, 784 P2d 1101 (1989) (citing *Metcalf v. AFSD*, 65 Or App 761, 765, 672 P2d 379(1983), *rev den*, 296 Or 411, 675 P2d 493 (1984), and ORS 183.482(8)(a)(B)). "Preponderance of evidence means 'more probably true than false.'" *State v. Jackson*, 313 Or 189, 832 P2d 443 (1992) (quoting from *Cook v. Marshall*, 214 Or 513, 527, 330 P2d 1026 (1958)). The Forum has used the preponderance standard, that is, that a fact is more likely than not, herein. The Forum has found it more likely than not, based on evidence in the whole record, that Respondents paid Complainant less than three other general managers, all male, with the same duties, because of her sex.

Remedy

The Forum has computed the difference between Complainant's actual earnings and what she would have earned if properly paid while she worked at Sunnyside. Similarly, the Forum has compared her actual earnings after her constructive discharge with what she should have earned had she continued at Sunnyside.

A constructive discharge results when an employee resigns over intolerable working conditions imposed by the employer. Unequal pay based on sex, where a demand for equality has been refused, creates intolerable (i.e., insoluble) working conditions over which a reasonable person would resign, and a resulting resignation is a constructive discharge. *Wild Plum, supra; West Coast Truck Lines, supra.*

Complainant testified to severe and prolonged emotional upset. She left a job that she had planned on keeping and took a position at less pay than Respondents should have paid. Both on the job at Sunnyside and afterward, she experienced tears, anxiety, sleeplessness, stress, and a diminution of self-worth over her treatment by Respondent Disch that was traceable to the wage issue. The Forum is awarding Complainant $7,500 for her emotional suffering.

Respondents' Exceptions

Respondents filed seventeen exceptions to the Proposed Order. The Forum has evaluated and accepted or rejected them as listed below. References are to Proposed Findings of Fact – The Merits (PFOF) and Findings of Fact – The Merits (FOF).

Exception No. 1: Respondents assert that the Agency's motion against their equitable estoppel defense was based on the Forum's inability to decide an equity defense. The Forum has struck the defense because it was inappropriate. The Commissioner's decisional ability is not limited to non-equity matters.

Exception No. 3: Respondents pointed out that PFOF 8 failed to recite that there were a number of mid-level managers at Sunnyside. That omission is corrected in FOF 9 herein.

Exception No. 4: Respondents took issue with PFOF 15 through 17. PFOF 16 and 17 dealt with

Complainant's early morning routine at Sunnyside in regard to running the computer. The Forum finds that such facts are not essential to the ultimate finding herein, and PFOF 16 and 17 have been deleted. The Forum finds that PFOF 15 is supported by the evidence. It is repeated as FOF 16 herein.

Exception No. 5: Respondents excepted to PFOF 6, 7, and 18. The Forum has clarified the expectation of performance for the general manager contained in PFOF 6 and 7; the revision is in FOF 8 herein. PFOF 18 was deleted.

Exception No. 9: Respondents excepted to PFOF 24, which compared Complainant's on premises presence with the male managers. The Finding has been deleted.

Exception No. 11: Respondents excepted to PFOF 30, 31, and 32 because, to Respondents, those Findings seemed to suggest "that Disch paid Sontra more" "to run a smaller facility." These Proposed Findings were mere recitations of fact confirming the lowest value placed on the Sunnyside position, and were supported by the evidence. They are combined into FOF 27 and 28 herein.

Exception No. 14: Respondents excepted to PFOF 57, having to do with Respondent Disch's testimony and credibility. The Forum has clarified this Finding, which appears as FOF 53 herein.

Exception No. 15: Respondents excepted to PFOF 59, having to do with the testimony of many employees and ex-employees of Sunnyside and Tee Dee's. The Forum has revised this Finding, now FOF 55, to reflect more fully the specifics affecting credibility.

Exception No. 17: Respondents excepted to Proposed Ultimate Finding of Fact 11, having to do with Complainant's emotional distress. Counsel protests

> "that the Referee did not allow Respondent to question Complainant at the hearing about her concurrent divorce and the stress and/or mental anguish she may have been experiencing at the same time she was upset with matters at the Sunnyside Inn. The Referee did not afford Respondent an opportunity to prove her concurrent divorce was actually the cause, if not at least a contributing factor, to her alleged mental anguish and emotional distress. Accordingly, Respondent takes exception to finding number 11 of the Ultimate Findings of Fact that Respondent caused Complainant's emotional distress."

The Forum has searched the record carefully and has not found a ruling even remotely similar to that alleged in the exception. Complainant's examination does not reflect an attempt by counsel to question Complainant in this regard, and there is no ruling elsewhere in the record. The exception is without merit.

Exceptions Nos. 2, 6, 7, 8, 10, 12, 13, and 16, involving PFOF 3, 11, 12, 23, 26, 37, and 48, and Proposed Ultimate Finding of Fact 12, respectively, are without merit in that each Proposed Finding is supported by evidence on the record and correctly states the fact or inference based thereon. These Proposed Findings are now, respectively, FOF 5, 12, 13, 20, 23, 33, and 44 and Ultimate Finding of Fact 12 herein.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondents, THOMAS H. DISCH, JR. and HENRY SPIVAK, Partners, dba Sunnyside Inn, are hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for KERRYLEE HARRINGTON, in the amount of:

a) EIGHT THOUSAND SEVEN HUNDRED FIFTY-FOUR DOLLARS ($8,754), representing wages Complainant lost between August 15, 1988, and July 20, 1990, as a result of Respondents' unlawful practice found herein; PLUS,

b) THREE THOUSAND FOUR HUNDRED THIRTY-FIVE DOLLARS ($3,435), representing wages Complainant lost between July 20, 1990, and January 9, 1991, as a result of Respondents' unlawful practice found herein; PLUS,

c) INTEREST AT THE ANNUAL RATE OF NINE PERCENT (9%), on the amount in section a) above from July 20, 1990, until paid and on the amount in section b) above from January 9, 1991 until paid, computed and compounded annually; PLUS,

d) SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500), representing compensatory damages for the mental and emotional distress Complainant suffered as a result of Respondents' unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for emotional distress, at the legal rate, accrued between the date of this Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any employee, and particularly in the compensation of any employee, based upon the employee's sex.

In the Matter of

CRISTOBAL LUMBRERAS

and Fremont Forest Systems, Inc., Respondents.

Case Number 36-92

Final Order of the Commissioner

Mary Wendy Roberts

Issued January 13, 1993.

SYNOPSIS

Respondents failed to provide to the Commissioner a certified true copy of all payroll records for work done as a farm labor contractor, when they paid workers directly, at least every 35 days starting from the time work first began on a reforestation contract, in violation of ORS 658.417(3) and OAR 839-15-300(2). One payroll was late by 29

days. There were no aggravating circumstances, and Respondents had no prior violations of statutes or rules. The Commissioner assessed a $250 civil penalty, pursuant to ORS 658.453 (1)(e), OAR 839-15-508(2)(b), and 839-15-510.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 8, 1992, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Cristobal Lumbreras (Respondent Lumbreras) represented himself. Fremont Forest Systems, Inc. (Respondent Fremont) was in default, and did not appear through a representative. Respondent Lumbreras called himself as a 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 Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On January 16, 1992, the Agency issued a "Notice of Intent to Assess Civil Penalties" (hereinafter Notice of Intent) to Respondents. The Notice of Intent cited the following bases for the civil penalties: (1) failing to provide the Commissioner certified true copies of all payroll records for work performed in reforestation on U.S. Forest Service contract number 52-04TO-1-1010S (hereinafter 1010S), in violation of ORS 658.417(3) and OAR 839-15-300(2); and (2) assisting unlicensed persons to act as farm labor contractors, in violation of ORS 658.440(3)(e).

2) The Notice of Intent was served on Respondent Lumbreras on February 16, 1992. The notice was served on Respondent Fremont on February 12, 1992.

3) By a letter dated March 3, 1992, Respondent Lumbreras denied the violations. The heading on the letter was "Fremont Forest Systems, Inc.," with its address, and the letter was signed by Respondent as "President." Attached to his response were certified payroll records.

4) On March 30, 1992, the Agency requested a hearing from the Hearings Unit.

5) On April 3, 1992, the Hearings Unit issued to Respondents and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to Respondents a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.

6) On April 22, 1992, the Agency moved for an order consolidating this matter with case number 30-92, In the Matter of Bardomiano G. Lumbreras, Isabel S. Lumbreras, and Willamette Forest Systems, Inc. On April 23, 1992, the Hearings Referee on case number 30-92 wrote to the respondents of both cases to request their response to the Agency's motion. The Hearings Unit received no response. On May 20, 1992, the Hearings Referee granted the motion to consolidate the cases, and issued to Respondents and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearing Referee.

7) On June 16, 1992, the respondents in case number 30-92 requested a postponement. Following an opportunity for the other participants to respond, the Hearings Referee granted the motion, and the hearing was reset for December 8, 1992.

8) On November 5, 1992, the Agency filed a motion for summary judgment, with exhibits, regarding the first allegation in the Notice of Intent.

9) On November 10, 1992, the Hearings Referee wrote a letter to the Respondents regarding the motion for summary judgment, and required their responses to the motion by November 20, 1992. In addition, the Hearings Referee notified Respondent Lumbreras that his letter answer to the Notice of Intent could not serve as an answer from Respondent Fremont. The Hearings Referee notified Respondents that Respondent Fremont was required by law to be represented by an attorney, and that Respondent Fremont had until November 20, 1992, to file an answer to the Notice of Intent. As of November 24, 1992, neither Respondent had responded.

10) On November 24, 1992, the Hearings Referee found Respondent Fremont in default for failing to file an answer to the Notice of Intent.

11) The Hearings Unit received no request for relief from default from Respondent Fremont.

12) On November 25, 1992, the Hearings Referee granted the Agency's motion for summary judgment.

13) On November 25, 1992, the Agency notified the Hearings Referee that the consolidated case, number 30-92, had settled. In addition, the Agency dismissed the second allegation against Respondents. The Agency claimed there were no aggravating factors to consider in assessing a civil penalty for the violation found by summary judgment, and requested that the hearing in the two cases be canceled.

14) On November 30, 1992, the Hearings Referee denied the Agency's request, because Respondent Lumbreras was, by rule, allowed an opportunity to present mitigating evidence for the purpose of reducing the amount of the civil penalty to be imposed. The Hearings Referee ordered a telephone hearing.

15) At the start of the hearing Respondent Lumbreras said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

16) Pursuant to ORS 183.415(7), the Agency and Respondent Lumbreras were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) The Proposed Order, which included an Exceptions Notice, was issued on December 11, 1992. Exceptions, if any, were to be filed by December 21, 1992. No exceptions were received.

FINDINGS OF FACT – THE MERITS

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

2) Respondents were licensed as farm labor contractors by the State of Oregon during 1991.

3) Respondents performed the activities of a forest labor contractor pursuant to a subcontract between Respondents and Willamette Forest Systems, Inc. (Willamette). Willamette had a contract, number 1010S, with the Forest Service of the United States Department of Agriculture (hereinafter the USFS).

4) On February 19, 1991, Respondents started work on the contract. Respondents completed work on the contract on April 2, 1991.

5) On April 24, 1991, Respondents submitted certified payroll records to the Agency for work performed between February 19 and March 16, 1991. The Agency received those records on April 25.

6) On April 29, 1991, Respondents submitted certified payroll records to the Agency for work performed between March 16 and April 2, 1991. The Agency received those records on April 30.

7) Thirty five days after February 19, 1991, was March 26, 1991. Thirty five days after March 26, 1991, was April 30, 1991.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the persons herein. ORS 648.405 to 658.485.

2) The actions, inactions, and statements of Respondent Lumbreras are properly imputed to Respondent Fremont.

3) By failing to provide to the Commissioner a certified true copy of all payroll records for work done as a farm labor contractor, when he paid employees directly, at least every 35 days starting from the time work first began on the reforestation, Respondents violated ORS 658.417(3) and OAR 839-15-300.

4) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondents. ORS 658.453(1)(c); OAR 839-15-508(2)(b). The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

OPINION

Respondent Fremont failed to file an answer to the Notice of Intent, and thus defaulted to the charges set forth in the Notice. In default cases the task of this Forum is to determine if a prima facie case supporting the Agency's Notice has been made on the record. ORS 183.415(6); *In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990), *In the Matter of Michael Burke*, 5 BOLI 47, 52 (1985). *See* also OAR 839-30-185.

Pursuant to OAR 839-30-070(6), the Agency filed a motion for summary judgment on the first allegation in its Notice of Intent. It asserted that no genuine issue of fact existed and the Agency was entitled to judgment as a matter of law as to the first violation alleged in the charging document. Subsection (c) of OAR 839-30-070(6) provides that, where the Hearings Referee recommends that the motion for summary judgment be granted, the recommendation shall be in the form of a Proposed Order, and the procedure established for issuing Proposed Orders shall be followed. This Order grants the Agency's motion and has been issued according to that procedure.

Based on the uncontroverted evidence produced by the Agency, the Forum finds that the Agency has established a prima facie case.

ORS 658.417 provides in part:

> "In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:
>
> "* * *
>
> "(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such information as the commissioner, by rule, may prescribe."

OAR 839-15-300(2) provides:

> "The certified true copy of payroll records shall be submitted at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made."

Credible evidence showed that Respondents started work on the USFS contract on February 19, 1991. Respondents' first submission of payroll statements was on April 24, 1991. That payroll should have been submitted by no later than March 26, 1991. Respondents were 29 days late with their first submission. Thirty five days following March 26 is April 30, the date the Agency received Respondents' second payroll. Thus, Respondents were not late with that payroll. *In the Matter of John Paauwe*, 5 BOLI 168, 172 (1986).

Based on this credible evidence and Respondent Lumbreras's admission that he did not provide certified payrolls to the Commissioner within the time required, the Forum has found that Respondents violated ORS 658.417(3).

The Agency proposed to assess a civil penalty for Respondents' violation. The Commissioner may assess a civil penalty not to exceed $2,000 for this violation. ORS 658.453(1)(e); OAR 839-15-508(2)(b). The Commissioner may consider mitigating and aggravating circumstances when determining

the amount of any penalty to be imposed. OAR 839-15-510(1). It is the responsibility of the Respondents to provide the Commissioner with any mitigating evidence. OAR 839-15-510 (2). Here, the Agency alleged no aggravating circumstances. Respondents have no prior violations of statutes or rules. The Forum finds the magnitude and seriousness of this violation low.

Accordingly, the Forum assesses a $250 civil penalty on Respondents for one violation of ORS 658.417(3), for filing late by 29 days a certified payroll on one contract. *Cf., In the Matter of Francis Kau,* 7 BOLI 45 (1987) ($500 for one violation of ORS 658.417(3), for failing to file certified payroll records); *In the Matter of Deanna Donaca,* 6 BOLI 212 (1987) ($500 for two violations of ORS 658.417(3), for failing to file certified payroll records on two contracts); *In the Matter of Jose Solis,* 5 BOLI 180 (1986) ($4,000 for two violations of ORS 658.417(3), for twice failing to file certified payroll records on one contract, with multiple other violations and aggravating circumstances); and *Paauwe, supra* ($1,000 for six violations of ORS 658.417(3), for failing to file certified payroll records six times on two contracts).

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, CRISTOBAL LUMBRERAS AND FREMONT FOREST SYSTEMS, INC. are hereby ordered to deliver to the Bureau of Labor and Industries, Business Office Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2162, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of TWO HUNDRED AND FIFTY DOLLARS ($250), plus any interest thereon, which accrues at the annual rate of nine percent, between a date ten days after the issuance of this Order and the date Respondents comply with this Order.

In the Matter of

DAN CYR ENTERPRISES, INC.,

dba Import Auto Salvage and Repair, Daniel J. Cyr, and Import Auto Salvage, Inc., Respondents.

Case Number 42-92

Final Order of the Commissioner

Mary Wendy Roberts

Issued January 13, 1993.

SYNOPSIS

Respondents terminated Complainant for legitimate, nondiscriminatory reasons; namely, Complainant had a bad attitude at work and damaged an automotive part that he was removing for resale. Respondents did not discriminate against Complainant because he was an injured worker. Complainant's protected class did not play a key role in the termination decision. ORS 659.410; 659.030(1)(g); OAR 839-05-015.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 21, 1992, in Room 1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. Alan McCullough, Case Presenter with the Civil Rights Division of the Bureau of Labor and Industries (the Agency), represented the Agency. David Gimmey (Complainant) was present throughout the hearing, and was not represented by counsel. James R. Vestigo, Attorney at Law, represented Dan Cyr Enterprises, Inc. (Respondent DCE) and Daniel J. Cyr (Respondent Cyr). Mr. Cyr was present throughout the hearing on his own behalf and as Respondent DCE's representative.

The Agency called the following witnesses (in alphabetical order): Billy Ray Bess, former employee of Respondent DCE; David Gimmey, Complainant; Diana Gimmey, Complainant's wife; Chris Lassen, Investigator, Workers' Compensation Division, Department of Insurance and Finance; and Jane McNeill, Senior Investigator with the Agency.

Respondent called the following witnesses (in alphabetical order): Steven Arnstutz, General Manager, Respondent DCE; Daniel Cyr, Respondent; Larry Davis, employee of Respondent DCE; and Art Warshawsky, employee of Respondent DCE.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about August 13, 1991, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that he was the victim of the unlawful employment practices of the Respondent. He alleged that Respondent DCE discriminated against him because he had an on-the-job injury and utilized the workers' compensation system in that, following his on-the-job injury, Respondent DCE terminated him.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent DCE in violation of ORS 659.410.

3) The Agency attempted to resolve the complaint by conference, conciliation, and persuasion, but was unsuccessful.

4) On June 1, 1992, the Agency prepared and duly served on Respondents Specific Charges that alleged that Respondent DCE had discharged Complainant from employment because Complainant suffered an on-the-job injury and invoked the Oregon workers' compensation procedures. The Specific Charges alleged that Respondent DCE's action violated ORS 659.410. In addition, the Specific Charges alleged that Respondent Cyr aided and abetted Respondent DCE in terminating Complainant, in violation of ORS 659.030(1)(g).

5) With the Specific Charges, the Forum served on Respondents the

following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On June 8, 1992, Respondents' attorney, James Vestigo, requested an extension of time to file Respondents' answer. The extension was requested because Mr. Vestigo was being married and was to be unavailable temporarily. On June 11 the Hearings Referee granted that request.

7) On June 11, 1992, the Agency filed a motion to postpone the hearing because the Agency's Case Presenter, Alan McCullough, was taking a parental leave of absence, and would have inadequate time upon his return to prepare for the hearing in this case. After giving Respondents an opportunity to respond to the motion, the Hearings Referee granted the motion on July 8, 1992.

8) On June 23, 1992, Ken Bradford wrote to the Hearings Referee to request that Import Auto Salvage, Inc. be dismissed from this case. He stated that in October 1989 he and his wife sold the Import Auto Salvage and Repair business to Respondent Cyr, but retained the Import Auto Salvage, Inc. name. Import Auto Salvage, Inc. was not an active business, and Mr. Bradford and his wife had no involvement with Respondent Cyr's business. After giving the Agency and Respondents an opportunity to respond to Mr. Bradford's letter, and after being advised that Import Auto Salvage, Inc. had no financial interest in or control over Respondent DCE while Complainant was employed, the Hearings Referee granted the Agency's motion to dismiss Import Auto Salvage, Inc. as a Respondent from the case.

9) On July 13, 1992, Respondents filed a timely answer in which they denied the allegations mentioned above in the Specific Charges.

10) On September 4, 1992, the Hearings Referee sent the Agency and Respondents prehearing instructions.

11) On September 8, 1992, Respondents' attorney requested a postponement of the hearing in order that he could attend the annual Oregon State Bar Convention. The Agency had no objection, as long as the hearing was rescheduled to occur before November 1992. The Hearings Referee granted Respondents' motion, and the hearing was rescheduled to begin on October 21, 1992.

12) On October 8, 1992, the Hearings Referee again sent the Agency and Respondents prehearing instructions.

13) Pursuant to OAR 839-30-071, the Agency and Respondents each filed a Summary of the Case.

14) On October 14, 1992, Respondents filed an amended answer in which they denied the allegations mentioned above in the Specific Charges, and asserted that Complainant failed to mitigate his alleged damages.

15) A prehearing conference was held on October 21, 1992, at which time the Agency and Respondent stipulated to facts that were admitted by the pleadings. Those facts were admitted into the record by the Hearings Referee at the beginning of the hearing.

16) At the start of the hearing, the attorney for Respondents stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

17) Pursuant to ORS 183.415(7), the Agency and Respondents were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) At the conclusion of the Agency's presentation of evidence, Respondents moved to dismiss the Specific Charges for lack of sufficient evidence. Following argument, the Hearings Referee denied the motion.

19) At the end of the hearing, the Agency and Respondents agreed to stipulate to Complainant's back wages. The Hearings Referee left the record open until November 4, 1992, for that stipulation. The Hearings Referee also gave Respondents until November 4 to advise the Hearings Referee about whether they would call Ernest Taylor as a witness; Taylor was subpoenaed by Respondents, but failed to show up at the hearing. On November 2, in a conference call, the Agency and Respondents gave the Hearings Referee their stipulation, and Respondents' attorney advised the Referee that Respondents would not call Taylor as a witness.

20) The Proposed Order, which included an Exceptions Notice, was issued on December 2, 1992. On December 7, 1992, the Agency requested an extension of time to file exceptions to the Order. On December 8, 1992, that request was granted. The deadline for exceptions was extended to January 15, 1993, for both the Agency and Respondents. On January 4, 1993, the Agency advised the Hearings Referee that the Agency would not file exceptions. No exceptions were received from Respondent.

FINDINGS OF FACT – THE MERITS

1) At the times material herein, Respondent DCE was an Oregon corporation doing business as Import Auto Salvage & Repair within the State of Oregon, and utilized the personal services of six or more employees.

2) Respondent Cyr was president and owner of Respondent DCE.

3) Complainant was initially employed by Respondent DCE in September 1990.

4) Complainant's job was parts extractor.

5) On or about March 1, 1991, Complainant injured his lower back at work.

6) Complainant injured his back while helping Billy Bess, his supervisor at the time, lift a motor out of a car and onto an engine stand.

7) Complainant reported this injury to his supervisor the same day he was injured and sought medical attention the following day.

8) Respondent Cyr asked Complainant to use his own insurance company for his medical care.

9) Complainant completed a workers' compensation claim form (801)

after his injury and submitted it to Respondent Cyr.

10) Complainant was off work for a couple of days. Respondent DCE paid Complainant's wages during this time, and paid Complainant's medical bills.

11) Complainant's physician put him on light duty until late March 1991, at which time Complainant obtained a full duty release and returned to his former duties.

12) Respondent DCE had no light duty jobs. Respondent DCE created a light duty job for Complainant until he returned to his former duties.

13) At the time of Complainant's injury, Respondent DCE did not have workers' compensation insurance coverage.

14) Complainant was Respondent's only compensably injured worker during the period of time that Respondent DCE did not have workers' compensation insurance coverage.

15) Complainant's workers' compensation claim caused the Oregon Department of Insurance and Finance (DIF) to investigate Respondent DCE. On May 6, 1991, DIF fined Respondent DCE $1,000 for failing to carry workers' compensation insurance coverage.

16) Complainant had behavior problems at work. Both before and after his injury, he had a bad attitude and daily displayed his temper. When he was angry he threw tools, slammed doors, argued, and complained. On one occasion, in front of a customer he dumped a container of antifreeze he had drained from a car when Art Warshawsky, a counter person for Respondent DCE, told him to move the car. He swore in front of customers. Complainant had problems pulling the right parts from cars.

17) On June 27, 1991, Warshawsky told Complainant to pull a sunroof out of a Honda. A customer wanted the entire sunroof assembly. Complainant asked Warshawsky three times if he wanted only the glass, and he said yes. Complainant cut the seal around the glass to get the glass out, damaging the sunroof assembly. Steve Amstutz, Complainant's supervisor at that time, chewed out Complainant for pulling the part out wrong. Complainant said he was told to pull the glass only, but Amstutz thought he was lying, or should have known to pull the whole assembly. Amstutz said he and Complainant would talk about it later. Complainant had never pulled out a sunroof before.

18) Respondent DCE lost $100 (the cost of replacing the seal) on the sale of the sunroof due to the damage Complainant caused while extracting it.

19) On June 27, 1991, Complainant was terminated from employment.

20) Amstutz told Complainant he was fired. Later, he talked to Respondent Cyr about it, and explained what had happened with the sunroof. Amstutz believed it was his decision to fire Complainant.

21) Amstutz's reasons for discharging Complainant were his bad attitude and his failure to remove the sunroof correctly. If not for the incident with the sunroof, Amstutz would not have fired Complainant.

22) Respondent Cyr participated in the decision to terminate Complainant.

23) Billy Bess, who was Complainant's friend, told him he was terminated because he had applied for workers' compensation insurance benefits.

24) Employees other than Complainant occasionally damaged a part, scratched a car, or slammed a door. Windshields were regularly broken while being removed. Complainant's problems were worse than other employees. Complainant was careless throughout his employment.

25) Larry Davis, a parts puller for Respondent DCE, cut his finger on the job. Respondent Cyr never told him to pay his own bills from the injury. Respondent Cyr was not enthusiastic about Davis's injury. Davis believed the cut would need stitches. Respondent Cyr told him to put a bandage on it and "bite the bullet." Davis got medical attention. Respondent Cyr never told Davis not to get medical attention. Respondent Cyr did not get angry at Davis for seeking medical attention.

26) Billy Bess's testimony was unreliable and not credible. He admittedly lied under oath at the hearing. He had felony convictions, and a conviction for Initiating a False Report, which by its very nature involves false statement. In addition, his testimony was biased. He was Complainant's friend, and was not on good terms with Respondents when he terminated his employment with Respondent DCE. He had been accused of theft, and demoted before he quit. Bess testified he overheard Respondent Cyr say to Amstutz that Respondent Cyr was going to fire Complainant. No other evidence corroborated that testimony, and it was contradicted by Amstutz and Respondent Cyr. I find Amstutz's and Respondent Cyr's testimony on this point credible, and accordingly find Bess's testimony not credible. Bess's testimony was given no weight whenever it was contradicted by credible evidence on the record. In some cases, it was not believed even when it was not controverted by other evidence.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent DCE employed six or more persons within the state of Oregon.

2) Complainant was a worker employed by Respondent DCE.

3) On March 1, 1991, Complainant was injured while on the job. Complainant notified Respondent DCE of the injury, sought medical treatment, and filed a claim for workers' compensation insurance benefits.

4) In late March 1991, Complainant was fully released by his treating physician to return to his former job, where Complainant worked until June 27, 1991, when he was terminated by Respondent DCE.

5) Respondent DCE terminated Complainant because he had a bad attitude and had damaged a sunroof when he removed it. Respondent Cyr participated in Complainant's termination.

CONCLUSIONS OF LAW

1) At all times material, Respondent DCE was an employer subject to the provisions of ORS 659.010 to 659.110, and 659.400 to 659.435. *See* ORS 659.400(3), 659.010(12) and (13).

2) Complainant was Respondent DCE's "worker," as that term is used in

ORS 659.410. *See* OAR 839-06-105 4)(a).

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein. *See* ORS 659.435 and OAR 839-06-121.

4) The actions, inactions, and knowledge of Respondent Cyr and Steve Amstutz, employees or agents of Respondent DCE, are properly imputed to Respondent DCE.

5) ORS 659.410 provides:

> "It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.807, or of 659.400 to 659.435 or has given testimony under the provisions of such sections."

Respondent DCE did not violate ORS 659.410 as charged, as Respondent DCE did not discriminate against Complainant with respect to his employment tenure because he had applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.807, or of 659.400 to 659.435.

6) ORS 659.030 provides in part:

> "(1) For the purposes of ORS * * * 659.400 to 659.460 * * *, it is an unlawful employment practice:
>
> "* * *
>
> "(g) 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 * * * 659.400 to 659.460 * * * or to attempt to do so."

Respondent Cyr did not violate ORS 659.030(1)(g) as charged, as he did not "aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS * * * 659.400 to 659.460 * * * or to attempt to do so."

7) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and the complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

Prima Facie Case

To present a prima facie case in this matter, the Agency must present evidence to prove the following four elements:

(1) The Respondent is a Respondent as defined by statute;

(2) The Complainant is a member of a protected class;

(3) The Complainant was harmed by an action of the Respondent;

(4) The Respondent's action was taken because of the Complainant's membership in the protected class.

OAR 839-05-010(1); *In the Matter of Jake's Truck Stop,* 7 BOLI 199, 212 (1988); *In the Matter of Western Medical Systems, Inc.,* 8 BOLI 108, 115 (1989).

The Agency established a prima facie case. Regarding the first three elements, the evidence showed that:

(1) Respondent DCE was an employer which employed six or more persons in Oregon. *See* ORS 659.010(11) and (12), 659.400(1), and OAR 839-06-115.

(2) Complainant was a worker employed by the Respondent DCE. *See* OAR 839-06-105(4)(a). He became a member of a protected class as soon as he reported his on-the-job injury to Respondent DCE, and thereby invoked the procedures provided for in the workers' compensation law. *See* OAR 839-06-105(2). In addition, Complainant applied for benefits provided for in Oregon's workers' compensation law.

(3) Respondent DCE terminated Complainant on June 27, 1991. The termination, which is covered under ORS 659.410 by the word "tenure," harmed Complainant both financially and by causing him mental suffering.

Regarding the fourth element, that is, the causal connection between Respondent DCE's action and Complainant's membership in the protected class, the Agency presented evidence that Respondent DCE did not have workers' compensation insurance for several months, that Complainant was injured during that period, that no other worker was injured during that period, that Respondent Cyr tried to persuade Complainant to use his own medical insurance to cover the on-the-job injury, that Complainant filed a workers' compensation claim, that Respondent DCE was fined $1,000 for not having workers' compensation insurance (which was discovered because of Complainant's claim), that Complainant's coworker (Bess) overheard Respondent Cyr say he was going to fire Complainant because he had cost Respondent Cyr $1,000, and that Respondent Cyr discouraged other workers from seeking medical attention when they were injured. From this evidence, if it were credible and persuasive, a reasonable person could infer that Respondent DCE discharged Complainant for invoking the workers' compensation system and applying for benefits.

Detracting from that evidence was the fact that Billy Bess's testimony was not credible, as described in Finding of Fact 26. This Forum has long applied ORS 10.095(3): a witness false in one part of the witness's testimony is to be distrusted in others. *In the Matter of Lee's Cafe,* 8 BOLI 1, 18 (1989). Here, Bess lied under oath at hearing, and had been convicted of making false statements. The Forum took guidance from Oregon Rule of Evidence 609, which permits the receipt of evidence of conviction of certain crimes for the purpose of attacking the credibility of a witness. As a result of this credibility determination, the Forum did not believe Bess's testimony that he heard Respondent Cyr say, before the sunroof incident, that he wanted to fire Complainant.

Respondents' Legitimate, Nondiscriminatory Reason

Respondents introduced credible evidence that Steve Amstutz believed that Complainant had a bad attitude at work and carelessly damaged a sunroof that he removed, and that these were the reasons he fired Complainant. Several credible witnesses, including Complainant, testified that Complainant had behavior and performance problems at work, and that

his removal of the sunroof was improper and cost Respondent DCE $100.

Pretext

The Agency attempted to show that Respondents' stated reason for discharging Complainant was pretextual. However, the preponderance of credible evidence on the whole record supported Respondents' legitimate, nondiscriminatory reason for firing Complainant.

Key Role

In addition, the Agency argued that, even if Respondents' reasons were legitimate, Complainant's protected class still played a key role in the termination decision. Under the key role test, the Complainant's protected class membership does not have to be the sole cause of the Respondent's action. If it played a key role in the Respondent's action, substantial evidence of unlawful discrimination exists. The test requires that the Complainant's protected class be more than a minimal, but not the only, cause of the Respondent's action. The crucial question is whether or not the harmful action would have occurred had the Complainant not been a member of the protected class. OAR 839-05-015; *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55, 66 (1987), *aff'd Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988); *In the Matter of Polk County E.S.D.*, 1 BOLI 280, 289 (1980), *aff'd w/o opinion Donaldson v. Polk County ESD*, 50 Or App 611, 625 P2d 1390 (1981).

Here, the evidence showed that the motivating factor and immediate cause of Complainant's termination was his poor attitude at work and the improper removal of the sunroof. The temporal relationship between the injury, the fine, and the discharge was weak. The comparative evidence, regarding Respondent Cyr's treatment of other injured workers, was also weak. Bess's testimony was not credible, and no other evidence showed that Respondent Cyr held it against Complainant that Respondent DCE did not have workers' compensation insurance and got fined. The evidence was not persuasive of a discriminatory animus toward Complainant or other injured workers. The Forum cannot find, given the facts on this record, that Complainant's protected class was more than a minimal cause of his discharge. I find that Respondent DCE's discharge of Complainant would have occurred had he not been a member of the protected class.

ORDER

NOW, THEREFORE, as Respondents have not been found to have engaged in any unlawful practice charged, the complaint and the specific charges filed against Respondents are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of
CLARA PEREZ,
dba AG Labor Services,
Respondent.

Case Number 21-93
Final Order of the Hearings Referee*
Douglas A. McKean
Issued February 3, 1993

SYNOPSIS

Respondent, a farm labor contractor, failed to pay wages to scores of workers on two contracts, in violation of ORS 652.120, 652.145, and 658.440(1)(c) and (d); assisted a person (her son) to act as a farm labor contractor without a license, in violation of ORS 658.440(3)(e); failed to comply with the terms and conditions of a valid and legal contract with a farmer, in violation of ORS 658.440(1)(d); repeatedly failed to execute written employment agreements with the workers, in violation of ORS 658.440 (1)(g); and employed a person (her husband) who had been denied a farm labor contractor license by the Commissioner. Finding that these violations demonstrated that Respondent's character, reliability, and competence made her unfit to act as a farm labor contractor, the Hearings Referee revoked Respondent's farm labor contractor license following an expedited hearing. ORS 658.445(1) and (3); OAR 839-15-145, 839-15-520(1)(c), (d), (e), (2), (3)(a), (d), (f) and (k).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 12 and 13, 1993, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Bldg E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Clara Perez Rodriguez (Respondent) was represented by Andrew P. Ositis, Attorney at Law. Ms. Perez was present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): Ruben Barboza, foreman for Barry's Christmas Trees; Jerry Barry (by telephone), Christmas tree grower; Alma Bejarao, Respondent's secretary, receptionist, and payroll clerk; Officer J.E. Coggins, City of Woodburn Police Department; Sergeant Allen DeVault, City of Woodburn Police Department; Jose Lopez Gonzalez, farm worker; Teresa Jarrett, office clerk for Barry's Christmas Trees; Judy Long, Compliance Specialist (Lead) with the Agency; Felipe Martinez, farm worker; Martine Monge, farm worker; Raul Pena, Compliance Specialist with the Agency; Respondent; Vasilie Shimanovski, Field Representative for the Agency; and Noel Zuniga, Respondent's crew leader. Juan Mendoza, appointed by the Forum and under proper affirmation, acted as an

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* OAR 839-33-000 to 839-33-095, *Expedited Contested Case Hearing Rules For Certain Licensing Matters*, authorize the Hearings Referee to issue a Final Order. ORS 651.060(3), (4).

interpreter for witnesses Gonzalez, Martinez, and Monge. Respondent called no witnesses.

Having fully considered the entire record in this matter, I, Douglas A. McKean, Hearings Referee of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On December 22, 1992, the Agency issued a "Notice of Intent to Revoke a Farm Labor Contractor License" (Notice of Intent) to Respondent. The Agency proposed to revoke Respondent's license because of her "failure to pay wages due and owing on established regular paydays to farm workers employed by [Respondent] in violation of ORS 652.120(1). Violation of the foregoing statutory section demonstrates that [Respondent's] character, competence and reliability make [Respondent] unfit to act as a Farm Labor Contractor which is grounds for license revocation under OAR 839-15-520 (3)(d). The license revocation is imposed pursuant to the provisions of ORS 658.445(3)."

2) As part of the Notice of Intent, Respondent received a Notice of Hearing, which set forth the time and place of the hearing and the designated Hearings Referee. With the hearing notice, Respondent received a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-33-000 through 839-33-095.

3) On Friday, January 8, 1993, Respondent filed by facsimile machine a request for a postponement of the hearing set to begin on Tuesday, January 12. On Monday, January 11, 1993, after hearing arguments from both the Agency and Respondent's counsel on the request, the Hearings Referee denied the request. The referee found that Respondent's request was untimely, that no actual conflict existed in counsel's schedule, that counsel's workload alone was insufficient to justify the postponement, that the Agency had five witnesses under subpoena for the next day's hearing, and that the record could be left open if necessary to accommodate a witness Respondent said was unavailable.

4) At the start of the hearing Respondent's attorney said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

5) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

6) At the beginning of the hearing, Respondent moved to dismiss the hearing because of alleged prejudice by Paul Tiffany, Administrator or the Wage and Hour Division of the Agency, and Mary Wendy Roberts, Commissioner of Labor. Respondent argued that the Hearings Referee, an employee of the Agency, was incapable of giving Respondent a fair hearing and decision. Respondent further moved the Hearings Referee to recuse himself because he was an employee of the Agency, and that the Agency appoint an independent hearings referee. The Hearings Referee denied the motions because neither Mr. Tiffany nor Commissioner Roberts was the final decision maker in the case. The Hearings Referee would issue the Final Order, and Respondent showed no bias or prejudice by the referee. Respondent had the burden of showing actual prejudice or bias. *Spray v. Board of Medical Examiners,* 50 Or App 311, 624 P2d 125, *modified on other grounds,* 51 Or App 773 (1981); *Boughan v. Board of Engineering Examiners,* 46 Or App 287, 611 P2d 670, 671 (1980); *Gregg v. Oregon Racing Commission,* 38 Or App 19, 588 P2d 1290, 1294 (1979). The mere fact that the Hearings Referee is an employee of the Agency is insufficient to prove bias or prejudice. In addition, administrative agencies typically investigate, prosecute, and adjudicate cases within their jurisdiction. This combination of functions by itself does not violate the due process clause. *Withrow v. Larkin,* 421 US 35, 54, 95 SCt 1456, 43 LEd2d 712 (1975); *Fritz v OSP,* 30 Or App 1117, 569 P2d 654, 656-67 (1977); *Palm Gardens, Inc. v. OLCC,* 15 Or App 20, 34, 514 P2d 888 (1973), *rev den* (1974).

7) Respondent next moved to dismiss the case because the Agency failed to comply with its own rules, citing OAR 839-30-070(10). The Hearings Referee denied the motion because that rule was inapplicable in this case. The hearing was being held pursuant to the procedural rules in OAR chapter 839, division 33.

8) During the hearing the Agency made a motion to amend the Notice of Intent to conform to the evidence and to reflect issues presented at the hearing. The amendments charged Respondent with violations of ORS 658.440(1)(c) and (d), and 652.145. The Hearings Referee granted the motion because the amendments reflected issues and evidence that had been previously introduced into the record and addressed without objection from Respondent.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent, a natural person, was licensed by the Agency as a farm labor contractor, doing business as AG Labor Services. The license expires on July 31, 1993.

2) Respondent was born in Mexico and raised in Texas. Her father was a laborer. Her formal education ended in junior high school. She was married in 1958, and raised five children.

3) Respondent is married to Jose L. Rodriguez. On October 22, 1992, the Commissioner denied Rodriguez a farm labor contractor license and assessed a civil penalty of $7,500 on him for his failure to pay workers in accordance with state law relating to wages, as well as for numerous violations of the farm labor contractor law, including repeatedly acting as a farm labor contractor without a license. Jose L. Rodriguez employed his son, Jaime P. Rodriguez, as general manager in his farm labor contracting business. Respondent did not work for her husband in his business. Respondent employed Jose L. Rodriguez as a supervisor during times material in her farm

labor contracting business. *In the Matter of Jose Rodriguez,* 11 BOLI 110 (1992).

4) At times material, Respondent employed her three sons in her farm labor contracting business. Jaime P. Rodriguez was her manager and foreman for the night shift of a contract with Jerry Barry, dba Barry's Christmas Trees, in Salem. Jose Rodriguez (hereinafter Jose Rodriguez Jr.) was a foreman on her contract with Barry. Joel P. Rodriguez was a foreman on her contract with Duane Trygg, dba Christmas Trees Unlimited, in Hillsboro.

5) Jaime Rodriguez recruited, solicited, and hired workers to be employees of Respondent. Rodriguez had no farm labor contractor license issued by the Commissioner.

6) In 1991, Respondent had a contract with Barry to harvest Christmas trees. Respondent made a profit from that contract. For 1992's harvest, Respondent called Barry to work for him again. Barry agreed to contract exclusively with Respondent in 1992.

7) In December 1991, the Agency did a routine field visit at Respondent's office and discovered that 76 workers were not being paid overtime. Within about a week, Respondent corrected the problem, and the Agency collected about $2,800 in wages for the workers.

8) On around October 16, 1992, Respondent executed a contract with Duane Trygg, dba Christmas Trees Unlimited. Respondent agreed to provide 53 men or whatever number was necessary to complete harvesting of Christmas trees in a professional and timely manner. Harvesting was to start on November 15, with the majority of the harvesting to be completed by November 30, 1992. Respondent was to be compensated on a piece rate of from 55 to 85 cents per tree. Trygg was to make payments as follows: $10,000 due on November 24; $10,000 due on December 1; $5,000 due on December 8; and the balance due on December 15, 1992.

9) Respondent's employees on the Trygg contract were supposed to be paid on Fridays and Saturdays.

10) On October 29, 1992, Respondent executed a contract with Jerry Barry, dba Barry's Christmas Trees, in Salem. Under that contract, Respondent was required to provide all labor necessary for the harvesting operation of approximately 82,000 trees. The contract ran from November 5 to December 12, 1992. Respondent agreed to "work exclusively for BARRY'S during the time period of this contract." Barry retained the right to terminate the contract upon 24 hours written notice if the contract was not being "conducted in a manner which [was] normal to the industry and in a timely and husbandrylike fashion." Jaime Rodriguez personally guaranteed that the contract would be conducted in a such a manner. As full compensation for Respondent's services, Barry was to pay her on a piece rate basis, based upon the size of the trees, and per tree packed, slung, baled, loaded, off-loaded, reloaded, and palletized. Hourly personnel were to be compensated at $8.75 per hour. The compensation was to be paid weekly in a lump sum at a rate of 75 percent of the work completed. The remaining 25 percent was to be paid upon completion of the whole job.

11) Respondent never told Barry about her contract with Trygg. She told Barry that all of her commitments were with him. She felt that as long as her contract with Trygg was not hurting Barry's business, it was fine. She felt that the Trygg contract did not hurt Barry's business because Trygg's farm was far away from Barry's farm.

12) During November 1992, Respondent cosigned with her son, Joel Rodriguez, a contract to buy a delicatessen called the Short Stop Deli next to Respondent's office in Woodburn. Joel was in California at the time. On November 4, 1992, Respondent set up an account in her name with the electric company for the deli. Respondent paid the seller $5,000 from her savings. She had an agreement to pay the seller another $10,000 on December 11, 1992. Respondent still owned the deli at the time of hearing. Respondent had not made the $10,000 payment at the time of hearing.

13) Barry's employees calculated the number of trees harvested weekly. Barry's checks were made out on Wednesdays, and were hand delivered to either Respondent or Jaime Rodriguez. On November 11, 1992, Barry paid Respondent $4,886.40.

14) Workers on the Barry contract were supposed to be paid every Wednesday for work they performed during the previous work week. The work week ran from Monday through Sunday. Work first began on Monday, November 2, 1992. The first payday was Wednesday, November 11. On that payday, each of the 10 to 15 workers was paid in full.

15) Workers were paid $4.75 per hour. Crew leaders and foremen were paid $5.00 or $5.25 per hour. Jose Rodriguez Jr. was paid a salary of $350 per week. Jaime Rodriguez was paid a salary. If workers worked the entire season, they were to receive a bonus of an extra 25 cents per hour worked. Some workers worked the entire season. According to the "Agreement Between Contractor and Workers" (WH-153S*), the workers were supposed to receive a bonus of one cent per tree if they stayed the entire season. Jaime Rodriguez told some workers that the rate of pay was $5.00 per hour, and that they would get $5.25 per hour if they completed the season. Jaime Rodriguez told Noel Zuniga, a crew leader, that his pay would be $5.25 per hour. Jaime Rodriquez later told Zuniga that the pay was $5.00 per hour, with a 25 cent bonus if he worked the entire season.

16) When workers came to get paid, Alma Bejarao, Respondent's secretary and payroll clerk, gave them a yellow "Payroll Record and Tax Statement" (hereinafter payroll statement). Bejarao then marked a timesheet/ payroll ledger that the worker had been paid. The worker then took the yellow payroll statement to Respondent, who paid the worker (if there was money) and marked the yellow payroll statement "paid." Workers were paid in cash. Often times, when there was no money for payroll, the worker was told

* Bureau of Labor and Industries form WH-153 is written in English. The same form, written in Spanish, is numbered WH-153S. Unless otherwise noted, any reference in this Order to form WH-153 is to be read to include form WH-153S.

to come back the next day and present the yellow payroll statement for pay. Because of this procedure, Bejarao's payroll ledger showed some workers had been paid, when they had not been paid by Respondent. There were "some problems" with Respondent's payroll records. Some workers disputed the time records made by the foremen. Any yellow payroll statement without "paid" written on it meant that Respondent had not paid the worker the wages shown on the statement.

17) Bejarao gave some workers a form WH-153S at the time the workers came in for their first pay check. The form did not state that they would be paid on an hourly rate, or what the hourly rate was. Some of Respondent's workers never saw a WH-153S; they were never given a copy and never saw a copy attached to a wall in Respondent's office.

18) The WH-153S stated that Respondent would make no personal loans to workers. Respondent loaned money to workers.

19) On Wednesday, November 18, 1992, Barry paid Respondent $6,870.39.

20) On November 18, Respondent was unable to pay all of the workers their earned pay. Respondent had 60 to 80 workers on the payroll at that time. Alma Bejarao told the workers to come back the next day. On Thursday, November 19, Bejarao again told the workers to come back the next day.

21) On Friday, November 20, 1992, 30 to 40 of Respondent's employees were at Respondent's office at 975 N. Pacific Highway, Woodburn, waiting to get paid. The workers were angry because they had not been paid on time. One worker who had been drinking, Felipe Martinez, got into a pushing match with Joel Rodriguez, and the worker received a cut on his forehead. At around 4:30 p.m., Bejarao called the Woodburn City Police to regain order. Respondent was paying some workers, but ran out of money before they were all paid. At one point, Respondent left to get more money. She returned with some money, but not enough to pay all of the workers. At 6:30 p.m., the money ran out, and the police pushed around 30 workers out of Respondent's office. The workers either had not been paid or had received only partial pay. Respondent could not pay the workers on Saturday, November 21.

22) Respondent paid Martinez on Friday, November 20, for two days' work, but she still owed Martinez wages for four days' work. Bejarao later invited a representative of Oregon Legal Services to accompany Martinez to the office to get his final pay. Respondent paid Martinez for all hours worked.

23) On Saturday, November 21, 1992, Barry gave Respondent a draw of $3,000.

24) On Monday, November 23, 1992, Barry gave Respondent a draw of $3,000.

25) On Tuesday, November 24, 1992, Barry paid Respondent $4,268.76.

26) On November 24, Raul Pena, a Compliance Specialist with the Agency, contacted Respondent about

workers' complaints that she was falling behind on paying wages.

27) On the next payday, Wednesday, November 25, 1992, around 20 workers were paid their wages. Some wages were paid that were due from the previous payday. Many workers were not paid, and they were upset. Workers started returning every day to get paid. Respondent paid no more wages in November 1992.

28) On November 27, 1992, Barry gave Respondent a draw of $5,000.

29) On November 30, 1992, Respondent went to Barry and requested another draw. Barry gave Respondent a draw of $6,000.

30) By December 1, 1992, Trygg had paid Respondent $25,000. Trygg told Respondent that he was already overpaying her. He paid her nothing more.

31) Respondent believed Trygg's payments were always correct and according to the contract, except for the last payment. Respondent believed that that payment was short for the work her employees performed in the third week of the contract, and which should have been paid to the workers on November 25.

32) Respondent believed Trygg owed her more than $15,000. She believed Trygg demanded more workers than the contract called for, and so he owed Respondent more money. Respondent did not know how many workers were supplied to Trygg. She complained that her foremen had no authority in selecting the fields to work in, and the workers had to be paid for time sitting around and moving between fields. Respondent planned to file a law suit against Trygg.

33) On Wednesday, December 2, 1992, Barry gave Respondent a draw of $10,000. Respondent told Barry she needed the money to pay her workers. Barry believed this draw was an advance on the 25 percent retainer he held under the contract.

34) On December 2, workers went to Respondent's residence at 1288 E. Lincoln Street, Woodburn, to get their pay. The city police were called.

35) On December 2, Respondent went to her office, where a "whole bunch" of workers were waiting to be paid. Respondent paid $10,000 in wages to workers on the Barry contract. There were "a lot of people" left unpaid. That evening she paid about $5 000 to 15 to 20 employees who had worked on the Trygg contract. Respondent did not mix the money she received from Barry with the money she received from Trygg. The Trygg workers were not paid with money from Barry.

36) On December 3, 1992, Respondent requested a loan of $7,000 from Barry in order to pay the employees. Barry did not agree to loan Respondent the money. He contacted his attorney.

37) On Thursday, December 3, 1992, around 30 workers were at Respondent's office waiting to get paid. At around 5 p.m., Bejarao called the city police to remove the workers so that she could close the office. The workers were upset because they were not getting paid on schedule. Respondent told Bejarao there was no money to pay the workers.

Respondent told Bejarao to close the office at 5 p.m. Raul Pena arrived and convinced the workers they should go home and come back the next day to be paid. Pena advised the police that he would contact Respondent about paying the workers on December 4. The workers were peaceful and cooperative, and left at the officers' request.

38) Late in the evening on December 3, 1992, Pena contacted Respondent at home to discuss paying the workers. Respondent told Pena that she was not getting paid by the farmers she worked for. Respondent said she expected money on Friday, December 4.

39) Duane Trygg told Pena on December 4, 1992, that Trygg would lend Respondent $8,000, based on the title to Respondent's car or trailer. Trygg said he had already paid Respondent $28,000 under the contract. Respondent borrowed $5,000 from Trygg.

40) On December 4, 1992, Barry terminated the contract with Respondent because she had failed to pay her workers' wages, and wage claims had been filed with the Agency. Barry believed there were problems getting enough workers from Respondent. It was Respondent's foremen's responsibility to determine how many workers to bring each day.

41) On the evening of December 4, around 50 workers were waiting for their pay. Respondent arrived with around $5,000, and paid between 15 and 20 employees who had worked on the Trygg contract. No employees who had worked on the Barry contract were paid. Jaime Rodriguez told Pena that he (Rodriguez) took responsibility for Respondent's inability to pay the workers. He said it was his decision to pay the workers the minimum wage of $4.75 per hour instead of on a piece rate basis. Respondent told Pena that she thought she still owed between $15,000 and $20,000 in wages as of December 4.

42) Respondent was required to pay her employees no less than the state minimum wage of $4.75 per hour, even if they were paid on a piece rate basis.

43) On December 8, 1992, Raul Pena began working with Bejarao on the payroll to facilitate paying the workers their wages. Pena also requested copies of Respondent's payroll records. Respondent and Bejarao cooperated with Pena.

44) On December 10, 1992, Barry wrote a check for $17,517.99 to Douglas, Dickey & Lynch, a law firm representing Barry. The firm then purchased a cashier's check for $17,517.99, payable to Respondent and the Agency. This money represented the amount Barry believed he owed Respondent for the last week of work plus the balance of the 25 percent retainer. The amount was worked out by an assistant attorney general with the Department of Justice, Respondent's attorney, and Barry's attorney. Respondent signed the check over to the Agency.

45) Also on December 10, 1992, Respondent's attorney demanded from Barry a final accounting and payment for services provided by Respondent. Around December 21, 1992, Respondent filed a law suit against Barry for breach of contract, an accounting, and damages.

46) On December 12, 1992, Respondent signed an acknowledgment that she owed wages from the pay period November 30 through December 7, 1992, in the approximate amount of $13,000. In addition, she acknowledged owing wages represented by the yellow payroll statements given to the Agency's staff (shown in an Agency exhibit). The acknowledgment did not cover payroll debts for payroll periods before November 30.

47) Respondent provided copies of her payroll records to the Agency. Pena was unsure whether all of the foremen's timesheets were turned in and were reflected in the payroll records. The records covered the work weeks ending November 22, November 29, and December 6, 1992. The Agency then analyzed those records by computer. They show that around 353 workers remained unpaid after the week ending December 6, 1992. Through the Agency, $18,012.74 in wages were paid on December 16, 1992. On December 24, 1992, Barry paid an additional $58,158 in wages, which was distributed to workers through the Agency. At the time of hearing, $13,538.85 in wages remained due and owing, and additional workers continued to show up at the Agency with yellow payroll statements asking for pay. In addition, Respondent's crew leaders and foremen had not been paid. Some unpaid workers may have left the country. No bonuses were calculated or paid.

48) Respondent thought it was a mistake to enter into contracts for a piece rate with Barry and Trygg. She thought the Barry contract cost her over $100,000 in wages. Barry paid a total of $118,701.54 to Respondent and the Agency between November 11 and December 24, 1992.

49) Respondent gave inconsistent testimony on when contract payments were received and in what amounts, on when workers were paid, on how many workers were supplied to farmers, and on other factual issues. Her memory of events and when they occurred was confused, and her testimony about some events was contradicted by other credible evidence. In addition, some of her testimony did not make sense. For example, she testified that she added $5,000 of her own money to the $4,886.40 she received from Barry in order to make the November 11 Barry payroll; however, she testified that there were only 10 to 15 workers paid on that payroll. (*See* Finding of Fact 17.) Even if there were 15 workers that payday, that would mean each worker received on average nearly $660. In order to receive that pay, an employee would have had to work about 106 hours that week (40 hours at $4.75 per hour, plus 66 hours at $7.13 per hour, the overtime rate). This is inconsistent with the other evidence. Accordingly, Respondent's testimony was unreliable and was given little weight whenever it was contradicted by other credible evidence. In some cases, her testimony was not believed even when it was uncontroverted.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondent was a farm labor contractor, as defined by ORS 658.405, doing business in the State of Oregon.

2) Jose L. Rodriguez worked for Respondent in her farm labor contractor activities described herein as either her employee or agent.

3) Jaime P. Rodriguez worked for Respondent as her manager and foreman. During times material, Jaime Rodriguez recruited, solicited, and hired Oregon workers on behalf of Respondent without a farm labor contractor license.

4) Respondent repeatedly failed to execute Agency form WH-153 (Agreement Between Contractor and Workers), or comparable written forms, in English or any other language, at the time of hiring and prior to each worker performing any work for Respondent.

5) Respondent failed to maintain a regular payday, at which date all employees were paid the wages due and owing to them.

6) Respondent failed to pay hundreds of her seasonal farm workers all wages earned and unpaid immediately upon the termination of the workers' employment. Respondent failed to pay her seasonal farm workers who quit employment without notice all wages earned and unpaid within 48 hours after the employee quit, or at the next regularly scheduled payday after the employee quit, whichever event first occurred.

7) By her failure to pay promptly, when due (or at all), wages earned and owing, Respondent failed to comply with the terms and provisions of the legal and valid agreements she had entered into, in her capacity as a farm labor contractor, with her employees.

8) By working under contract with Trygg while she worked under contract with Barry, Respondent willfully failed to comply with the provision of her legal and valid contract with Barry to work exclusively for him during the term of the contract.

9) Respondent's character, reliability, and competence make her unfit to act as a farm labor contractor.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein. ORS 648.405 to 658.485.

2) The actions, inactions, and statements of Jaime P. Rodriguez are properly imputed to Respondent. As Rodriguez was either Respondent's employee or agent during all times material herein, and his actions, inactions, and statements were made in the course and within the scope of that employment or agency, Respondent is responsible for those actions, inactions and statements.

3) ORS 652.120 provides in part:

> "(1) Every employer shall establish and maintain a regular payday, at which date all employees shall be paid the wages due and owing to them.
>
> "(2) Payday shall not extend beyond a period of 35 days from the time that such employees entered upon their work, or from the date of the last regular payday."

Respondent violated ORS 652.120.

4) ORS 652.145 provides:

> "Notwithstanding ORS 652.140, if an employee has worked for an employer as a seasonal farm worker, whenever the employment terminates, all wages earned and unpaid become due and payable immediately. However, if the employee quits without giving the employer at least 48 hours' notice, wages earned and unpaid are due and payable within 48 hours after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever first occurs. * * *"

Respondent violated ORS 652.145.

5) ORS 658.440(1) provides in part:

> "Each person acting as a farm labor contractor shall:
>
> "* * *
>
> "(c) Pay or distribute promptly, when due, to the individuals entitled thereto all money or other things of value entrusted to the labor contractor by any person for that purpose.

Respondent violated ORS 658.440 (1)(c). The evidence shows that Respondent failed to promptly pay to the workers all of the money she received from Barry and Trygg for the purpose of paying wages.

6) ORS 658.440(1) provides in part:

> "Each person acting as a farm labor contractor shall:
>
> "* * *
>
> "(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

Respondent violated ORS 658.440 (1)(d) by failing to pay her workers their earned and due wages. Respondent also violated ORS 658.440(1)(d) by failing to comply with the provision of her contract with Barry to work exclusively for him.

7) ORS 658.440(1) provides in part:

> "Each person acting as a farm labor contractor shall:
>
> "* * *
>
> "(f) Furnish to each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement in the English language and any other language used by the farm labor contractor to communicate with workers that contains a description of:
>
> "(A) The method of computing the rate of compensation.
>
> "(B) The terms and conditions of any bonus offered, including the manner of determining when the bonus is earned.
>
> "(C) The terms and conditions of any loan made to the worker.
>
> "(D) The conditions of any housing, health and day care services to be provided.
>
> "(E) The terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof.
>
> "(F) The terms and conditions under which the worker is furnished clothing or equipment.
>
> "(G) The name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited,

supplied or employed by the farm labor contractor.

"(H) The existence of a labor dispute at the worksite.

"(I) The worker's rights and remedies under ORS chapter 656, ORS 658.405 to 658.485, the Service Contract Act (41 USC. 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner.

"(g) At the time of hiring and prior to the worker performing any work for the farm labor contractor, execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in subparagraphs (A) to (I) of paragraph (f) of this subsection. The written agreement shall be in the English language and any other language used by the farm labor contractor to communicate with the workers."

Respondent repeatedly violated ORS 658.440 by failing to execute the written agreement described in subsection (1)(g) with any worker at the time of hiring and prior to the worker performing any work for her.

8) ORS 658.405 provides in part:

"As used in ORS 658.405 to 658.485 and 658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in * * * the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; * * *."

OAR 839-15-130 provides in part:

"The following persons are not required to obtain a farm or forest labor contractor's license:

"* * *

"(8) An employe [sic] of a Farm or Forest Labor Contractor except for any employe [sic] who:

"(a) recruits, solicits, supplies or employs workers on behalf of the Farm or Forest Labor Contractor * * *."

ORS 658.410(1) provides in part:

"[N]o person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries."

ORS 658.415(1) provides in part:

"No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.485. * * *"

ORS 658.440 provides in part:

"(3) No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

"* * *

"(e) Assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830."

Jaime P. Rodriguez was acting as a farm labor contractor without a license. Respondent violated ORS 658.440 (3)(e).

9) Pursuant to ORS 658.445, the Commissioner of the Bureau of Labor and Industries has the authority to and may revoke Respondent's license to act as a farm/forest labor contractor if:

"(1) The licensee or agent has violated or failed to comply with any provision of ORS 658.405 to 658.503 and 658.830 and ORS 658.991(2) and (3); or

"* * *

"(3) The licensee's character, reliability or competence makes the licensee unfit to act as a farm labor contractor."

OAR 839-15-145 provides:

"(1) The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules includes, but is not limited to, consideration of:

"(a) A person's record of conduct in relations with workers, farmers and others with whom the person conducts business;

"(b) A person's reliability in adhering to the terms and conditions of any contract or agreement between the person and those with whom the person conducts business;

"(c) A person's timeliness in paying all debts owed including advances and wages;

"* * *

"(g) Whether a person has violated any provision of ORS 658.405 to 658.485;

"(h) Whether a person has employed an agent who has had a farm or forest labor contractor license denied, suspended, revoked or not renewed or who has otherwise violated any provisions of ORS 658.405 to 658.485 * * *."

OAR 839-15-520 provides in part:

"(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to * * * revoke a license application:

"* * *

"(c) Violating or causing to be violated an existing contract of employment;

"* * *

"(e) Assisting an unlicensed person to act as a Farm or Forest Labor Contractor; * * *

"(2) When the * * * licensee demonstrates that the * * * licensee's character, reliability or competence makes the * * * licensee unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the * * * license of the licensee be suspended, revoked or not renewed.

"(3) The following actions of a Farm or Forest Labor Contractor * * * licensee or an agent of the * * * licensee demonstrate that the * * * licensee's character, reliability or competence make the * * * licensee unfit to act as a Farm Labor Contractor:

"(a) Violations of any section of ORS 658.405 to 658.485;

"* * *

"(c) Willful violation of the terms and conditions of any work agreement or contract;

"(d) Failure to comply with federal, state or local laws or ordinances relating to the payment or wages * * *;

"(f) Repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.485 and these rules;

" * * *

"(k) Employ or use an agent who has had a farm or forest labor contractor license denied, suspended, revoked or not renewed or who has otherwise violated ORS 658.405 to 658.485; * * *"

Respondent has violated or failed to comply with ORS 652.120, 652.145, 658.440(1)(c), (d), (g), and (3)(e). Respondent's record of conduct with her workers, her reliability in adhering to the terms and conditions of her contracts with workers and Barry, her timeliness in paying her debts (including wages and other debts), her violations of the farm labor contractor statutes (including assisting her son to act as a farm labor contractor without a license), her failure to comply with state laws relating to the payment of wages, and her employment of her husband, who was denied a farm labor contractor license, have all been considered. Under the facts and circumstances of this record, and pursuant to the applicable law and rules, Respondent has demonstrated her unfitness to act as a farm or forest labor contractor, and her license must be revoked.

OPINION

The Agency initially proposed to revoke Respondent's farm labor contractor license because she violated ORS 652.120, and the violation demonstrated that her character, reliability, or competence made her unfit to act as a farm contractor. *See* ORS 658.445(3); and OAR 839-15-145 (1)(a), (b), and (c); and 839-15-520 (1)(c), (2), and (3)(d). During the hearing, the Agency amended the Notice of Intent to include alleged violations of ORS 652.145 and 658.440(1)(c) and (d).

The Agency argued at hearing that, if it proved that one of the actions described in OAR 839-15-520(3) occurred with respect to Respondent, such action demonstrated Respondent's character, reliability, or competence made her unfit to act as a farm labor contractor. Therefore, the Agency argued, revocation was the exclusive sanction. This is the same argument the Agency made, and the Commissioner rejected, in *In the Matter of Efrain Corona,* 11 BOLI 44, 58 (1992):

"[T]he Forum will not construe OAR 839-15-520 to reduce the discretion given the Commissioner as the final decision maker for the Agency by ORS 658.445, which states that the Commissioner 'may' refuse to renew a license if the licensee's character, reliability, or competence make the licensee unfit to act as a farm labor contractor. OAR 839-15-520(8) provides that 'nothing in this rule shall preclude the Commissioner from imposing a civil penalty in lieu of * * * refusing to renew a license application[.]' The Commissioner may impose any sanction authorized by statute. Accordingly, the Forum interprets OAR 839-15-520(2) to give direction to the Commissioner in her role as prosecutor, but not to limit her statutory discretion in her role as adjudicator."

Similarly, where the Commissioner has designated final order authority to a Hearings Referee, as she has done here, the Hearings Referee may impose any sanction authorized by statute. OAR 839-33-095.

Respondent argued that mitigating circumstances had to be considered, and evidence should be taken on such issues; the Agency argued that such evidence was unnecessary in a license revocation case. Because the statutes and rules provide for imposition of civil penalties, and because the rules provide that the Commissioner may consider mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, the Hearings Referee may take evidence on such circumstances even when revocation is the sanction sought by the Agency. OAR 839-15-510. Indeed, the Hearings Referee may take evidence of mitigating and aggravating circumstances in order to determine which sanction is appropriate, such as a license suspension instead of revocation.

In making that determination, the Commissioner considers whether a person has violated any provision of ORS 658.405 to 658.485. OAR 839-15-145(1)(g), 839-15-520(3)(a). Here, Respondent has violated several of those provisions.

The evidence was undisputed that Respondent employed her son, Jaime P. Rodriguez, and that with her knowledge he recruited, solicited, and hired workers on behalf of Respondent without a farm labor contractor license. Assisting an unlicensed person to act as a farm labor contractor violates the law. ORS 658.440(3)(e); *In the Matter of Stancil Jones,* 9 BOLI 233, 239 (1991). This violation demonstrates that Respondent's character and reliability make her unfit to act as a farm labor contractor. OAR 839-15-520 (1)(e), (3)(a).

Respondent's failure to maintain a regular payday, at which date all employees were paid the wages due and owing to them violates state law relating to the payment of wages. ORS 652.120, 652.145. This too demonstrates that her competence and reliability make her unfit to act as a farm labor contractor. OAR 839-15-145 (1)(c), 839-15-520(3)(d).

Respondent's failure to pay her workers as agreed violated her employment agreements with them. Each such failure constitutes a violation of ORS 658.440(1)(d). *In the Matter of Jose Solis,* 5 BOLI 180, 203 (1986); *In the Matter of Francis Kau,* 7 BOLI 45, 53 (1987). Here, there were scores, if not hundreds, of violations. But where the Agency proposes to revoke a license, the exact number of violations is not critical. *In the Matter of Xavier Carbajal,* 8 BOLI 206, 223 (1990). The violations are considered by the Commissioner to be of such magnitude and seriousness that revocation of Respondent's farm labor contractor license is appropriate. OAR 839-15-145(1)(a) and (b), 839-15-520 (1)(c).

Respondent's failure to comply with the provisions of her legal and valid agreement with Jerry Barry also demonstrates Respondent's unfitness to act as a farm labor contractor. OAR 839-15-145(1)(a) and (b).

Respondent acknowledged that she failed to pay the wages of scores of her employees. She also acknowledged that her contracts with Barry and Trygg were mistakes, in that she agreed to be compensated by the farmers on a piece rate basis, but she agreed to pay her workers on an hourly basis. Jaime Rodriguez personally took responsibility for Respondent's inability to pay the workers. *See* Finding of Fact 41. As a mitigating circumstance Respondent argued that she had been underpaid by the farmers, and that that was the cause of her failure to pay the workers according to her agreement with them. She hoped lawsuits against the farmers would bear this out.

However, evidence on this record does not prove that she was not paid according to her contracts. What the record demonstrates is that, for more than a month, Respondent provided hundreds of employees to work under contracts that, from the second week of work, were not providing enough compensation to cover employees' wages.

The record also shows that Respondent failed to execute WH-153 forms (Agreement Between Contractor and Workers) with her workers before they started work. What forms she gave out did not tell the workers what their rate of pay would be. The bonus the workers were promised, 25 cents per hour, was different than what Respondent had typed on the WH-153, one cent per tree. Respondent's supervisors told some workers the rate of pay was $5.00 per hour, plus the bonus, not the $4.75 they actually received. Several of these same workers testified they had never seen a WH-153 form. One purpose of the WH-153 form is to eliminate any confusion or misunderstandings about the agreed pay rate. Respondent's repeated failure to execute these agreements as required, and the apparent confusion about wage rates and bonuses, violates ORS 658.440(1)(g) and obviously aggravates the other circumstances present here. It also demonstrates that Respondent's character, competence, and reliability make her unfit to act as a farm labor contractor. OAR 839-15-520(3)(f).

The evidence was undisputed that Respondent employed her husband, Jose L. Rodriguez, who has had his farm labor contractor license denied by the Commissioner and has otherwise violated the farm labor contractor statutes. OAR 839-15-145(1)(h) and 839-15-520(3)(k) make it clear that for Respondent to employ him or use him as an agent demonstrates that her character and reliability make her unfit to act as a farm labor contractor.

While the Agency did not charge Respondent with several of the violations or circumstances described above, these matters are aggravating circumstances relevant to the assessment of Respondent's character, competence, and reliability to act as a farm labor contractor. And they are relevant in determining the proper sanction.

Respondent presented evidence of her prior history as a farm labor contractor, and her efforts to correct a previous violation of law regarding overtime pay in December 1991. Her history showed that, before she got into the farm labor contractor business, she had taken care of her family. She had little formal education. She had no experience in the farm labor contractor business (or apparently any other business) and, when she got her license, she relied heavily on her son Jaime to run the business. The evidence showed she had one previous contract with Barry, in December 1991. Beyond that, the evidence is unclear about how many other contracts she had during her two years as a contractor. There was no evidence about the size of the contracts or any other details that would assist the Hearings Referee judge Respondent's character, competence, or reliability. This evidence did nothing to bolster the evaluation of Respondent's fitness to act as a farm labor contractor.

Based upon the whole record of this matter, the Forum is not satisfied as to Respondent's character, competence, and reliability, and finds her unfit to act as a farm labor contractor. Revocation of Respondent's farm labor contractor license is appropriate.

Pursuant to OAR 839-15-140(1)(c) and 839-15-520(4), where a farm labor contractor license has been revoked, the Commissioner will not issue the contractor a license for a period of three years from the date of the revocation.

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503 and OAR 839-33-095, for the Commissioner of the Bureau of Labor and Industries I hereby revoke the license of CLARA PEREZ, aka Clara Perez Rodriguez, to act as a farm labor contractor, effective on the date of this Final Order. CLARA PEREZ is prevented from reapplying for a license for a period of three years from the date of this revocation, in accordance with ORS 658.415(1)(c) and OAR 839-15-520(4).

In the Matter of

C. VOGAR'D AMEZCUA,

dba Delta Trade/Delta Building Maintenance, Respondent.

Case Number 44-92

Final Order of the Commissioner

Mary Wendy Roberts

Issued February 8, 1993.

SYNOPSIS

Respondent sexually harassed Complainant, his 17 year old secretary and receptionist, in violation of ORS 659.030(1)(b) where he talked to her about sexual matters, told her that he slept with his other receptionist, had stacks of "dirty" magazines lying around his office and encouraged Complainant to look at them, told her that he wanted her to be his sexual companion, grabbed her buttocks, and asked her about having sex with two men. Respondent's conduct was unwelcome to Complainant, and created an intimidating and offensive working

environment. Respondent discriminated against Complainant because of her sex, in violation of ORS 659.030 (1)(a) and (b), when he terminated her employment because he was sexually attracted to her and could not control himself, and she rejected his advances. The Commissioner awarded Complainant back pay and compensation for her mental distress. ORS 659.030(1)(a) and (b); OAR 839-07-550.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 12, 1992, in Room 1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. Judith Bracanovich, Case Presenter with the Civil Rights Division of the Bureau of Labor and Industries (the Agency), represented the Agency. Melissa Lund (Complainant) was present throughout the hearing, and was not represented by counsel.

C. Vogar'd Amezcua (Respondent) did not appear at the hearing in person or through a representative.

The Agency called the following witnesses (in alphabetical order): Buffy Bishop, Complainant's friend (by telephone); Jerrie Litsjo, Complainant's mother (by telephone); Melissa Lund, Complainant; and David Wright, Senior Investigator with the Agency.

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

FINDINGS OF FACT – PROCEDURAL

1) On November 13, 1991, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent discriminated against her because of her sex, in that he sexually harassed her and terminated her employment on September 19, 1991, because he was attracted to her and could not control himself.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondent in violation of ORS 659.030(1)(a), (b), and (f).

3) The Agency subsequently initiated conciliation efforts between the Complainant and Respondent, but was unsuccessful.

4) On June 8, 1992, the Agency prepared and duly served on Respondent Specific Charges which alleged that Respondent sexually harassed Complainant, and terminated her because of her refusal to engage in sexual relations with Respondent, in violation of ORS 659.030(1)(a) and (b).

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) As of July 13, 1992, and through the date of hearing, the Forum had not received a responsive pleading from Respondent as required by OAR 839-30-060.

7) On July 13, 1992, the Agency filed a request that the Hearings Referee find Respondent in default, pursuant to OAR 839-30-185, for failure to file an answer to the charging document within 20 days, as required by OAR 839-30-060.

8) On July 14, 1992, the Hearings Referee issued to Respondent a "Notice of Default," which notified Respondent that his failure to file a responsive pleading within the required time constituted a default to the Specific Charges, pursuant to OAR 839-30-185. The notice advised Respondent that he had 10 days in which to request relief from the default. As of the date of hearing, November 12, 1992, no such request was received by the Forum.

9) On August 4, 1992, the Hearings Unit notified the Agency that the Notice of Default sent to Respondent at two addresses (including his post office box) had been returned. The Agency, after further investigation, presented evidence to the Hearings Unit that Respondent had been served with the charging document, and the post office box was still his. In addition, the Agency found a new home address for Respondent.

10) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file. The Agency mailed the Summary of the Case to Respondent at his post office box and his home address.

11) Respondent failed to appear at the hearing held at the time and place set forth in the Notice of Hearing.

12) Pursuant to ORS 183.415(7), the Agency was verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) The Proposed Order, which included an Exceptions Notice, was issued on December 8, 1992. Exceptions, if any, were to be filed by December 18, 1992. No exceptions were filed in the Proposed Order.

FINDINGS OF FACTS – THE MERITS

1) Respondent owned and operated a janitorial service and product sales business in Beaverton under the names of Delta Trade and Delta Building Maintenance. Respondent was in his late thirties.

2) Complainant, who is female, was employed part time by Respondent from September 9 to 19, 1991, as a receptionist, secretary, and bookkeeper for both businesses. She was 17 years old when she worked for Respondent. It was her first office job.

3) Complainant worked around six hours per day, five days per week. The wage agreement was for $5.00 per hour, paid on the fifth and twentieth of each month. She had no agreement to work on commission, or to act as a consultant. Respondent supplied all of the supplies Complainant needed to do her job. Respondent set

Complainant's work schedule. Respondent told Complainant how to do her job. Complainant had no right to hire employees.

4) During the nine days she worked for Respondent, Complainant worked 54.5 hours.

5) Respondent's office was small, and included four rooms. When Complainant worked, she was alone in the office with Respondent. People did not come into the office to do business; it was done over the phone.

6) Over the course of Complainant's employment with him, Respondent talked about sexual matters with Complainant. He told her that he slept with his other receptionist, who gave him "blow jobs." He had stacks of "dirty" magazines laying around the office. Respondent told Complainant to look at the magazines, which had advertisements for items such as dildos, and to see if she saw any items she liked. Respondent told her that he ordered items from the magazines. He told her on one occasion that he had seen her underwear while she sat in a chair. Respondent told Complainant that he wanted to have someone work for him who would also be his companion and have sex with him. Complainant told Respondent she was not interested in being his companion. Respondent told her that, because he was her boss, he should be able to grab her buttocks, and on one occasion he did that. Respondent knew Complainant had a boyfriend, and he asked her about having sex with two men together. When Respondent talked to Complainant about sexual subjects or touched her, Complainant told him "no." Complainant told Respondent she thought he was sick or perverted. Respondent took it as a joke and laughed.

7) Respondent's comments and physical contacts with Complainant shocked and embarrassed her, and she found them unwelcome and offensive. Complainant was scared and "jumpy" at work, even though she did not take everything Respondent said seriously.

8) Complainant considered looking for another job after Respondent's sexual conduct started. She was reluctant to quit because her mother, Jerrie Litsjo, had helped her get the job with Respondent. Her mother had previously cleaned buildings as an independent contractor for Respondent in the janitorial business.

9) Complainant told her mother about Respondent's comments. Litsjo told Complainant to just ignore Respondent, as long as he did not touch her. Litsjo told Complainant to call her if there was any problem.

10) On Thursday, September 19, 1991, Respondent grabbed Complainant. He told her it was his birthday. Four or five times during the day Respondent asked her to stay after work with him and drink wine. Complainant believed Respondent wanted to have sex with her. Complainant told him "no," that she had plans with her friends, and that Buffy Bishop was coming to pick her up after work.

11) Just before 3 p.m., when Complainant was supposed to get off work, Respondent fired Complainant. He told her that he was sexually attracted to Complainant, and could not control himself around her. He told her he could not have her around him any more.

12) During the time that Respondent was firing Complainant, Buffy Bishop arrived to pick up Complainant. Complainant waved to Bishop to come in. Bishop overheard what Respondent said to Complainant. Bishop called Respondent a pervert, and told him the termination was not right.

13) After Respondent fired Complainant, she asked him for her wages. Respondent said he would pay her when he paid his other employees. Complainant demanded to be paid immediately, and grabbed Respondent's books that she had been working on. She went downstairs to a lawyer's office and telephoned her mother.

14) Between 10 minutes and a half hour later, Litsjo arrived and went into Respondent's office with Complainant and Bishop. Litsjo demanded that Respondent pay Complainant her wages. Respondent said he would not pay her until the next day.

15) Respondent then agreed to write a check to Complainant for "commissions and consulting." Complainant added up her hours, and Respondent wrote her a check, dated September 20, 1991. Complainant was unable to cash the check until the beginning of December because there were insufficient funds in Respondent's account.

16) Respondent told Litsjo that he fired Complainant because he could not control himself with her, that he was sexually attracted to Complainant, and that he fired her for her own protection.

17) After she was terminated, Complainant had no other source of money. In order to live with her mother she had to work. She lost the insurance on her car because she was unable to make the payments. She later sold her car and bought a "lower budget" car.

18) After she was terminated, Complainant looked for work in malls. She filled out applications. She called businesses to see if they were hiring. She mailed resumes for jobs listed in the Oregonian newspaper. On May 29, 1992, she was no longer available for work.

19) Complainant lost $5,400 in back wages (six hours per day times five days per week equals 30 hours; 30 hours times $5 per hour equals $150 per week; $150 per week times 36 weeks (between September 19, 1991, and May 29, 1992) equals $5,400).

20) Respondent's actions made Complainant feel angry, humiliated, embarrassed, and very frustrated. She felt that the only reason Respondent hired her was to have sex with her, and the reason he fired her was because she refused. She felt that she would not have been fired if she had had sex with Respondent. It lowered her self esteem. Respondent's actions made it uncomfortable for Complainant to work around older men who were her "boss." She felt nervous and confused working around older men.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an employer in the State of Oregon with one or more employees.

2) Complainant was employed by Respondent.

3) Complainant is female.

4) Respondent engaged in a course of verbal and physical conduct of a sexual nature toward Complainant while she worked for Respondent.

5) Respondent's conduct was directed toward Complainant because of her sex.

6) Respondent's conduct was offensive and unwelcome to Complainant.

7) Respondent's conduct had the effect of creating an intimidating and offensive working environment.

8) Respondent made sexual advances at and requests for sexual favors from Complainant.

9) Complainant rejected Respondent's sexual advances and requests for sexual favors.

10) Following Complainant's rejection, Respondent terminated Complainant's employment.

11) Complainant made adequate efforts to seek work following her termination by Respondent. She was not eligible for work after May 29, 1992.

12) Complainant suffered anger, embarrassment, humiliation, and frustration because of Respondent's conduct and his termination of her employment with Respondent. It lowered her self esteem. Following her employment with Respondent, Complainant felt uncomfortable, nervous, and confused working around older men.

13) Complainant suffered financial distress due to Respondent's termination of her employment. Complainant lost $5,400 in wages between September 19, 1991, and May 29, 1992.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110. ORS 659.010(6); OAR 839-07-505(3).

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein. ORS 659.010 to 659.121.

3) ORS 652.030(1) provides:

"For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340 and 659.400 to 659.435, it is an unlawful employment practice:

"(a) For an employer, because of an individual's * * * sex, * * * to refuse to hire or employ or to bar or discharge from employment such individual. However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

"(b) For an employer, because of an individual's * * * sex, * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

OAR 839-07-550 provides:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(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."

Respondent violated ORS 659.030 (1)(a) and (b).

4) Pursuant to ORS 659.060 and by the terms of 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

Respondent was found in default, pursuant to OAR 839-30-185(1)(a), for failing to file an answer to the Specific Charges. Respondent made no request for relief from default. OAR 839-30-190. In addition, he failed to appear at the scheduled hearing, and thus defaulted pursuant to OAR 839-30-185(1)(b).

In default situations, the Agency must present evidence to prove a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6); OAR 839-30-185(2).

Prima Facie Case

To present a prima facie case of a violation of ORS 659.030(1) for sexual harassment, the Agency must present evidence on the following elements:

1. The Respondent is a Respondent as defined by statute;

2. The Complainant is a member of a protected class;

3. The Complainant was harmed by an action of the Respondent;

4. The Respondent's action was taken because of the Complainant's membership in the protected class.

OAR 839-05-010(1); *In the Matter of Palomino Cafe and Lounge, Inc.*, 8 BOLI 32, 41 (1989); *In the Matter of Colonial Motor Inn*, 8 BOLI 45, 54 (1989).

The Agency has established a prima facie case. The credible testimony of Agency witnesses together with documentary evidence submitted were accepted and relied upon herein. Regarding the first three elements, the evidence showed that:

1. Respondent was a person who in this state engaged or utilized the personal service of one or more

employees *See* ORS 659.010(6) and (12), and OAR 839-07-505(3).

2. Complainant is female.

3. The termination and the sexual harassment Complainant endured during her employment (described below) harmed Complainant both financially and by causing her mental suffering.

Regarding the fourth element, the evidence showed that Respondent was admittedly sexually attracted to Complainant. He made sexual advances to Complainant, he made requests for sexual favors, he made numerous comments of a sexual nature, and he grabbed her buttocks, all because of her sex. Complainant's testimony was clear that Respondent's sexual conduct was unwelcome. Complainant's submission to Respondent's sexual conduct was made implicitly a term or condition of Complainant's employment. Respondent made it abundantly clear to Complainant that he wanted her to be his sexual companion. Complainant's rejection of Respondent's advances and requests was the basis for Respondent's decision to terminate Complainant. Respondent knew that his sexual overtures were unwelcome, and terminated Complainant's employment "for her own protection" when she rejected him. This is "quid pro quo" harassment. *See* EEOC: Policy Guidance on Sexual Harassment (March 19, 1990), 8 FEP Manual 405:6681 (BNA 1990).

In addition, during the course of her employment, Respondent's sexual conduct had the purpose or effect of creating an intimidating and offensive working environment. Again, Respondent made it clear he wanted a sexual relationship with Complainant, let her know he had been looking up her shorts, kept "dirty" magazines around the office, and asked Complainant to look at them. He asked about Complainant's sexual practices, and grabbed her buttocks. A reasonable person would find such conduct intimidating and offensive. This is classic "hostile environment" harassment. *Id.*

The credible evidence on the whole record is conclusive that Respondent discriminated against Complainant in the terms and conditions of her employment because of her sex, in violation of ORS 659.030(1)(b). The evidence is also conclusive that Respondent discharged Complainant from her employment because she rejected his sexual conduct, in violation of both ORS 659.030(1)(a) and (b).

Damages

The purpose of back pay awards in employment discrimination matters is to compensate a complainant for the loss of wages and benefits which the complainant would have received but for the respondent's unlawful discrimination. Such awards are calculated to make the complainant whole for injuries suffered because of the discrimination. *In the Matter of K-Mart Corporation,* 3 BOLI 194, 202 (1982).

Complainant made an adequate job search after she was discharged. The period for measuring back pay ended on May 29, 1992, when Complainant was no longer available for employment. Complainant lost $5,400 in wages as a direct consequence of Respondent's illegal actions.

Awards for mental suffering depend on the facts presented by each Complainant. The Forum found that

Complainant experienced mental suffering due to Respondent's sexual harassment and illegal termination, as described in Findings of Fact numbers 7, 17, and 20. The sum awarded in the Order below is intended to compensate Complainant for her lost wages and mental distress.

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, Respondent C. VOGAR'D AMEZCUA is hereby ordered to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, #32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for MELISSA LUND, in the amount of:

a) FIVE THOUSAND FOUR HUNDRED DOLLARS ($5,400), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) TWO HUNDRED EIGHTY FOUR DOLLARS AND NINETY FOUR CENTS ($284.94), representing interest on the lost wages at the annual rate of nine percent accrued between June 1, 1992, and December 31, 1992, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between January 1, 1993, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

d) TEN THOUSAND DOLLARS ($10,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any current or future employee because of the employee's sex.

3) Post in a conspicuous place in Respondent's offices a copy of ORS 659.030, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

In the Matter of
MARVIN CLANCY,
Richard D. Hews, and
Sharon F. Hews,
Respondents.

Case Number 05-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued February 8, 1993.

SYNOPSIS

Respondents did not refuse to rent an apartment to Complainant because of his race or color where the

Complainant, a black man, called the apartment manager, a white man, and was told an apartment was available, the Complainant arrived 15 minutes later, the manager was showing the vacant apartment to a couple when the Complainant arrived, the manager's wife told Complainant that the apartment had been rented, the couple subsequently did not rent the apartment, and, when the city housing authority called, the manager told them that an apartment was available. ORS 659.031, 659.033.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 7, 1992, in Bureau of Labor and Industries Office, 3865 Wolverine St. NE, Suite E-1, Salem, Oregon. Alan McCullough, Case Presenter for the Civil Rights Division of the Bureau of Labor and Industries (the Agency), represented the Agency. Carl G. Moody (Complainant) was present throughout the hearing, and was not represented by counsel. Bruce H. Tompkins, Attorney at Law, appeared on behalf of Marvin Clancy, Richard D. Hews, and Sharon F. Hews (Respondents). Mr. and Ms. Hews were present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): Fran Bates, Senior Investigator for the Agency; Merrie Chapin, secretary and receptionist, Salem Housing Authority; Dave Domine, counselor, Salem Housing Authority; Janet Hernandez, Housing Services Supervisor, Salem Housing Authority; and Carl Moody, Complainant.

Respondent called the following witnesses (in alphabetical order): Margaret Clancy, wife of Respondent Clancy (by telephone); Marvin Clancy, Respondent and former manager of the Plymouth Square Apartments (by telephone); Richard D. Hews, D.C., Respondent and owner of the Plymouth Square Apartments; and Carol Rogers, daughter of Respondent Clancy.

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

FINDINGS OF FACT – PROCEDURAL

1) On January 24, 1992, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondents (naming specifically Margaret Clancy, who was later dismissed from the case; see Procedural Finding of Fact 16, below) discriminated against him because of his race or color in that, on October 30, 1991, Respondents refused to rent an apartment to him.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful practice by Respondents in violation of ORS 659.033.

3) The Agency subsequently initiated conciliation efforts between the Complainant and Respondents. Conciliation failed.

4) On August 10, 1992, the Agency prepared and duly served on Respondents (including Margaret Clancy) Specific Charges that alleged that Respondents had refused to rent an apartment to Complainant because of his race or color. The Specific Charges alleged that Respondents' action violated ORS 659.033.

5) With the Specific Charges, the Forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On August 27, 1992, Respondents filed an answer in which they denied the allegation in the Specific Charges mentioned above, and stated numerous affirmative defenses.

7) On September 23, 1992, the Hearings Referee sent prehearing instructions to the participants.*

8) On September 24, 1992, the Agency filed a motion to amend the Specific Charges to correct the spelling of Richard and Sharon Hews' names. On September 25, 1992, the Hearings Referee sent a letter to Respondents' attorney concerning the Agency's motion to amend, and requested a response by October 2, 1992. On October 2, the Hearings Unit received Respondents' letter stating they had no objection to the Agency's motion.

9) Pursuant to OAR 839-30-071, the Agency and Respondents each filed a Summary of the Case.

10) On September 25, 1992, Respondents filed a motion to take the testimony of Marvin Clancy and Margaret Clancy by telephone, because they lived in Idaho. On October 2, 1992, the Agency said it did not object to Respondents' motion, provided the Clancys' testimony was taken in a manner to protect the Agency's ability to cross examine them.

11) On October 6, 1992, the Hearings Referee granted the Agency's motion to amend the Specific Charges, and granted Respondents' motion to take the Clancys' testimony by telephone. The Hearings Referee ordered the Clancys not to consult with each other during the course of the testimony of either of them.

12) A pre-hearing conference was held on October 7, 1992, at which time the Agency and Respondents stipulated to certain facts. The Hearings Referee admitted those facts into the record at the beginning of the hearing.

13) At the start of the hearing, the attorney for Respondents stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

14) Pursuant to ORS 183.415(7), the Agency and Respondents were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the

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* "Participant" or "participants" includes the charged party and the Agency. OAR 839-30-025(17).

procedures governing the conduct of the hearing.

15) During Complainant's testimony, he refused to testify about matters related to his alleged mental suffering. The Hearings Referee decided not to strike his direct testimony on the issue, but drew an adverse inference from his refusal to testify.

16) At the end of the Agency's case in chief, Respondents moved to dismiss the Specific Charges against Margaret Clancy, Richard Hews, and Sharon Hews because the evidence failed to support the charges. The motion was granted with respect to Margaret Clancy, but denied with respect to Mr. and Ms. Hews. The Agency moved to amend the Specific Charges to delete Margaret Clancy as a Respondent. The Hearings Referee granted that motion.

17) At the end of the hearing, the Hearings Referee left the record open until October 19, 1992, for simultaneous written closing arguments from the participants. Pursuant to OAR 839-30-175, the Hearings Referee requested a written statement of Agency policy regarding the liability of owners of real property for the discriminatory acts of their property managers. Pursuant to OAR 839-30-155, the Hearings Referee also requested a post-hearing reply brief from Respondents. The record of the hearing was left open until October 30, 1992, for that brief. Respondents and the Agency each submitted timely closing arguments and briefs, which are hereby admitted to the record.

18) The Proposed Order, which included an Exceptions Notice, was issued on November 18, 1992. On November 25, 1992, the Agency requested an extension of time until January 4, 1993, to file exceptions to the Proposed Order. On November 30, 1992, that request was granted. The deadline for exceptions was extended to January 4, 1993, for both the Agency and Respondents. On December 23, 1992, the Agency filed its exceptions. On January 4, 1993, the Agency requested an extension of time to file an addendum to its exceptions. The addendum was exceptions written by Complainant. The Hearings Referee granted an extension of time to January 11, 1993, for the addendum, which was timely filed. No exceptions were received from Respondent.

FINDINGS OF FACT – THE MERITS

1) At all times material, Richard D. Hews and Sharon F. Hews were owners of an apartment complex at 809 Plymouth Drive, NE, Salem, Oregon. Marvin Clancy was a manager of the apartment complex.

2) Respondents are white persons.

3) Respondent Clancy's duties included showing and renting apartments, and collecting rents. He ran the day-to-day operations of the complex, which had 24 apartments. Clancy had an oral agreement with Respondent R. Hews in which he got free rent for managing the apartments, and received compensation for other duties, such as cleaning. Respondent R. Hews did not control Mr. Clancy's hours, or exert day-to-day control over his actions as manager. Respondent R. Hews did all of the bookkeeping for the apartments.

4) Respondents Hews had an oral and a written nondiscrimination policy for their apartments. Respondent R. Hews gave the written policy to each of his managers, including Respondent Clancy. Respondent Clancy followed the policy.

5) Complainant never saw or talked to either Respondent R. Hews or S. Hews before the hearing in this matter.

6) Complainant is a black person.

7) From June 1989 to October 1991, Complainant lived with his parents in Salem. Around October 1, 1991, Complainant's parents moved to Portland. Complainant got a room in a motel, and started looking in the newspaper for a place to live. On October 21, 1991, Complainant applied for an interim housing loan from the Salem Housing Authority (SHA). The SHA approved a loan to Complainant for a one bedroom apartment, and gave Complainant a voucher for $290 for rent and $150 maximum for deposit.

8) Complainant was employed as a seasonal laborer by Oregon Cherry Growers, at a rate of $6.17 per hour, for 40 hours per week. At the time of his application with the Salem Housing Authority, Complainant had about $20 in the bank.

9) Sometime before November 1, 1991, Margaret Clancy contacted the Salem Housing Authority and said that Respondents would have five vacant apartments by November 1, 1991.

10) During the month of October 1991, four of Respondents' apartments became vacant. They were all rented to new tenants by November 1, 1991.

11) On October 30, 1991, Respondents had one vacancy at the apartment complex.

12) Complainant learned from the Statesmen Journal newspaper of an apartment available in Respondents' apartment complex.

13) On October 30, 1991, Complainant telephoned the apartment complex regarding the availability of an apartment. He was told to come and look at the apartment.

14) Complainant went to look at the apartment after the telephone call.

15) Complainant did not have a car, so he rode a bicycle to the apartment complex. It took him about 15 minutes to travel to the apartments after the telephone call.

16) Margaret Clancy met Complainant at the door of the manager's apartment. Carol Rogers, Respondent Clancy's daughter, was in the apartment. Rogers saw Complainant and overheard part of the conversation between him and Margaret Clancy. When Complainant arrived, Respondent Clancy was showing the vacant apartment to a couple who had previously filled out a rental application. Margaret Clancy thought the couple were going to rent the apartment. She told Complainant that she thought the apartment was rented and that no apartment was available, but that he needed to talk with Respondent Clancy. Margaret Clancy asked Complainant if he had previously filled out an application. Complainant acted angry and left. Ms. Clancy did not have an opportunity to offer Complainant an application.

17) Complainant never requested an application form.

18) The couple who were looking at the apartment with Respondent Clancy did not rent it.

19) Neither Margaret Clancy nor Respondent Clancy refused to rent an apartment to Complainant due to his race or color.

20) Respondents had a black/ Hispanic tenant in the apartments. The remaining tenants were white. Respondents Hews had minority tenants in other rental properties they owned.

21) About 45 minutes after he left Respondents' apartments, Complainant went to the SHA. He told the receptionist, Merrie Chapin, that he was having a hard time finding a place to live. He told her what had happened when he went to Respondents' apartments, and said that the door had been slammed in his face. The receptionist talked to her supervisor, Jan Hernandez. All discrimination complaints were brought to Hernandez. Chapin told Hernandez that Complainant said he'd been discriminated against. Hernandez interviewed Complainant, who said he'd telephoned the landlord, went to the apartment, and the manager told him that they didn't have any vacancies and "slammed the door."

22) Hernandez was aware of an SHA form concerning Respondents' apartments showing five vacancies. Hernandez telephoned Respondents' apartments. When Respondent Clancy answered, Hernandez asked to speak to Margaret Clancy, who was shown on the SHA form as the apartment manager. Respondent Clancy identified himself as Mr. Clancy. Hernandez identified herself, and Respondent Clancy said he had one apartment available "now."

23) Hernandez suggested several options to Complainant, including calling Respondent again. Complainant had no intention of going back to Respondents' apartments after his visit there. When Complainant left the apartments, he did not intend to file a complaint. Hernandez asked Complainant if he wanted to fill out a Housing and Urban Development (HUD) discrimination complaint form, and helped him fill out the complaint. Complainant was upset.

24) During the investigation of Complainant's complaint, Agency investigator Fran Bates wanted to have Complainant identify Marvin Clancy, because Complainant said he had talked to only Mr. Clancy, yet Mr. Clancy said he had not seen Complainant. Bates took a picture of Respondent Clancy, and presented it with pictures of other men to Complainant. Complainant had earlier described Mr. Clancy as white, middle aged, with white hair. Complainant later identified Mr. Clancy from the pictures.

25) Complainant's testimony was not credible. The Hearings Referee paid special attention to all of the witnesses during their testimony. Important points in Complainant's testimony were contradicted by credible evidence, and by his own statements given during the Agency's investigation and during a deposition. Much of the disputed evidence focused on whether Complainant talked with Mr. Clancy or Ms. Clancy. For example, Complainant testified that when he called the apartments, he spoke to a man who said that two apartments were available. Yet Complainant's own complaint states that he called the apartment manager and "she" said he could come see the apartment. He testified that while he was at the apartments, he spoke to a gentleman, and that there was no one else at the apartment besides the man, who was the only one Complainant talked to or saw. However, he told the investigator that a woman was sitting at a desk while he talked to Respondent Clancy. In addition, during his deposition Complainant identified from a group of pictures the wrong man as Respondent Clancy. Credible testimony from Margaret Clancy, Marvin Clancy, and Rogers contradicted Complainant's testimony. These contradictions and inconsistencies rendered Complainant's testimony unreliable. Further, Complainant is a convicted felon. He committed three burglaries and one robbery, and spent time in the Oregon State Penitentiary five or six times throughout the 1980s. As a result, Complainant's testimony was not believed whenever it was contradicted by credible evidence on the record. In some instances, his testimony was not believed even when it was not controverted.

26) The testimony of Respondent R. Hews, Respondent S. Hews, Respondent Clancy, Margaret Clancy, and Carol Rogers was credible. While there were some inconsistencies on minor points in their testimony, the Forum did not find that these made the balance of the testimony unreliable.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent R. Hews and Respondent S. Hews were owners of an apartment complex in the State of Oregon.

2) Respondent Clancy was the manager of the apartment complex. He was the employee or agent of the Hews.

3) Complainant is a black person.

4) Respondents had a vacancy in the apartment complex. Complainant was a prospective occupant.

5) Respondents refused to rent an apartment to Complainant because Margaret Clancy believed no apartment was available.

CONCLUSIONS OF LAW

1) At all times material herein, Respondents were persons subject to the provisions of ORS 659.010 to 659.110. ORS 659.010(12) and (13).

2) ORS 659.031 provides:

> "As used in ORS 659.033, unless the context requires otherwise, 'purchaser' includes an occupant, prospective occupant, lessee, prospective lessee, buyer or prospective buyer."

At all times material herein, Complainant was purchaser – that is, a prospective occupant – of Respondents' apartment.

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein. ORS 659.045 to 659.060.

4) ORS 659.033(1) provides:

> "No person shall, because of [the] race * * * of any person:
>
> "(a) Refuse to sell, lease or rent any real property to a purchaser."

Respondents did not violate ORS 659.033.

5) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and the complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

This case turns on the credibility of the witnesses. The Hearings Referee had the opportunity to listen to and pay special attention to all of the witnesses. The Forum reviewed the testimony in the light of all of the evidence on the record. The Forum found Complainant's testimony not credible, as noted in Finding of Fact 25. And just as important, the Forum found Respondents' witnesses' testimony credible, as noted in Finding of Fact 26.

Here, the allegations in Complainant's complaint describe a prima facie case of housing discrimination. Among the facts found are that Complainant, a black man, learned about a vacant apartment from a newspaper. He called the apartment complex and was told an apartment was available. He went to the apartment complex 15 minutes later, and was told that the apartment had been rented. He then went to the city housing authorities, who called the apartment complex within an hour or so of Complainant's visit, and were told by the apartment manager that an apartment was available. Respondents are all white. All but one of the tenants of the apartment complex, which had 24 apartments, were white. From those facts, a reasonable inference can be drawn that Complainant was refused the chance to rent an apartment because of his race or color.

Respondents presented evidence of a legitimate, nondiscriminatory reason for telling Complainant that no apartment was available. The credible testimony of Mr. and Ms. Clancy and Carol Rogers was that Mr. Clancy was showing the available apartment to a couple at the time of Complainant's visit. The couple had previously filled out a rental application form, and Mr. and Ms. Clancy believed the couple were going to rent the apartment following their inspection. Ms. Clancy told the Complainant that the apartment was rented. After that, the couple left without renting the apartment. When the Salem Housing Authority called later, Mr. Clancy reported that the apartment was still vacant.

The Agency presented evidence to show that Respondents' reason was pretextual. However, the Forum found that evidence unpersuasive. The preponderance of the evidence supports Respondents' legitimate, nondiscriminatory reason for not renting an apartment to Complainant, and therefore Respondents did not violate ORS 659.033.

This decision makes it unnecessary to discuss Respondents' other defenses concerning their constitutional rights to a jury trial, and the vicarious liability of Respondents Hews.

Exceptions

The Agency filed exceptions to the Proposed Order challenging the credibility determinations made by the Hearings Referee. The Commissioner has previously held that,

> "[a] hearing referee's credibility findings are accorded substantial deference by this Forum. Absent convincing reasons for rejecting such findings, they are not disturbed." *In the Matter of Western Medical Systems, Inc.*, 8 BOLI 108, 117 (1989).

The Agency's exceptions do not provide a convincing basis for rejecting the referee's findings in this matter.

The Agency first takes issue with the statement that the Hearings Referee "carefully observed all of the witnesses during their testimony," and notes that two of Respondents' witnesses testified by telephone. This Forum recognizes that the word "observe" is defined much more broadly than simply "to look at." It means "to notice or perceive (something)," or "to pay special attention to," or "to examine and study scientifically." *Webster's New World Dictionary* 982 (2nd coll. ed. 1986). As used in the Proposed Order, "observed" meant "paid special attention to," and that phrase has been used in this order for clarity.

The Agency next claims that a "key issue in this case were [sic] whether there was an actual apartment vacancy at the time Complainant visited the apartments, as Respondents' defense throughout the investigation and hearing was that there was no vacant apartment when Complainant arrived at the apartments." That statement misstates the facts. The testimony at hearing and Margaret Clancy's letter to the Agency during the investigation consistently stated that an apartment was vacant when Complainant visited the apartments, but Ms. Clancy believed it had been rented by the couple who were inspecting it. Hence, Ms. Clancy told Complainant the apartment had been rented.

The Agency identifies inconsistencies in the testimony of Respondents' witnesses and documents. It is true that there were inconsistencies, and the Hearings Referee so found. However, the Forum is not persuaded to change the credibility determinations. Some of the inconsistencies involve whether Carol Rogers's son was at the apartments or in school at the time of Complainant's visit. The Forum finds this issue inconsequential, and the inconsistency in the testimony too insignificant to cause the Forum to disbelieve other consistent testimony on important facts. The more important testimony that was inconsistent involved which apartments were rented during October 1991, and when the new tenants submitted their rental applications. On these details, Mr. and Ms. Clancy's memories were weak, and they were testifying without any documents to refresh their memories. Accordingly, this testimony was not reliable, and was not used as the basis for findings of fact. At the same time, the Forum does not find that the Clancy's intended to deceive it. Accordingly, the Clancys' and Rogers's testimony that was consistent and reliable was found credible.

With respect to Complainant's testimony and credibility, the Agency suggests that the Hearings Referee placed undue emphasis on Complainant's criminal record in the credibility determination. The Agency cites two other cases in which the same referee referred to a witness's criminal record

in the credibility determination and found the witness not credible.

In *In the Matter of Harry Markwell,* 8 BOLI 80, 91-92 (1989), the Hearings Referee found both the complainant and the respondent not credible. Complainant was found not credible because on important points her testimony was inconsistent or her memory failed. On many points her testimony was contradicted by credible evidence. The Hearings Referee cited several examples of the complainant's inconsistent and contradicted testimony. In addition, she forged the respondent's signature on prescription slips, for which she was caught and convicted. Forgery by definition is for the purpose of fraud or deceit. During her arrest, she lied to the police. In *In the Matter of Dan Cyr Enterprises, Inc.,* 11 BOLI 172, 177 (1993), a witness's testimony was found not credible when he admittedly lied under oath at the hearing, and his testimony was biased. His testimony on a critical point was uncorroborated, and contradicted by credible testimony. In addition, he had a conviction for initiating a false report, which involved false statement. Accordingly, the witness's testimony was found not credible.

The Forum has reviewed those cases and finds that appropriate weight was given those witnesses' criminal records. Given the other grounds for finding the witnesses' testimony not credible, the Forum believes that the same credibility findings would have been made without the evidence of criminal convictions.

In the addendum to the Agency's exceptions, Complainant presented new facts that were not presented at hearing, and are not part of that record. Those new facts have not been considered by this Forum. OAR 839-30-165(1). Complainant argues about disputed evidence; however, none of his arguments persuade this Forum to reverse the credibility determinations. For example, he asserts that during his deposition Respondent's counsel showed him an altered copy of the group of photographs, which Complainant used to identify Respondent Clancy. He suggests that counsel moved the pictures around before Complainant's testimony, and moved them again after the testimony in order to say that Complainant misidentified Respondent Clancy. However, such an irregularity was never objected to at the deposition. In light of that, the Forum finds Complainant's allegation of such a serious charge against Respondent's counsel unproven and utterly unbelievable. The allegation only highlights Complainant's failure to correctly identify Respondent Clancy, and Complainant's lack of credibility. Complainant also challenges the finding of fact concerning the number of felonies he has committed. The Forum has reviewed his testimony, and the finding in this order is in accord with his testimony. However, that finding is relevant only to his credibility, and on this point Complainant's exceptions do not help him. At hearing, Complainant testified to convictions for "three burglaries and a robbery three, and maybe some driving, driving offenses." In his exceptions, he asserts,

> "I never committed a robbery in my life and the record will reflect that. I have one conviction for robbery in the third degree which was originally theft in the third degree an infraction involving 35mm film at a supermarket, an 'infraction'. Because of a technicality in Oregon law I was charged and eventually convicted of Robbery III in a court of law. The burgularies [sic] were also infractions and misdemeanors that were bumped up because of technicalities." (Emphasis in the original.)

None of this detail about Complainant's convictions is in the record of this hearing, so this Forum will not consider it. OAR 839-30-165(1). However, if it were considered, it would do nothing to improve Complainant's credibility due to the improbability of the assertions.

In its exceptions, the Agency did not dispute the inconsistencies in Complainant's testimony, but believed that his inconsistencies were magnified, while significant inconsistencies in Respondents' witnesses' testimony were ignored. The Forum agrees that there were inconsistencies in all of the witnesses' testimony, but disagrees that some were magnified or ignored. For the reasons given above, the Forum finds that the preponderance of credible evidence supports the findings of facts made in this Order.

ORDER

NOW, THEREFORE, as Respondents have not been found to have engaged in any unlawful practice charged, the complaint and the amended specific charges filed against Respondents are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of
Bob D. Berry and
Laure D. Berry, Partners, dba
FLAVORS NORTHWEST,
Respondents.

Case Number 46-92
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 29, 1993.

SYNOPSIS

Respondents, who were both registered as parties in interest on the assumed business name of a cafeteria, employed two wage Claimants on an hourly basis, not on salary, and failed to pay their wages due, including overtime, within 48 hours after they quit. Respondents discharged another Claimant, and failed to pay his wages immediately upon his termination. Where Respondents continued to operate the cafeteria and pay other obligations, including wages, they failed to prove their defense of inability to pay the Claimants' wages at the time they accrued. The Commissioner awarded the Claimants wages due, penalty wages, and expenses plus interest. ORS 652.140(1) and (2); 652.150; 652.310(1) and (3); 653.010(12); 653.261(1); OAR 839-20-004(14); 839-20-030; 839-20-040(2) and (4).

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

hearing was held on November 24, 1992, in Room 1004 of the State Office Building, 800 NE Oregon Street, Portland. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Bob D. Berry and Laure D. Berry (Respondents)* were present throughout the hearing and were represented by Dean H. Shade, Attorney at Law, Portland. Claimants Jacqueline (Jackie) Otey and Mark Otey were present throughout the hearing and Claimant Matthew Hamilton was present for his own testimony. None of the Claimants were represented by counsel.

The Agency called as witnesses Claimants Matthew Hamilton, Jackie Otey, and Mark Otey; Portland State Office Building Manager Charles Rosenblad; and Agency Compliance Specialist Margaret Trotman. Respondents called as witnesses Respondents Bob D. Berry and Laure D. Berry.

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

FINDINGS OF FACT – PROCEDURAL

1) On July 30, 1991, Claimant Jackie Otey filed a wage claim with the Agency, alleging that she had been employed by "Flavors Northwest, Bob Barry [sic], Owner," and that she had not been paid wages earned and due to her.

2) On July 30, 1991, Claimant Mark Otey filed a wage claim with the Agency, alleging that he had been employed by "Flavors Northwest, Bob Barry [sic], Owner," and that he had not been paid wages earned and due to him.

3) On or about November 1, 1991, Claimant Matthew Hamilton filed a wage claim with the Agency, alleging that he had been employed by "Flavors Northwest, Bob Berry," and that he had not been paid wages earned and due to him.

4) At the time each filed a wage claim, each Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from the employer.

5) On March 30, 1992, the Agency served on Dean H. Shade, Attorney at Law, Portland, through the Sheriff of Multnomah County, Oregon, Order of Determination No. 91-179 (Determination 91-179), based on the Agency's investigation of the wage claims filed by Claimants.

6) Determination 91-179 found that Respondents owed Claimants a combined total of $2,061.29 in unpaid wages, and sought an additional total of $6,313 as penalty wages based on Respondents' willful failure to pay the earned wages due. Determination 91-179 required that, within 20 days, Respondents either pay said sums to the Commissioner or request a contested case hearing and submit an answer to the charges.

7) On March 31, 1992, attorney Shade advised the Agency that he did not currently represent Respondents and that he was forwarding Determination 91-179 to Respondents. On April 16, 1992, attorney Shade, acting on his clients' instructions, formally accepted service of Determination 91-179 and filed an answer and a request for contested case hearing.

8) On June 17, 1992, at the Agency's request, the Hearings Unit issued a Notice of Hearing to Respondents and to Claimants indicating the time and place of the hearing. A document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200, accompanied the Notice of Hearing.

9) The Agency submitted a Summary of the Case pursuant to OAR 839-30-071 on November 16, 1992. Respondents submitted a Case Summary prior to hearing.

10) At the commencement of the hearing, counsel for Respondents stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

11) Pursuant to ORS 183.415(7), Respondents and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) At the close of the Agency's case in chief, the Agency moved to amend Determination 91-179 to include the provisions of ORS chapter 653 regarding overtime and work time. Evidence having been received regarding alleged overtime and disputed work time, the Hearings Referee allowed the amendment.

13) Following the presentation of evidence, the Hearings Referee asked the Agency and Respondents for written argument with the initial submission for each due December 4, 1992, and rebuttal due one week later on December 11, 1992. Submissions were received timely under that schedule and the record herein closed on December 14, 1992.

14) The Proposed Order, which included an Exceptions Notice, was issued on February 2, 1993. Exceptions, if any, were to be filed by February 12, 1993. Respondents' exceptions were received timely on February 12, 1993. They are dealt with as described at the end of the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) On July 15, 1991, Respondents made an assumed business name filing with the Corporation Division of the office of the Secretary of State of the State of Oregon for the assumed name of "Flavors Northwest." Both were listed as registrants, with Respondent as authorized representative.

2) Respondent entered into an agreement with the Business Enterprise Program (BEP) of the Oregon Commission for the Blind (Commission) to operate the Portland State Office Building (PSOB) Cafeteria, 1400 SW 5th Avenue, Portland. The agreement was to run from July 1, 1991, to July 1, 1992, and was executed by

* Throughout this Order, for brevity, "Respondent" refers to Bob D. Berry; "Respondents" refers to both Bob and Laure Berry. "Respondent Laure Berry" is self-explanatory.

Respondent as vendor on July 2, 1991. Respondent Laure Berry did not sign the agreement. It was signed for BEP and the Commission on July 12.

3) Respondent was recognized as an individual doing business as "Flavors Northwest" by BEP and the Commission, by a City of Portland Business License (dated August 1, 1991), by the federal Internal Revenue Service (IRS) assignment of an employer identification number (dated August 20, 1991)*, by the State of Oregon Department of Revenue assignment of an employer identification number (undated), by the State of Oregon Employment Division assignment of an account number (dated August 13, 1991), by a United States National Bank business checking account (dated August 8, 1991), by Respondent's accountant D. S. Yadov, CPA (dated August 14, 1991, and accepted by Respondent September 11, 1991), and by vendors to the business Otis Spunkmeyer Cookies (dated September 20, 1991), US West Communications (billing July 29, 1991), S. E. Rykof & Co. food service (dated July 10, 1991), Boyd Coffee Company (dated July 19, 1991), and MCI Telecommunications Corporation (dated July 24, 1991).

4) Respondent's eyesight is severely impaired by retinitis pigmentosa and glaucoma. He is extremely farsighted, cannot drive, and reads and writes only with great difficulty. Respondent Laure Berry frequently acts as his eyes.

5) Respondent had attended Western Culinary Institute (Western), and had experience in a family restaurant business. Claimant Mark Otey attended Western with Respondent.

6) Respondent learned of the possible availability of the PSOB cafeteria in May 1991. He bid on the opportunity with the Commission. At that time he discussed with Claimants Otey the possibility of working for him. They talked about menu, pricing, controls, inventory, and compensation.

7) The prior operator stayed at the PSOB cafeteria until late June, at which time BEP notified Respondent that he could begin operating the cafeteria on July 1.

8) When Respondent obtained the right to operate the PSOB cafeteria, Claimants Mark and Jackie Otey spent 10.5 hours each on June 29 and 14 hours each on June 30, 1991, readying the PSOB cafeteria to open as Flavors Northwest. They were to be paid $6.00 an hour and $5.00 an hour, respectively. Claimant Mark Otey had originally wanted $6.50 an hour, but agreed to work for $6.00.

9) Respondent told Claimants Otey that he couldn't afford to pay them for June 29 and 30 for two weeks or more after opening. They agreed to defer those wages.

10) Claimant Mark Otey began working as cook on July 1. He agreed to $6.00 an hour about July 13 so that Respondent could hire Traci Bates as a baker and cook. Bates was hired at $6.00 an hour on July 15, and earned $6.50 an hour after August 1.

* IRS erroneously listed him as "Labors Northwest," but at the restaurant location.

11) Claimant Jackie Otey began working as cashier on July 1 at $5.00 an hour.

12) At times material, persons entering or leaving the PSOB before 6 a.m. and after 6 p.m. on weekdays and at any time on weekends or holidays were required to enter on a building logsheet their identity, date, time, room number, and department. This included state employees and other persons working or meeting in the building. Access to the building was controlled by a security officer.

13) Claimants Otey lived in Vancouver, Washington, at times material and drove to work each day. Usually, they picked up Respondent at his northeast Portland home each morning and took him home in the evening after work.

14) Respondent and Claimants Otey arrived at the PSOB together on 17 of the weekday mornings from July 1 through July 29, 1991, for which records were available. They arrived at or after 5 a.m. six times and before 5 a.m. eleven times.

15) Respondent's agreement with BEP required that the cafeteria be open each weekday except holidays from 7 a.m. to 4 p.m. There was a temporary modification to this that provided for a 6:30 a.m. opening in July. Special workers such as window washers were sometimes served earlier.

16) Respondent and Claimants Otey generally closed the doors at 4 p.m. and left shortly after that time.

17) Respondent's records included completed employment applications, INS forms I-9, and IRS W-4 forms for Claimants Mark and Jackie Otey. Claimants Otey signed the forms on or about July 9, 1991. Respondent Laure Berry assisted in completing the I-9 and W-4 forms.

18) On Claimant Mark Otey's employment application, Respondent noted the following below Claimant's signature:

> "Although Mark Otey lacks in experience and ability, he shows a willingness to be trained."

Respondent further filled in the form as follows:

> Ability: "some – needs additional training"; Hired: "7-9-91"; For Dept.: "Kitchen"; Position: "Assistant Cook – Mngr"; Salary Wages: $1200.00 month".

Respondent signed the form as General Manager.

19) On Claimant Jackie Otey's employment application, Respondent noted the following below Claimant's signature:

> "Although Jackie Otey lacks in experience and ability, she shows a willingness to be trained."

Respondent further filled in the form as follows:

> Ability: "some experience – needs additional training"; Hired: "7-9-91"; For Dept.: "Service, Dinning" [sic]; Position: "Cashier – Dinning [sic] Room Service – Mngr."; Salary Wages: $1000.00 month".

Respondent signed the form as General Manager.

20) Claimant Mark Otey did not see Respondent's written comments on his employment application while he was employed by Respondent.

Claimant Jackie Otey did not see Respondent's written comments on her employment application while she was employed by Respondent. They took lunch and breaks when the cafeteria was not busy, subject to Respondent's instructions to them never to leave a customer standing and waiting.

21) Margaret Trotman was a Compliance Specialist for the Agency who investigated the wage claims of Claimants Otey and Hamilton. She obtained information from Claimants and Respondents, computed the amounts owing alleged in Determination 91-179, and sent a demand letter to Respondents.

22) Respondent's records did not reflect a completed INS form I-9, IRS W-4 form, or employment application for Claimant Matthew Hamilton. Claimant Jackie Otey obtained social security numbers from Claimant Hamilton and Claimant Mark Otey at Respondent Laure Berry's request on or about July 9 while Claimants Hamilton and Mark Otey were working. She saw Respondent Laure Berry fill out W-4's and I-9's with the information.

23) A few days after he started working for Respondent on June 29, Claimant Hamilton signed an employment application. He worked as a dishwasher, did some prep work, and emptied the garbage. He took his lunch and breaks when the cafeteria was not busy. On or about July 17, he was fired by Respondent. On one occasion before his employment terminated, Claimant Hamilton was paid $165 in cash by Respondent.

24) After July 17, Claimants Otey, Traci Bates, and Respondent shared the dishwashing. In August, Respondent hired Bruce McGinnis as dishwasher at $6.00 an hour.

25) Claimants Otey did not keep precise records of the hours they worked at the PSOB cafeteria. They knew the approximate times that they arrived each morning and that they left at the end of the day. They knew the weekends and holidays they had worked. Their wage claim calendars, as modified by their respective wage transcription computation sheets, reflected the gross hours they were at work. Each denied having a set lunch hour.

26) Claimant Mark Otey worked as a cook. His early morning duties were to prepare biscuits, fresh gravy, and egg batter for French toast, and to bake cookies and cinnamon rolls. On weekdays he worked from 5 a.m. to 4 p.m. He worked six hours on July 4, a holiday, and 12 hours on July 6, a Saturday. He admitted leaving early on one occasion for his wife's medical appointment. He had no set time for lunch, and took a lunch break each day on the premises, subject to customer demand for service. He denied that either he or his wife had agreed to work on salary.

27) Claimant Jackie Otey worked as a cashier. In the early morning, she made coffee, put donuts away, and put out newspapers and a change cup, all of which Respondent had asked her to do. Also, if the cafeteria had not been vacuumed the night before, Respondent would ask her to do that. She stocked milk and a juice dispenser. During the day, she ran the cash register, bussed and wiped down tables, and emptied ash trays. On weekdays she worked from 5 a.m. to 4 p.m. She worked six hours on July 4, a holiday, and 12 hours on July 6, a Saturday. She admitted leaving early on one occasion for a medical appointment. She had no set time for lunch, and took a lunch break each day on the premises, subject to customer demand for service. She first heard about being salaried on July 29 when she asked Respondent about overtime pay.

28) In late May 1991, Claimants Otey ordered chef coats, a navy jumper, and chef hats for use at the PSOB cafeteria. Respondent accompanied Claimant Mark Otey to the supplier.

29) Claimant Jackie Otey paid $53.76 for her uniform items, which was not reimbursed. Claimant Mark Otey paid $24.31 for his uniform items, which was not reimbursed. Respondent told them the uniform was required and that he would reimburse them.

30) Respondent kept a record representing employee work hours at the restaurant, a black book which he called a "cash book." Claimants Otey signed for the money paid to them on the pages of this book. Other than employee signatures, entries in this book were made by Respondent.

31) Respondent kept another record representing employee work hours at home, a red book with pages headed "Individual Payroll Record," one page for each employee. There was no page for Claimant Hamilton. Entries in this book were made by Respondent Laure Berry from information supplied to her by Respondent. She also made out handwritten withholding slips for Claimants Otey from information supplied by Respondent's accountant Yadov.

32) Respondent's accountant Yadov had a third record. It was set up on a "bi-weekly" basis for "July 1 to 10" [sic], 1991, and on a "semi-monthly" basis for July 16 to 31 as to Claimants Otey, and reflected a salary method of pay. It did not show actual hours worked. It showed an arbitrary nine hours per day at $6.00 an hour for Claimant Mark Otey and $5.00 an hour for Claimant Jackie Otey for 10 days, "July 1 to 10" [sic], and an arbitrary 10 hours per day at $6.00 an hour for Claimant Mark Otey and $5.00 an hour for Claimant Jackie Otey for 11 days, from July 16 to 31. All other employees of Flavors Northwest were paid on an hourly basis.

33) Respondent supplied the information to Yadov either directly or through Respondent Laure Berry, acting as a messenger. Yadov's record showed 10 hours per day for each of Claimants Otey for June 28 and 29, 1991, at $6.00 per hour and $5.00 per hour respectively. In August 1991, this record changed from "semi-monthly" to "weekly."

34) The figures in various records and withholding slips were not in agreement, particularly as to the amount of deductions shown.

35) Claimants Otey were paid on or about July 12, 1991, in cash. They each signed the cash book. Claimant Mark Otey receipted for $423.29. Claimant Jackie Otey receipted for $361.17. These amounts were represented to Claimants to be net pay for 90 straight time hours apiece. Neither Claimant computed whether the amounts were accurate at the time

because Respondent had assured them he would take care of the overtime before the next payday.

36) On July 29, Claimant Jackie Otey asked Respondent about payment for overtime; Respondent said he had no cash on hand for that purpose, and to wait until the regular payday at the end of the month.

37) At times material, Claimants Otey lived with Claimant Mark Otey's mother. She was doing some typing work for Respondent. In the evening of July 29, Respondent went to her home. She and Claimant Jackie Otey confronted him about overtime claimed to be owed to both Claimants Otey. Respondent denied owing any overtime. He discussed with Claimant Jackie Otey the salary arrangement he alleged was in effect, and asked her to have Claimant Mark Otey call him.

38) Respondent told Claimant Jackie Otey later that evening that he would not pay the overtime, i.e., beyond 40 hours a week, that Claimants Otey were seeking. Claimants Otey never returned to work for Respondent. On July 30 Claimant Jackie Otey picked up the pay that Respondent acknowledged owing for the latter half of July and for June 29 and 30. She signed Respondent's cash book for the cash received for herself and for Claimant Mark Otey.

39) Respondent Laure Berry was employed by Multnomah County Corrections beginning April 30, 1991. At times material, she was in and out of Portland training as a corrections officer. She began working swing shift, from 3:30 p.m. to 11:30 p.m. at the Multnomah County Justice Center jail on June 28. She acted as Respondent's eyes, reading for him and doing paper work at home and at the restaurant as time allowed. She was not a party to Respondent's early discussions with Claimants Otey regarding wages or salary. She acted as a messenger between Respondent and the accountant, and made the entries in the red book as Respondent directed her. She saw Hamilton at the PSOB cafeteria quite a bit the first part of July, but did not see him working. She denied that Respondent hired Hamilton, whom she stated was not reliable. She did not prepare a ledger page in the red book for Hamilton.

40) In July of 1991, Respondents were negotiating to buy a house.

41) Respondent was obligated to the Commission for inventory in the amount of $2,700, payable in monthly installments for a year. There was no penalty on the operation of the restaurant if an installment was delayed or missed. The required payments were made during times material.

42) The testimony of Respondent was inconsistent and not totally credible. He testified that Claimant Mark Otey was supposed to work from 5 a.m. to 3 p.m. with an hour for lunch (a total of 9 hours), and that Claimant Jackie Otey was supposed to work from 7 a.m. to 4 p.m. with an hour for lunch (a total of 8 hours). He stated that he told Claimant Jackie Otey not to work before 7 a.m. and that he told Claimant Mark Otey not to work after 3 p.m., but acknowledged that both were present each day from 5 a.m. to 4 p.m. Claimants Otey both denied that Respondent objected to Mark Otey working after 3 p.m. or to Jackie Otey working before 7 a.m. Respondent

testified that he had allowed for time to be worked beyond 40 hours in the amount of salary he determined for each of the Claimants Otey. He stated that he allowed for 50 hours a week at $5.00 and $6.00 respectively, but that he in no way expected either of the Claimants Otey to work over 40 hours except occasionally, even though his own schedule for Claimant Mark Otey totaled 45 hours per week. He said it was necessary to compute their pay that way in advance in order to assure a fixed labor cost in the first month of operation. Respondent testified that Hamilton did not work for him at all at the Flavors Northwest restaurant, but acknowledged that Hamilton was often on the premises in early July 1991. He stated that he did not recall ever signing Hamilton into the building, even after acknowledging his own July 4 signature on the building log, below which was written "M. Hamilton," in similar handwriting with the same time in and out. Respondent stated that he and Claimant Mark Otey went to Empire Uniform together, but denied telling Claimants Otey that they should obtain uniforms for which he would reimburse them. His insistence that he and Claimants consistently arrived at work at or after 5 a.m. most mornings in July 1991 was controverted by written record. Respondent testified that all receipts for July were paid out and that he opened a business bank account in August with no balance, implying that Respondents were without funds to pay Claimants, but the bank statement showed deposits of $1,835 in August 1991. Based upon such contradictions and inconsistencies, the Forum has credited Respondent's testimony only when it was verified or supported by other credible testimony or inference in the record.

43) The testimony of Claimant Hamilton was generally credible. His statement that Respondent drove a car on one occasion, while all other evidence indicated that Respondent does not drive, did not detract markedly from his other testimony, most of which, including the hours he worked, was verified by other credible evidence.

44) Claimant Hamilton worked at the PSOB cafeteria for Respondent from June 29 through July 17, 1991, for $6.00 an hour. Initially, he worked from 7 a.m. to 4 p.m., claiming eight hours a day for June 29 through July 3 and for July 5. He worked 10 hours each day July 8 to 12 and on July 16. On those days he took lunch when the cafeteria was not busy. He worked six hours on July 4, a holiday, and 12 hours on July 6, a Saturday. Generally, he did not ride to work with Respondent and Claimants Otey, but came in later. At hearing, he stated that the hours he claimed were a "guesstimate" because he reported his hours to Respondent and did not himself keep a record.

45) Claimant Hamilton worked a total of 114 regular hours and 28 overtime hours, earning $936 in wages in 16 days of work. He was paid $165. The balance of earned, unpaid, due, and owing wages equals $771.

46) At times material, Claimants Otey worked 11 hours a day during the week, beginning generally at 5 a.m. and working until at least 4 p.m., except for one day with a two hour medical appointment. They each worked 10.5 hours on June 29, 14 hours on

June 30, 6 hours on July 4, and 12 hours on July 6.

47) Claimant Mark Otey worked a total of 181.5 regular hours and 78 overtime hours, earning $1,791 in wages in 24 days of work. He was paid $1320. The balance of earned, unpaid, due, and owing wages equals $471.

48) Claimant Jackie Otey worked a total of 181.5 regular hours and 78 overtime hours, earning $1,492.50 in wages in 24 days of work. She was paid $1100. The balance of earned, unpaid, due, and owing wages equals $392.50.

49) Civil penalty wages are computed in accordance with Agency policy by multiplying the hourly rate by the regular hours actually worked, multiplying one and one half the hourly rate by the overtime hours actually worked, and dividing the combined products by the number of days actually worked to arrive at the average daily rate.

50) For Claimant Hamilton, civil penalty wages are as follows: $936 divided by 16 equals $58.50 (average daily rate). $58.50 multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of $1,755.

51) For Claimant Mark Otey, civil penalty wages are as follows: $1,791 divided by 24 equals $74.63 (average daily rate). $74.63 multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of $2,238.90.

52) For Claimant Jackie Otey, civil penalty wages are as follows: $1,492.50 divided by 24 equals $62.19 (average daily rate). $62.19 multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of $1,865.70.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondents Bob D. Berry and Laure D. Berry were persons doing business as Flavors Northwest in the State of Oregon, who employed one or more persons in the operation of that business.

2) Respondents employed Claimant Matthew Hamilton from June 29 through July 17, 1991, the day Respondent discharged him, at an agreed rate of $6.00 an hour. Respondents owe Claimant Matthew Hamilton $771, representing $936 in wages earned during the period less $165 Respondents paid Claimant for the period.

3) Respondents employed Claimant Mark Otey from June 29 through July 29, 1991, the day he quit employment, at an agreed rate of $6.00 an hour. Respondents owe Claimant Mark Otey $471, representing $1,791 in wages earned during the period less $1320 Respondents paid Claimant for the period.

4) Respondents employed Claimant Jackie Otey from June 29 through July 29, 1991, the day she quit employment, at an agreed rate of $5.00 an hour. Respondents owe Claimant Jackie Otey $392.50, representing $1,492.50 in wages earned during the period less $1100 Respondents paid Claimant for the period.

5) Respondents owe Claimant Mark Otey $24.31 for his uniform items, which was not reimbursed. Respondents owe Claimant Jackie Otey $53.76 for uniform items, which was not reimbursed.

6) Respondents willfully failed to pay Claimant Hamilton all wages earned and unpaid immediately upon termination of employment. More than 30 days have elapsed from the due date of those wages.

7) Respondents willfully failed to pay Claimants Otey all wages earned and unpaid within 48 hours of termination of employment, exclusive of Saturdays, Sundays, and holidays. More than 30 days have elapsed from the due date of those wages.

8) Civil penalty wages for Claimant Hamilton, computed pursuant to ORS 652.150 and agency policy, equal $1,755.

9) Civil penalty wages for Claimant Mark Otey, computed pursuant to ORS 652.150 and agency policy, equal $2,238.90.

10) Civil penalty wages for Claimant Jackie Otey, computed pursuant to ORS 652.150 and agency policy, equal $1,865.70.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the subject matter and of the individuals herein under ORS chapters 652 and 653, and is authorized to bring this proceeding pursuant to ORS 652.332. The disposition of these wage claims is a proper exercise of that authority.

2) ORS 652.310(1) defines "employer" as:

> "any person who * * * engages personal services of one or more employees * * *."

Respondents, doing business as Flavors Northwest, were employers subject to ORS chapters 652 and 653 and Oregon Administrative Rules (OAR) promulgated thereunder at all times material herein.

3) ORS 652.310(3) defines "employee" as:

> "any individual who * * * renders personal services * * * to an employer who * * * agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services * * *."

Claimants Mark Otey, Jackie Otey, and Matthew Hamilton were employees of Respondents subject to ORS chapters 652 and 653 and Oregon Administrative Rules (OAR) promulgated thereunder at all times material herein.

4) At times material, ORS 653.261(1) provided that the Commissioner issue rules prescribing an overtime rate of pay of one and one-half times the regular rate of pay, and OAR 839-20-030 provided that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay. Respondents were obligated by law to pay each Claimant one and one-half times the respective hourly rate for all hours worked in excess of 40 hours in a week.

5) At times material, ORS 652.140(1) provided that all wages due at the time an employee was discharged were due immediately, and ORS 652.140(2) provided that all wages due at the time an employee voluntarily quit were due within 48 hours thereafter, exclusive of weekends and holidays. Respondents were

obligated to pay Claimant Hamilton all sums due on July 17, 1991, and to pay Claimants Otey all sums due by August 1, 1991.

6) At times material, ORS 652.150 provided that an employer's willful failure to pay at the times prescribed in ORS 652.140 subjected the employer to a civil penalty for nonpayment of up to 30 days wages at the same rate, unless the employer could show a financial inability to pay when the wages first became due. Respondents willfully failed to pay the respective Claimants herein the wages due them under ORS 652.140, and were subject to the nonpayment penalty provided by statute.

7) At times material, ORS 653.010(12) provided:

> "'work time' includes both time worked and time of authorized attendance."

OAR 839-20-004(14) provided:

> "'Hours worked' means all hours for which an employee is employed by and required to give to his/her employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place and all time the employee is suffered or permitted to work [and includes] 'work time' as defined in ORS 653.010(12)."

OAR 839-20-040 provided, in part:

> "(2) Work requested or required is considered work time. Work not requested, but suffered or permitted is considered work time.
>
> "* * *
>
> "(4) It is the duty of the employer to exercise control and see that the work is not performed if it does not want the work to be performed. The mere promulgation of a policy against such work is not enough."

The work hours claimed by all Claimants herein during which they were present at the job site and performing work constituted work time.

OPINION

The Agency presented credible evidence that Claimants Mark and Jackie Otey worked at an hourly rate while employed by Respondents Berry. A preponderance of the credible evidence established that they consistently arrived at the restaurant at or before 5 a.m., that both began work upon arrival, and that on most days they left shortly after 4 p.m. While both denied having a scheduled lunch hour, both acknowledged that they took lunch daily. There was evidence that they were on duty during lunch. Evidence also established their work on a holiday and on two weekend days in June and one in July. In reaching these conclusions, the Forum has relied on the available evidence of building access as well as the testimony.

Respondents' principle defense as to Claimants Otey was that they were salaried employees. Claimants Otey denied any salary agreement, and there was no witnessed or written verification that they had initially agreed to work for salary. The notations on the employment applications were added by Respondent below and after the respective Claimant's signature. Both acknowledged that they agreed to Respondent delaying payment for the pre-opening work. Both said that they accepted their July 12 pay without overtime computation because Respondent assured them he would pay the overtime on or before the next payday. Claimants Otey then inquired about their overtime when that payday approached and refused to work further upon discovering that Respondent was rejecting any overtime claim and that the rejection was on the basis that they were salaried employees.

Some of Respondents' evidence appeared inconsistent with the claimed salaried status. The two July pay periods involved, July 1 to July 10 [sic] and July 16 to July 31, were described on the bookkeeper's record as "bi-weekly" and "semi-monthly," respectively. The deductions entered on Respondent's "cash book" pages, which Claimants Otey signed as receipts for the cash pay they received, differed from the figures entered in the bookkeeper's record and the "individual payroll record," or "red book" figures Respondent Laure Berry kept at home. The resulting net pay also differed. Respondent testified that the "red book" record represented actual hours, but that record failed to show any hours for July 4 or July 6, days on which Claimants Otey stated they worked and on which the building register verified their presence. The "red book" also showed less hours than testimony and other written record showed that Claimants Otey were at work.

Respondent stated unconvincingly that he told Jackie Otey not to work before 7 a.m., and that he told Mark Otey not to work after 3 p.m. He admitted that both were present during those times and may have done some work anyway. It was clear that he made no great point of these hours at the time or insisted to the employees that they were off duty and should leave. Both statute and rule define hours worked as time on the employer's premises during which the employer suffers or permits the employee to perform work. It is all the time an employee is required to be on the employer's premises, on duty, or at a prescribed work place. *In the Matter of Dan's Ukiah Service,* 8 BOLI 96 (1989).

As is true of the claims of the Oteys, the claim of Claimant Hamilton depends on the credibility of the witnesses. There can be little doubt that Hamilton was often on the premises of Respondents' restaurant in early July 1991. Both Respondents acknowledged his frequent presence. Respondents did not controvert the testimony that Respondent Laure Berry prepared an application for Hamilton. All three Claimants, contrary to Respondent's testimony, stated that Claimant Hamilton worked as a dishwasher, emptied garbage, and helped with cleanup tasks. All stated that he came in later than did Claimants Otey. Thus, there was no record of his entering the building except on July 4, when he was signed in with Respondent. Respondent denied being there on July 4, but he could not deny his signature. He did deny that Claimant Hamilton worked for him. Based on a preponderance of evidence, the Forum has found otherwise. Claimant Hamilton was present and permitted to work on the dates between June 29 and July 17 that he claimed.

Respondents' Affirmative Defense

As an affirmative defense, Respondents' answer avers that if wages were due as alleged in Determination 91-179, Respondent was financially unable to pay them at the time they accrued. That is a statutory defense to liability for penalty wages. The evidence showed that the business continued after July 1991, that other employees were paid, and that other obligations of the business were met. While Respondent stated that he spent all that was taken in, he also testified that he met the payments required by his contract with BEP. Both Respondents stated that they were in the midst of buying another home. Both had income independent of Flavors Northwest. A claimant's right to civil penalty cannot be overcome by mere denial of ability to pay. *In the Matter of Mega Marketing,* 9 BOLI 133 (1990). There must be some specific information as to the financial resources and requirements of both the business and the employer personally. *In the Matter of Lois Short,* 5 BOLI 277 (1986). A temporary shortage of cash does not constitute financial inability, where an employer continues to operate a business and chooses to pay certain obligations in preference to employee wages. *In the Matter of Country Auction,* 5 BOLI 256 (1986). Respondents did not show by a preponderance of evidence that they did not have the financial ability to pay Claimants.

Liability of Respondent Laure Berry, Respondents' Exceptions Thereto

Both Respondents were registrants under the assumed business name, "Flavors Northwest." Respondents' answer denies that Laure Berry was a partner, or did business as "Flavors Northwest." Respondents excepted to the conclusion that Respondent Laure Berry was legally liable, together with Respondent Bob D. Berry, for any wages owed by Flavors Northwest to the Claimants herein. In support of this exception, Respondents cite *First National Bank of Eugene v. Williams,* 142 Or 648, 20 P2d 222(1933), *Stone-Fox, Inc. v. Vandehey Development Co.,* 290 Or 779, 626 P2d 1365(1981), and *Hull v. Oland,* 61 Or App 85, 655 P2d 1088 (1982), and argue that the test for determining the existence of a partnership revolves around the intent of the alleged partners as to the relationship and proof of such intent. The cases cited involved land sales and stand for the proposition that tenants by the entirety, joint venturers, or co-owners are not necessarily partners in dealing with others in the subject matter of their tenancy or venture. They echo ORS 68.120(2) and do not deal with individuals doing business under an assumed business name.

Respondent Laure Berry was a co-registrant as "Flavors Northwest," the assumed business name. To the public, she was a co-owner. More particularly, to the Claimants, she was a co-owner and operator with her husband. Respondent Bob Berry did the managing and dealt with most vendors. But Laure Berry had an active role. She obtained applications and other documents, kept records, and handled at least one payday. One purpose served by the requirement that persons dealing commercially under a name other than their own register the name and their interest is to assure that others may readily identify who is behind the assumed name. ORS 648.010. This purpose would be thwarted if registrants could deny their interest in (and possible liability for) an enterprise after the fact. In this case, the Agency presented evidence of the unchanged registration. Respondent Bob Berry testified to an alleged attempt to modify the registration. He may have intended that Laure Berry be removed as a registrant, but the Agency's evidence, dated in 1992, showed that she was not. The statute delineates how a registration may be changed or withdrawn. ORS 648.025. That did not occur.

Respondents' Other Exceptions

Respondents' numerous exceptions generally took issue with the Proposed Findings of Fact – The Merits (PFOF) in the Proposed Order. The Forum has made some minor changes in wording which are reflected in Findings of Fact – The Merits (FOF) 8, 12, 14, 26, 27, 35, and 42 for the purpose of making those Findings more precise, but the basic facts are unchanged. FOF 43 through 48 and 50 through 52, Ultimate Findings of Fact 1 through 10, and Conclusions of Law 5 and 6 are supported by substantial evidence in the whole record. Similarly, statements in the Opinion section of the Proposed Order are supported by substantial evidence or permissible inference. Evidence includes inferences. *In the Matter of Sierra Vista Care Center,* 9 BOLI 281 (1991), *aff'd, Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992); *Arkad Enterprises v. Bureau of Labor and Industries,* 107 Or App 384, 812 P2d 427 (1991); *City of Portland v. Bureau of Labor and Industries,* 298 Or 104, 690 P2d 90 (1981).

Based on the evidence adduced at hearing, the Forum has recomputed the hours worked, the overtime claimable, and the penalty wage rate for all three Claimants. FOF 44 through 52. Because no exact quitting time was ever established (it was generally between 4 and 4:30 p.m.), the recomputation assumes work hours from 5 a.m. to 4 p.m. for Claimants Otey, and a later starting time for Claimant Hamilton.

The Order below also awards uniform expenses to Claimants Otey.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders BOB D. BERRY and LAURE D. BERRY, PARTNERS, to deliver to the Business Office of the Bureau of Labor and Industries, 1010 State Office Building, 800 NE Oregon Street, # 32, Portland, Oregon 97232, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR MARK DAVID OTEY in the amount of TWO THOUSAND SEVEN HUNDRED THIRTY-FOUR DOLLARS and TWENTY-ONE CENTS ($2,734.21), representing $471 in gross earned, unpaid, due, and payable wages, $2,238.90 in penalty wages, and $24.31 in reimbursable expenses, plus interest at the rate of nine percent per year on the sums of $471 and $24.31 from July 31, 1991, until paid, and nine percent interest per year on the sum of $2,238.90 from August 30, 1991, until paid, AND

2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JACQUELINE D. OTEY in the amount of TWO THOUSAND THREE HUNDRED ELEVEN DOLLARS and NINETY-SIX CENTS ($2,311.96), representing $392.50 in gross earned, unpaid, due, and payable wages, $1,865.70 in penalty wages, and $53.76 in reimbursable expenses, plus interest at the rate of nine percent per year on the sums of $392.50 and 53.76 from July 31, 1991, until paid, and nine percent interest per year on the sum of $1,865.70 from August 30, 1991, until paid, AND

3) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR MATTHEW D. HAMILTON in the amount of TWO THOUSAND FIVE HUNDRED TWENTY-SIX DOLLARS ($2,526), representing $771 in gross earned, unpaid, due, and payable wages, and $1,755 in penalty wages, plus interest at the rate of nine percent per year on the sum of $771 from July 17, 1991, until paid, and nine percent interest per year on the sum of $1,755 from August 16, 1991, until paid.

In the Matter of
RICHARD J. ILG
and George J. Ilg, dba Ilg & Son Nursery, Respondents.

Case Number 09-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 29, 1993.

SYNOPSIS

Three wage Claimants worked on a piece-rate basis digging up trees and plants for Respondents, who operated a nursery as a partnership. Respondents failed to pay wages due within 48 hours after the Claimants' employment terminated. The Commissioner found both Respondents liable to the wage Claimants due to the partnership relationship, and that their failure to pay wages due was willful. Finding that the Claimants worked together and agreed to share their earnings equally, the Commissioner awarded each claimant $3,642.30, representing $2,649 in gross earned, unpaid, due, and payable wages, and $993.30 in penalty wages, plus interest. ORS 68.210(1); 68.230; 68.250; 68.270; 652.140(1) and (2); 652.150; 652.310(1) and (2); 653.010(9); 653.022.

The above-entitled matter came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 15, 1992, in Room 1004 of the State Office Building, 800 NE Oregon Street, Portland. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. George J. Ilg (Respondent George Ilg) was present throughout the hearing. Richard J. Ilg (Respondent Richard Ilg) did not attend the hearing and was ruled in default. Neither Respondent was represented by counsel. Claimants Francisco Altamirano, Javier Altamirano, and Jose Altamirano were present throughout the hearing. Claimant Ramiro Sanchez did not attend the hearing. None of the Claimants were represented by counsel. Juan Mendoza, Salem, appointed by the Forum, acted as interpreter under proper affirmation for the Spanish speaking Claimants.

The Agency called as witnesses Claimants Jose, Javier, and Francisco Altamirano and Agency Compliance Specialist Gabriel Silva. Respondent George Ilg, who also testified, called as witnesses his wife, Diane Ilg, and his sister-in-law, Carol Ilg.

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

FINDINGS OF FACT – PROCEDURAL

1) On June 17, 1991, Claimant Jose Altamirano filed a wage claim with the Agency, alleging that he had been employed by Ilg & Son Nursery through Respondent Richard Ilg and that he had not been paid wages earned and due to him.

2) On June 19, 1991, Claimant Javier Altamirano filed a wage claim with the Agency, alleging that he had been employed by Ilg & Son Nursery through Respondent Richard Ilg and that he had not been paid wages earned and due to him.

3) On November 24, 1992, Claimant Francisco Altamirano filed a wage claim with the Agency, alleging that he had been employed by Ilg & Son Nursery through Respondent Richard Ilg and that he had not been paid wages earned and due to him.

4) At the time each claimant filed a wage claim, he assigned to the Commissioner of the Bureau of Labor and Industries, in trust for claimant, all wages due from the employer.

5) On February 11, 1992, the Agency served on Respondent Richard J. Ilg through the Sheriff of Marion County, Oregon, and on February 13, 1992, the Agency served on Respondent George J. Ilg through the Sheriff of Clackamas County, Oregon, Order of Determination No. 91-161 (Determination 91-161), which was based on the Agency's investigation of the wage claims filed by Claimants.

6) Determination 91-161 found that Respondents owed Claimants Altamirano, together with Claimant Ramiro Sanchez, a combined total of $8,463 in unpaid wages, and sought an additional total of $3,553.20 as penalty wages based on Respondents' willful failure to pay the earned wages due. Determination 91-161 required that, within 20 days, Respondents either pay said sums to the Commissioner or request a contested case hearing and submit an answer to the charges.

7) On February 21, 1992, counsel for Respondent George Ilg requested an extension of time for appearance of both Respondents. On March 4, 1992, the Agency extended time in which to answer Determination 91-161 to March 16, 1992, and on March 11, 1992, counsel for Respondent George Ilg filed an answer and request for contested case hearing on behalf of Respondent George Ilg and Ilg & Son Nursery. No answer or further appearance was ever filed by or on behalf of Respondent Richard Ilg.

8) On September 9, 1992, at the Agency's request the Hearings Unit issued a Notice of Hearing to Respondent Richard Ilg, 1515 Hardcastle Avenue, Woodburn, Oregon, 97071; to Respondent George Ilg, 6002 S Newman Road, Woodburn, Oregon, 97071; to Respondent George Ilg's attorney; and to Claimants indicating the time and place of the hearing. A document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200, accompanied the Notice of Hearing.

9) On October 9, 1992, Respondent George Ilg's attorney resigned at his client's request. On October 20, 1992, the Hearings Referee reset the hearing from December 1 to December 15, 1992, and advised Respondents and Claimants of the new date and that a new Case Presenter was assigned. Notice of these changes was mailed to Respondent George Ilg, 6002 S Newman Road, Woodburn, Oregon, 97071; to Respondent Richard Ilg, 1515 Hardcastle Avenue, Woodburn, Oregon, 97071; and to the Claimants.

10) On October 27, 1992, Respondent George Ilg telephoned the Hearings Referee, confirmed that his attorney had resigned, stated that he could not afford an attorney and could not afford to attend the hearing, and attempted to explain his defense to the Hearings Referee. Respondent George Ilg was advised by the Referee that the facts of the case should not be discussed outside the hearing. Respondent George Ilg was urged to attend the hearing if he wished to contest the case and to do so with counsel.

11) In early December, the Agency advised the Hearings Referee that Respondent George Ilg had retained counsel. The Agency submitted a Summary of the Case pursuant to OAR 839-30-071 on December 4, 1992.

12) On December 4, 1992, the Forum issued prehearing instructions to the Agency; to Respondent Richard Ilg, 1515 Hardcastle Avenue, Woodburn, Oregon, 97071; and to Respondent George Ilg's current attorney. The instructions included a reminder to Respondent's counsel regarding the rule requiring a Case Summary.

13) Also on December 4, 1992, the Agency filed a motion for an order requiring Respondent's counsel to provide a Case Summary, and for exclusion of any evidence produced by counsel for Respondent George Ilg at hearing which should have been but was not included in a Case Summary.

14) On December 7, 1992, the Hearings Referee issued his ruling on the Agency's motions, clarifying the provisions of OAR 839-30-071 requiring a party represented by counsel to file a Case Summary, and granting an extension of time to December 10, 1992, for Respondent's counsel to do so.

15) On December 14 the Forum received a copy of the client-requested resignation of Respondent George Ilg's second attorney and notice that said Respondent would represent himself at hearing. Neither Respondent submitted a Case Summary.

16) At the commencement of the hearing, Respondent George Ilg stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

17) Pursuant to ORS 183.415(7), Respondent George Ilg, the Agency, and Claimants were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) At the commencement of the hearing, the Hearings Referee noted that Respondent Richard Ilg had failed to answer Determination 91-161 or to request a hearing thereon, and had been served with notice of the time and place of hearing but was not in attendance. The Hearings Referee declared Respondent Richard Ilg in default pursuant to OAR 839-30-185.

19) During the hearing at the close of the Agency's case in chief, the Agency withdrew the claim of Claimant Ramiro Sanchez, no evidence having been adduced thereon and the Agency being without assignment or other authority to proceed on behalf of Claimant Sanchez.

20) The Proposed Order, which included an Exceptions Notice, was issued on February 10, 1993. Exceptions, if any, were to be filed by February 20, 1993. On February 18, 1993, Respondent George Ilg excepted generally to the Proposed Order, and the Hearings Referee granted Respondent George Ilg until March 1, 1993, to file specific exceptions. Respondent George Ilg's exceptions were received timely on March 1, 1993, and are dealt with as described at the end of the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) On February 18, 1983, Respondents George Ilg and Richard Ilg made an assumed business name filing with the Corporation Commissioner of the State of Oregon (now the Corporation Division of the Office of the Secretary of State) for the assumed business name of "Ilg & Son Nursery." The business address was located in Clackamas County at 6002 S Newman Road, Woodburn, Oregon, 97071. Both were listed as parties in interest, with Richard Ilg as authorized representative

2) Respondents operated Ilg & Son Nursery as a partnership; both had signature authority on a business bank account at the Mt. Angel Branch of the First Interstate Bank of Oregon. Respondent George Ilg's late wife, Sandra, signed Ilg & Son checks up to the time of her death from cancer in November 1990.

3) Claimant Jose Altamirano began working for Ilg & Son Nursery in about 1989. He learned of the job through Jose Perfecto, who worked there. Claimant Jose Altamirano saw Respondent George Ilg around the

nursery, but had little contact with him because Respondent Richard Ilg directed the work.

4) In early 1990, Claimant Jose Altamirano's brothers, Claimants Javier and Francisco Altamirano, began working with Claimant Jose Altamirano digging up trees. Their schedule depended on demand. Respondent Richard Ilg would call them to work and directed their work.

5) Claimants Altamirano worked digging up trees for Respondents from about March 1 until June 1990, when they went to Mexico. They were to be paid on a piece-rate basis, per tree, at $1.00 per vertical foot for trees up to 7 feet tall. They were to be paid $25 per tree for larger trees and for those packed in cans or star containers. They were to be paid at a different rate per plant for shrubs (from $1.25 to $3.50 per plant, depending on the variety), plus $1.00 per tree for those they had to carry out of the field to the road.

6) Claimant Jose Altamirano kept a notebook which included the totals that he and his brothers dug in 1990. They helped each other with the work and agreed to share the earnings equally.

7) Respondent Richard Ilg paid some money to Claimants by check. At times he told them that they would have to wait for Respondent George Ilg to sign checks. At other times in 1990, he left checks for them with Sandra Ilg.

8) At times material, Respondent George Ilg owned approximately six acres at 6002 Newman Road, Woodburn, the location of Ilg & Son Nursery. His home was also located at that address. Much of the acreage was used to grow nursery stock, including plants of the types dug up by Claimants.

9) Respondent George Ilg's brother lived next door to the nursery. His land was also used to grow nursery stock, some of which was of the type dug up by Claimants.

10) At times material, Respondent Richard Ilg owned a house at 1515 Hardcastle, Woodburn. It was unknown whether he had plants or nursery stock on that property.

11) When Claimants left for Mexico in June 1990, Respondents owed them $12,397.25, according to Claimant Jose Altamirano's calculations. When they returned from Mexico in July 1990, Respondents paid them $3,000 of that amount in a check payable to Jose Altamirano and signed by both Respondents. In August 1990, Respondents paid them another $3,000 of that amount in a check payable to Francisco Altamirano and signed by both Respondents.

12) From time to time in 1990, Claimants worked for Respondents on an hourly basis in addition to the piece-rate tree digging. Each received timely payment of those hourly earnings.

13) Claimants again worked for Respondents digging up trees and shrubs on the same agreed piece-rate basis in 1991, from February to May. Claimant Jose Altamirano again kept track of the size, variety, and number in a notebook. He received one payment of $200 cash and one check for $1,300 for this work. He shared these payments with his brothers.

14) Following the death of Sandra Ilg in November 1990, the Ilg & Son Nursery business "just went to pieces." It was operated as a partnership up to that time, with Respondent Richard Ilg handling the operation. Respondent George Ilg was occupied with a construction business he operated with his brother. He was "backing up" his son in the nursery business.

15) In January or February 1991, Respondent George Ilg received a telephone call from the bank to the effect that Respondent Richard Ilg had attempted to cash a $6,500 check to Ilg & Son Nursery from L. E. Cooke Company, rather than put it through the partnership account. The bank had required that it be deposited. Respondent George Ilg obtained a copy of the check in December 1992, and marked it "stolen check."

16) The Cooke Company dealt with Respondent Richard Ilg on the business represented by their $6,500 check. Their letter to Respondent George Ilg suggested that the payment was for business generated in 1990 with the product delivered in 1990. Respondent George Ilg was without information regarding the transaction and did not know how the proceeds were spent.

17) In February 1991, Respondent George Ilg ordered Respondent Richard Ilg off of the nursery premises, told him not to return, and changed the locks and the post office box.

18) At the time, Respondent Richard Ilg had possession of the Ilg & Son Nursery business account check book. Respondent George Ilg obtained the check book in April 1991. Respondent George Ilg denied signing several checks payable to Respondent Richard Ilg.

19) At times material, Gabriel Silva was a Compliance Specialist for the Agency. He investigated the wage claims of Claimants Altamirano. According to his calculations from the information supplied to him by Claimants, there remained due and unpaid to the Claimants Altamirano on June 24, 1991, the gross sum of $7,947, or $2,649 apiece.

20) On June 24, 1991, Silva sent a demand letter for that amount (plus $516 allegedly owed to Sanchez) to Ilg & Son Nursery, 1515 Hardcastle St., Woodburn, Oregon, 97071.

21) Silva received no response to his demand. He was aware that Respondent George Ilg was a partner in Ilg & Son. He went by the Ilg & Son Nursery on Newman Road, but saw no activity there.

22) On November 13, 1991, Silva located Respondent Richard Ilg at 1515 Hardcastle. Respondent Richard Ilg acknowledged the wages owed to Claimants, stating it was accurate within $200, more or less. He gave Silva a written statement to that effect, which he signed in Silva's presence.

23) Respondent Richard Ilg told Silva that payment to Claimants had been delayed by the refusal of Plants Perfect of Murray, Utah, to pay Ilg & Son. He also said that Ilg & Son Nursery was not bankrupt, but was in the process of attempted sale of the business.

24) Claimants were not aware of any disagreement between Respondents George and Richard Ilg in 1991. They believed the two still worked

together. When they dug up trees at the Newman Road address in March through May of 1991, Respondent Richard Ilg let them onto the grounds. They also dug up trees and plants at Respondent Richard Ilg's directions at locations near Monitor, Oregon, and near Molalla, Oregon. They did not know a more exact location or address, and did not know who owned the land in those locations.

25) Claimants used Respondent Richard Ilg's Hardcastle address when they filed their wage claims because they knew he lived there and they had previously reached him there.

26) At times material, Respondent George Ilg's sister-in-law, Carol Ilg, lived next door to the nursery. There was some nursery stock on that property. From December 1990 to February 1991, Respondent Richard Ilg came by the nursery for the mail. She knew that Respondent George Ilg had "kicked out Richard" in February. She did not see any of the Claimants, or anyone else, working at the nursery address after February 1991.

27) Between September 1990 and May 1991, Carol Ilg drove a school bus from 7:30 a.m. to noon and from 2 p.m. to 3:45 p.m. on weekdays.

28) Diane Ilg, Respondent George Ilg's present wife, assisted him in 1991 with book work and matters in connection with closing the nursery. Along with Respondent George Ilg, she denied that any of the Altamiranos were employees on the books or payroll of Ilg & Son Nursery in 1991. She denied that any contract digging would be considered wages.

29) In November 1991, Respondent George Ilg sought legal advice about dissolving the partnership with Respondent Richard Ilg. An attorney provided him with a form for cancellation of the assumed business name and instructions on what to do with it, including obtaining Respondent Richard Ilg's signature and filing the completed form in Salem. Respondent George Ilg was also advised to give notice to his creditors and suppliers of the dissolution and to tell them that he would not be responsible for any Ilg & Son debt. He was advised on tax matters and to have a written documentation of dissolution if there had been a formal written partnership agreement.

30) Respondent George Ilg obtained Respondent Richard Ilg's signature on a State of Oregon Corporation Division Cancellation of Assumed Business Name form on November 18, 1991, and signed the form himself on November 29, 1991. The record does not reveal whether the completed form was filed.

31) Where employees are paid on a piece-rate basis, civil penalty wages are computed in accordance with Agency policy by dividing the total piece-rate earnings by the number of days (including portions of days) actually worked to arrive at the average daily rate.

32) Claimants Jose Altamirano, Francisco Altamirano, and Javier Altamirano each worked 80 days earning the unpaid portion of their piece-rate earnings, a gross amount of $7,947. Individually, each Claimant earned $2,649. The penalty wages owed to each Claimant is $993.30. ($2649 divided by 80 equals $33.11 (average daily rate); $33.11 multiplied by 30 (the number of days for which civil penalty wages continued to accrue) equals $993.30.)

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondents George J. Ilg and Richard J. Ilg were persons doing business as Ilg & Son Nursery in the State of Oregon.

2) Claimants Jose Altamirano, Francisco Altamirano, and Javier Altamirano rendered personal services to Ilg & Son Nursery under an agreement to pay them based on the quantity of trees handled or dug, that is, a piece-rate basis, from March 1990 to May 1991.

3) Ilg & Son Nursery did not pay Claimants Altamirano all that they earned on a piece-rate basis and there is now due, owing, and unpaid to each of said Claimants the sum of $2,649.

4) The failure to pay Claimants Altamirano all sums earned and unpaid within 48 hours of termination of employment, exclusive of Saturdays, Sundays and holidays was willful. More than 30 days have elapsed from the due date of those earnings.

5) Civil penalty wages for each of the Claimants Altamirano computed pursuant to ORS 652.150 and agency policy, equal $993.30.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the subject matter and of the individuals herein under ORS chapters 652 and 653, and is authorized to bring this proceeding pursuant to ORS 652.332. The disposition of these wage claims is a proper exercise of that authority.

2) At times material, ORS 652.310(1) defined "employer" as:

> "any person who * * * engages personal services of one or more employees * * *."

At times material Respondents, doing business as Ilg & Son Nursery, were employers subject to ORS chapters 652 and 653 and Oregon Administrative Rules (OAR) promulgated thereunder.

3) At times material, ORS 652.310(2) defined "employee" as:

> "any individual who * * * renders personal services * * * in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the * * * number of operations accomplished, or quantity produced or handled[.]"

At times material, ORS 653.010(9) provided:

> "'Piece-rate' means a rate of pay calculated on the basis of the quantity of the crop harvested."

ORS 653.022 provided:

> "'piece-rate-work-day' means any day during which an employee performs any agricultural labor on a piece-rate basis for not less than one hour. * * *"

Claimants Jose Altamirano, Francisco Altamirano, and Javier Altamirano were employees of Respondents subject to ORS chapters 652 and 653 and Oregon Administrative Rules (OAR) promulgated thereunder. The unpaid piece-rate earnings of Claimants Altamirano constituted wages.

4) At times material, ORS 652.140(2) provided that all wages due at the time an employee voluntarily quit were due within 48 hours thereafter, excluding weekends and holidays. The unpaid piece-rate earnings herein constituted wages due. Respondents were obligated to pay Claimants Altamirano all sums due on June 2, 1991.

5) At times material, ORS 68.210(1) provided:

> "Every partner is an agent of the partnership for the purpose of its business, and the act of very partner * * * binds the partnership, unless the partner so acting has * * * no authority to [so] act for the partnership * * * and the person with whom the partner is dealing has knowledge of the fact that the partner has no such authority."

At times material, ORS 68.230 provided:

> "An admission or representation made by any partner concerning partnership affairs within the scope of the authority of the partner as conferred by this chapter is evidence against the partnership."

ORS 68.250 provided:

> "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership * * * loss or injury is caused to any person [not a partner], or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act."

The acknowledgment by Respondent Richard Ilg that Claimants' statement of wages owed was accurate confirmed the accuracy of their claims. The conduct of Respondent Richard Ilg in failing to pay Claimants all sums due as wages was a violation of ORS 652.140. The actions, inactions, statements, and motivations of Respondent Richard Ilg are properly imputed to the partnership, Ilg & Son Nursery.

6) At times material, ORS 652.150 provided that an employer's willful failure to pay wages as prescribed in ORS 652.140 subjected the employer to a civil penalty for nonpayment of up to 30 days wages at the same rate, unless the employer could show a financial inability to pay when the wages were first due. Respondents willfully failed to pay the respective Claimants herein the wages due them under ORS 652.140, and were subject to the nonpayment penalty provided by statute.

7) At times material, ORS 68.270 provided, in part:

> "All partners are liable:
>
> "(1) Jointly and severally for everything chargeable to the partnership under ORS 68.250 * * *."

Respondents George J. Ilg and Richard J. Ilg are jointly and severally liable to (respectively) Claimant Jose Altamirano, Claimant Francisco Altamirano, and Claimant Javier Altamirano for the unpaid wages and penalty wages found herein.

OPINION

Claimants Jose Altamirano, Francisco Altamirano, and Javier Altamirano were employed by Respondents in 1990 and in 1991. In addition to hourly wage work for which they were properly compensated, they dug up trees and other plants on a "piece-rate" basis, that is, by the foot or unit, during both terms of employment. Respondent George Ilg was without question aware of this work in 1990: he signed checks in payment. He claimed he was unaware of their work in 1991 and denied that he was in any way obligated to them for unpaid wages.

Claimants dealt with Respondent Richard Ilg, but were entitled to and did assume that they were employed by Ilg & Son Nursery. None of them received any notice of Respondent George Ilg's alleged disavowal of the partnership. There was only Respondent George Ilg's self-serving assertion that he had advised anyone in a timely manner of the purported dissolution or that he had taken any steps to dissolve the partnership with his son, or that Ilg & Son Nursery was no longer a partnership for which he might be liable. Respondent Richard Ilg continued to operate as if the partnership existed, had possession of the partnership checkbook and access to its bank account, and dealt with these Claimants and others as he had previously.

The record indicates that Respondent George Ilg consulted an attorney in regard to the partnership about November 1991. He obtained Respondent Richard Ilg's signature for canceling the assumed business name, but did not establish on this record that the cancellation form was filed with the state Corporation Division. Whether or not Respondent George Ilg failed to follow the advice given him is not material. By that time, Claimants had done their work, had not been paid, and wage claims had been filed.

Respondent George Ilg chose to appear without counsel after consulting at least two attorneys. He attempted to show that Claimants were not employees, but were merely preparing a shipment for delivery. That is a distinction without a difference. Claimants dug up trees and plants at the nursery and other locations at the instance of one of the partners. There was no evidence that they shared Respondents' enterprise as copartners or that they were independent contractors. Claimants were entitled to compensation for their personal services as employees.

Respondent Richard Ilg did not answer the charging document. He had notice of the hearing date but did not attend the contested case hearing. He was held in default and the available evidence formed a prima facie case of a willful failure to pay his (and the partnership's) employees. Under the facts of this case and the law of partnership, even if Respondent George Ilg did not know of Claimants' employment, he was still liable for the wage obligation incurred through his partner. Under the facts and circumstances of this record, Respondents are jointly and severally liable to Claimants. ORS 68.270; *In the Matter of William Sarna*, 11 BOLI 20 (1992); *In the Matter of Rainbow Auto Parts and Dismantlers*, 10 BOLI 66 (1991).

Respondent George Ilg's Exceptions

Respondent's exceptions reiterate the substance of his various defenses at hearing: that "Ilg & Son" was not in operation in 1991 and had no employees that year, that the nursery location was only on Newman Road and not at the various locations Claimants dug plants, that Richard Ilg was not

authorized to act for the partnership, and that the Agency's investigation and basis for claim were not communicated to Respondent George Ilg until service of Determination 91-161.

The Findings of Fact in the Proposed Order are supported by substantial evidence on the whole record herein, and are confirmed in this Final Order with the exception that Finding number 30, that the completed Assumed Business Name cancellation form was never filed, is modified to state that the record does not reveal whether it was filed. The record does not establish that the alleged dissolution of the partnership was known to the wage Claimants or to others during the time the Claimants performed their labor.

In addition, Respondent George Ilg questioned the documentation of Claimants' work, consisting of Claimant Jose Altamirano's contemporaneous listing of the items dug, averring that "all employees need to present absolute documents to be paid by any employer in this State." It is incumbent upon the employer to maintain payroll records, and to produce them to establish the appropriate amounts involved where the Forum concludes that the employee was employed and improperly compensated. ORS 653.045. Where there are no such records, the Forum may rely on evidence produced by the Agency, including the employee's notations and testimony. *In the Matter of Ken Taylor,* 11 BOLI 139 (1992) (citing *In the Matter of Rainbow Auto Parts, supra,* and *In the Matter of Dan's Ukiah Service,* 8 BOLI 96 (1989)). *See also In the Matter of Jack Mongeon,* 6 BOLI 194 (1987); *In the Matter of Judith Wilson,* 5 BOLI 219 (1986); *In the Matter of Marion Nixon,* 5 BOLI 82 (1984); and *In the Matter of Superior Forest Products,* 4 BOLI 223 (1984). There was adequate testimony as to the meaning of Claimant's notes in relation to the number, size, and type of plants dug. Respondent's other exceptions are without merit.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders GEORGE J. ILG and RICHARD J. ILG, PARTNERS, to deliver to the Business Office of the Bureau of Labor and Industries, 1010 State Office Building, 800 NE Oregon Street, # 32, Portland, Oregon, 97232, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JOSE ALTAMIRANO in the amount of THREE THOUSAND SIX HUNDRED FORTY-TWO DOLLARS and THIRTY CENTS ($3,642.30), representing $2,649 in gross earned, unpaid, due, and payable wages and $993.30 in penalty wages, PLUS interest at the rate of nine percent per year on the sum of $2,649 from June 2, 1991, until paid, and nine percent interest per year on the sum of $993.30 from July 1, 1991, until paid, AND

2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR FRANCISCO ALTAMIRANO in the amount of THREE THOUSAND SIX HUNDRED FORTY-TWO DOLLARS and THIRTY CENTS ($3,642.30), representing $2,649 in gross earned, unpaid, due, and payable wages and $993.30 in penalty wages, PLUS interest at the rate of nine percent per year on the sum of $2,649 from June 2, 1991, until paid, and nine percent interest per year on the sum of $993.30 from July 1, 1991, until paid, AND

3) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JAVIER ALTAMIRANO in the amount of THREE THOUSAND SIX HUNDRED FORTY-TWO DOLLARS and THIRTY CENTS ($3,642.30), representing $2,649 in gross earned, unpaid, due, and payable wages and $993.30 in penalty wages, PLUS interest at the rate of nine percent per year on the sum of $2,649 from June 2, 1991, until paid, and nine percent interest per year on the sum of $993.30 from July 1, 1991, until paid.

In the Matter of
Kenneth D. Gordon and
Teri Gordon and
SEALING TECHNOLOGY, INC.,
aka/dba Seal-Tec, Inc.,
Respondents.

Case Number 13-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 7, 1993.

SYNOPSIS

Respondent Sealing Technology, Inc. intentionally failed to pay the prevailing wage rate to workers on four public works projects in violation of ORS 279.350. As corporate officers who knew or should have known the amount of the applicable prevailing wages, Respondents K. Gordon and T. Gordon were responsible for the corporation's failure to pay prevailing wage rates. Respondents were held not eligible for public works contracts for three years, pursuant to ORS 279.361(1) and (2). ORS 279.350, 279.361; OAR 839-16-035(1), 839-16-085(1) - (3).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on March 16 and 17, 1993, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Kenneth D. Gordon (Respondent K. Gordon) represented himself. Teri Gordon (Respondent T. Gordon) did not appear in person or through a representative. Sealing Technology, Inc. (Respondent Seal-Tec) was not represented by counsel and did not appear at hearing.

The Agency called the following witnesses (in alphabetical order): Curtis Bogle, former employee of Respondent Seal-Tec; Mike Eubanks, Division Manager, Contractors, Inc.; Dan Ficker, employee of Respondent Seal-Tec; Lora Lee Grabe, former Compliance Specialist with the Agency;

Andrew Grissom, employee of Respondent Seal-Tec; Steve Howe, former Project Superintendent, Bishop Construction, Inc.; Leon Madrid, former employee of Respondent Seal-Tec; Robin Miller, former employee of Respondent Seal-Tec; John Mohlis, Bricklayers Union Local 11; Kelly Nida, former employee of Respondent Seal-Tec; Bob Parshall, Project Manager, Pense Kelly Construction Co.; Kelly Roth, Construction Manager, Donald Drake Construction Co.; David Stansbury, former employee of Respondent Seal-Tec; Linda Tedder, former Office Manager of Respondent Seal-Tec; and Don Turner, Prevailing Wage Rate Coordinator with the Agency. Respondent K. Gordon called himself as his sole witnesses.

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

FINDINGS OF FACT – PROCEDURAL

1) On September 18, 1992, the Agency issued a "Notice of Intent to Make Placement on List of Ineligibles" (Notice of Intent) to Respondents. The Notice of Intent alleged that, in violation of ORS 279.350(1), Respondents intentionally failed to pay the prevailing rate of wage to workers on the following four public works projects:

1. Oregon State Penitentiary Intensive Management Project, a public works project let by the Oregon State Department of Corrections.

2. Columbia River Correctional Institution, a public works project let by the Oregon Department of Corrections.

3. Durham Waste Water Treatment Plant, a public works project let by the Unified Sewerage Agency.

4. Portland State University project, a public works project let by the Oregon State System of Higher Education.

The Notice of Intent was amended at hearing to show that Respondent Seal-Tec did business as, and was also known as, Seal-Tec, Inc. Respondents answered through counsel on October 8, 1992.

2) On October 29, 1992, the Hearings Unit issued to Respondents and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to Respondents a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.

3) On February 23, 1993, Respondents' counsel advised the Hearings Unit that he had withdrawn as Respondents' counsel. On March 4, 1993, Respondent K. Gordon requested a postponement of the hearing scheduled to begin on March 16, 1993. The Agency objected, and the Hearings Referee denied the request. The Hearings Referee advised Respondent K. Gordon that Respondent Seal-Tec had to be represented by an attorney, citing ORS 9.320 and 9.160, and OAR 839-30-025(7) and (15).

4) Respondent K. Gordon attended the hearing. Respondents T. Gordon and Seal-Tec did not appear. The Hearings Referee found Respondents T. Gordon and Seal-Tec in default, pursuant to OAR 839-30-057 and 839-30-185(1)(b). The Hearings Referee advised Respondent K. Gordon of the Respondents' right to request relief from default, pursuant to OAR 839-30-190. No request for relief from default was received by the Hearings Unit.

5) At the start of the hearing Respondent K. Gordon said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

6) Pursuant to ORS 183.415(7), the Agency and Respondent K. Gordon were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

7) The proposed order, which included an Exceptions Notice, was issued on April 15, 1993. Exceptions were to be filed by April 26, 1993. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent Sealing Technology, Inc. was an Oregon corporation doing business as Seal-Tec, Inc. Respondent K. Gordon was Respondent Seal-Tec's president, and Respondent T. Gordon was its corporate secretary and bookkeeper. Respondent T. Gordon did all payroll for Respondent Seal-Tec employees. Bud Fowler was Respondent Seal-Tec's chief estimator for developing contract bids. Respondent K. Gordon was involved with contract bids.

2) On January 2, 1990, the Oregon State Department of Corrections first advertised for bid solicitations for an Oregon State Penitentiary Intensive Management Project, a public works project (hereinafter the OSP project). Pence/Kelly Construction, Inc. was the prime contractor. Respondent Seal-Tec bid for and was awarded a subcontract on the OSP project. Respondent K. Gordon signed the subcontract for Respondent Seal-Tec. Bid and contract documents clearly identified the project as one requiring payment of prevailing wage rates (PWR). The Agency's "Prevailing Wage Rates for Public Works Contracts in Oregon" booklet (PWR booklet), effective January 1, 1990, was attached to the bid and contract documents. The PWR booklet showed that the PWR for bricklayers was $18.63 per hour (base rate), plus $4.33 per hour (fringe benefit), or a total of $22.96 per hour. The overtime rate was $32.27 per hour. In order for Respondent Seal-Tec to bid on the subcontract, the prime contractor gave Respondent Seal-Tec specifications for the job. The specifications included the PWR booklet.

3) Respondent Seal-Tec worked on the OSP project from around June 19, 1990, to March 31, 1991. Respondent Seal-Tec's workers performed manual work usually done by bricklayers. During that period, Respondent Seal-Tec did not pay six workers PWR for their work on the OSP project. On April 15, 1991, the Agency filed a Notice of Claim against the prime contractor's surety bond for $22,574.31 in

unpaid wages due Respondent Seal-Tec's workers. The prime contractor paid the workers their back wages, and later deducted the wages paid from its contract payments to Respondent Seal-Tec.

4) On a certified payroll report (CPR) for the week ending July 13, 1990, Respondent Seal-Tec classified its workers as "Laborers, Group 1," and claimed to have paid them $18.64 per hour, and $25.51 per hour for overtime. The CPR was signed by Respondent K. Gordon. In fact, one worker (Nida) was paid $10.50 per hour, and the other four workers were paid either $7.00 or $8.00 per hour. After December 1, 1990, Respondent Seal-Tec started paying the workers $16.17 per hour, the prevailing wage rate for tile and terrazzo helpers.

5) Respondent K. Gordon first told the workers that the OSP project was not a PWR job. During a strike in September 1990, the workers became sure that the project was a public works project. Respondent K. Gordon told the workers they would be paid the laborers' rate. Beginning in September, Respondent Seal-Tec began giving some workers "PW Bonus" checks to pay them for PWR back wages due. These PWR bonuses were recorded in Respondent Seal-Tec's payroll records by Respondent T. Gordon.

6) On February 27, 1990, Respondent K. Gordon signed a subcontract for Respondent Seal-Tec with Donald M. Drake Co., the prime contractor, to provide services on the Columbia River Correctional Institution project (hereinafter the CRCI project), a public works contract let by the Oregon State Department of Corrections. The PWR booklet was one of the contract documents, and was with the bid specifications. A representative of Respondent Seal-Tec had to look at the specifications in order to bid on the job. The PWR for bricklayers, from the July 1989 PWR booklet, was $18.28 per hour (base rate), plus $4.18 per hour in fringe benefits, or a total of $22.46 per hour. The overtime rate was $31.60 per hour.

7) Respondent Seal-Tec worked on the CRCI project from around May 8 to September 29, 1990. Respondent Seal-Tec's workers performed manual work usually done by bricklayers. During that period, Respondent Seal-Tec did not pay seven workers PWR for their work on the project. On November 30, 1990, the Agency filed a notice of claim against the prime contractor's surety bond for $2,450.03 in back wages due Respondent Seal-Tec's workers.

8) On a CPR for the week ending May 12, 1990, Respondent Seal-Tec classified its workers as "Tile and Terrazzo Helpers" and claimed to have paid them $16.17 per hour, and $19.98 per hour for overtime. The CPR was signed by Respondent K. Gordon. In fact, the two workers listed in the report (Madrid and Stansbury) were paid $7.00 and $8.00 per hour, respectively.

9) When workers found out from the prime contractor's project superintendent that the CRCI project was a public works project and that they were supposed to be paid PWR, Respondent K. Gordon told the workers that they were not paid PWR because their work was "specialty work." Later, Respondent K. Gordon told the workers that he would pay them PWR, but he would have to pay them off a little bit at a time.

10) On July 18, 1990, Respondent K. Gordon signed a subcontract for Respondent Seal-Tec with Contractors, Inc., the prime contractor, to provide services on the Durham Waste Water Treatment Plant project (hereinafter the Durham project), a public works contract let by the Unified Sewerage Agency. The prime contractor provided Respondent Seal-Tec with a sample certified payroll report form. The subcontract required Respondent Seal-Tec to submit the payroll reports and comply with PWR laws. The PWR for bricklayers, from the January 1989 PWR booklet, was $18.28 per hour (base rate), plus $3.68 per hour in fringe benefits, or a total of $21.96 per hour.

11) Respondent Seal-Tec worked on the Durham project from around July 16 to October 11, 1990. Respondent Seal-Tec's workers performed manual work usually done by bricklayers. During that period, Respondent Seal-Tec did not pay four workers PWR for their work on the project. For the week ending July 28, 1990, Respondent Seal-Tec submitted a CPR to the prime contractor showing only Steven Ripley working one day, July 23, and that he was exempt from PWR because he was an owner. On November 30, 1990, the Agency filed a notice of claim against the prime contractor's surety bond for $49.80 in back wages owed to one Respondent Seal-Tec worker for work performed on the Durham project.

12) In December 1989, the Oregon State System of Higher Education first advertised for bid solicitations for a public works remodel project at Portland State University (hereinafter the PSU project). Bishop Contractors, Inc. was the prime contractor. On March 13, 1990, Respondent K. Gordon signed for Respondent Seal-Tec three subcontracts on the PSU Project. The PWR rate schedule was incorporated into the contract specifications.

13) Respondent Seal-Tec worked on the PSU project from around August 20 to October 24, 1990. Respondent Seal-Tec's workers performed manual work usually done by tile and terrazzo helpers. The PWR for tile and terrazzo helpers, from the July 1989 PWR booklet, was $13.32 per hour (base rate), plus $2.85 per hour in fringe benefits, or a total of $16.17 per hour. The overtime rate was $22.83 per hour. During that period, Respondent Seal-Tec did not pay six workers PWR for their work on the PSU project. When Steve Howe, the prime contractor's project superintendent, began pursuing the issue of whether Respondent Seal-Tec's employees were receiving PWR, Steve Ripley, Respondent Seal-Tec's co-owner, became aggravated with Howe. On November 30, 1990, the Agency filed a notice of claim against the prime contractor's surety bond for $186.90 in unpaid wages due Respondent Seal-Tec's workers. After Respondent Seal-Tec provided it with timesheets, the Agency determined that more unpaid PWR wages were due.

14) On a CPR for the week ending August 25, 1990, Respondent Seal-Tec classified its workers as "Laborers, Group 1," and claimed to have paid them $18.64 per hour, and $25.51 per hour for overtime. The CPR was

signed by Respondent K. Gordon. In fact, one worker (Nida) was paid $10.50 per hour, another worker (Bogle) was paid $12.00, and the other four workers were paid either $7.00 or $8.00 per hour.

15) When workers found out from the prime contractor's project superintendent that the PSU project was a public works project and that they were supposed to be paid PWR, Respondent K. Gordon said the project superintendent was wrong. Respondent K. Gordon told the workers that they were not paid PWR because their work was "specialty work." The superintendent then showed one of the workers (Madrid) a certified payroll report submitted by Respondent Seal-Tec. Respondent K. Gordon later agreed to pay the employees PWR, but said he would have to pay them back over time.

16) In November 1990, Lora Lee Grabe, the Agency's compliance specialist assigned to this case, began a review of complaints and a wage claim filed by employee Curtis Bogle and John Mohlis, the Business Representative of the International Union of Bricklayers and Allied Craftsmen. Grabe interviewed them to learn what work Respondent Seal-Tec was doing. In addition, she contacted unions and the Agency's prevailing wage rate coordinator to determine what job classification was appropriate for this work. Beginning on December 12, 1990, when the Agency's compliance specialist made her first field visit to Respondent Seal-Tec's offices, and continuing through April 1991, the Agency provided Respondent Seal-Tec and Respondent K. Gordon information (including statutes and rules) about PWR, job classifications, the overtime requirements, certified payroll report requirements, and related information. The Agency repeatedly requested payroll records, timesheets, employee telephone numbers and addresses, and related information from Respondent K. Gordon. The Agency repeatedly told Respondent K. Gordon what the correct classification was and what the correct PWR was for each project. During this time, Respondent K. Gordon and Respondent Seal-Tec intentionally failed to provide the Agency with correct information and records, misrepresented how the payroll was prepared, continued to fail to pay the correct PWR (including overtime and fringe benefits) on the OSP project, and failed to submit CPRs. On CPRs that Respondent Seal-Tec did submit, the reported wage rates, classifications, and wages paid were false. Respondent Seal-Tec's office manager, Tedder, threatened to quit because Respondent K. Gordon was not providing correct records to the Agency; Respondent K. Gordon told Tedder he was afraid to provide the real time and payroll records to the Agency. As late as March 1991, Respondent K. Gordon was still telling his workers that they did not earn overtime pay for work over eight hours in a day. Respondent Seal-Tec and Respondent K. Gordon intended to mislead the Agency during its investigation, and knowingly failed to pay the correct prevailing wage rate. Respondent K. Gordon directed the Agency to send all correspondence concerning this case to his home address, which he shared with Respondent T. Gordon, his wife. Respondent T. Gordon prepared the payroll reports at home. During the investigation, Respondent K. Gordon expressed his intention to pay off the back wages owed to the workers.

17) During the investigation of this matter and at hearing, Respondent K. Gordon gave several reasons for failing to pay PWR on the four public projects. He claimed that he had little experience with PWR, and did not know that the jobs required payment of PWR. He claimed that the failure to pay PWR was unintentional. He claimed that Respondent Seal-Tec's estimator wrote the bids from the specifications and looked only at the areas of the specifications concerning Respondent Seal-Tec's specialty. Respondent K. Gordon claimed that he did not read each contract completely. He also claimed that the jobs were not bid correctly, and he did not have the money to pay the PWR. He claimed that he did not know which classification to use for his workers. He admitted that he continued to work on the projects after he learned they required payment of the PWR. Respondent K. Gordon looked for the prevailing wage rate that would be the easiest to pay.

18) At the time of hearing, all of Respondent Seal-Tec's employees had been paid all back wages for work on the four public works projects discussed in these findings. These back wages equaled $31,139. The notices of claim issued on November 30, 1990, were based on incomplete data, and the claim amounts were revised upward once Respondent Seal-Tec provided its payroll records to the Agency.

19) During times material, Respondent Seal-Tec was doing primarily public works contracts. Most of its bookkeeping would have involved PWR.

ULTIMATE FINDINGS OF FACT

1) Respondent Seal-Tec is an Oregon corporation. Respondent K. Gordon is its corporate president. Respondent T. Gordon is its corporate secretary. Respondent T. Gordon is also Respondent Seal-Tec's bookkeeper, and handles its payroll.

2) Respondent Seal-Tec bid on and received a subcontract to perform bricklayers work on the Oregon State Penitentiary, a public works. Respondent K. Gordon knew prevailing wages were required on the project and Respondent Seal-Tec, through Respondent T. Gordon, intentionally paid the workers at wage rates under the appropriate prevailing wage rate. Respondent Seal-Tec and its officers were free agents. Respondent Seal-Tec intentionally failed to pay the prevailing rate of wage to its workers on this public works project.

3) Respondent Seal-Tec bid on and received a subcontract to perform bricklayers work on the Columbia River Correctional Institution project, a public works. Respondent K. Gordon knew prevailing wages were required on the project and Respondent Seal-Tec, through Respondent T. Gordon, intentionally paid the workers at wage rates under the appropriate prevailing wage rate. Respondent Seal-Tec and its officers were free agents. Respondent Seal-Tec intentionally failed to pay the prevailing rate of wage to its workers on this public works project.

4) Respondent Seal-Tec bid on and received a subcontract to perform bricklayers work on the Durham Waste

Water Treatment Plant, a public works. Respondent K. Gordon knew prevailing wages were required on the project and Respondent Seal-Tec, through Respondent T. Gordon, intentionally paid the workers at wage rates under the appropriate prevailing wage rate. Respondent Seal-Tec and its officers were free agents. Respondent Seal-Tec intentionally failed to pay the prevailing rate of wage to its workers on this public works project.

5) Respondent Seal-Tec bid on and received a subcontract to perform bricklayers work on a Portland State University remodeling project, a public works. Respondent K. Gordon knew prevailing wages were required on the project and Respondent Seal-Tec, through Respondent T. Gordon, intentionally paid the workers at wage rates under the appropriate prevailing wage rate. Respondent Seal-Tec and its officers were free agents. Respondent Seal-Tec intentionally failed to pay the prevailing rate of wage to its workers on this public works project.

6) On all four public works projects described in Ultimate Findings of Fact numbers 2 through 5, Respondent K. Gordon and Respondent T. Gordon knew or should have known the amount of the applicable prevailing wages.

CONCLUSIONS OF LAW

1) Respondent Seal-Tec employed workers upon public works in Oregon. Respondent K. Gordon and Respondent T. Gordon were officers or agents of Respondent Seal-Tec, an Oregon corporation. The Commissioner of the Bureau of Labor and Industries has jurisdiction over Respondents and the subject matter herein. ORS 279.348 to 279.365.

2) ORS 279.350(1) provides in part:

> "The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed."

OAR 839-16-035(1) provides:

> "Every contractor or subcontractor employing workers on a public works project shall pay to such workers no less than the prevailing rate of wage for each trade or occupation, as determined by the Commissioner, in which the workers are employed."

Respondent Seal-Tec violated ORS 279.350(1) by failing to pay the prevailing rate of wage to workers employed upon four public works projects.

3) ORS 279.361(1) provides in part:

> "When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a * * * subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, * * * the * * * subcontractor * * * shall be ineligible for a period not to exceed three years from the date of publication of the name of the * * * subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works."

OAR 839-16-085(1) provides in part:

> "When the Commissioner, in accordance with the Administrative Procedures Act, determines that a * * * subcontractor has intentionally failed or refused to pay the prevailing rate of wages to workers employed upon public works, * * * the * * * subcontractor * * * shall be ineligible to receive any contract or subcontract for public works for a period not to exceed three (3) years."

Because Respondent Seal-Tec intentionally failed to pay the prevailing rate of wage to workers employed upon public works, it shall be ineligible for a period not to exceed three years from the date of publication of its name on the ineligible list to receive any contract or subcontract for public works.

4) ORS 279.361(2) provides:

> "When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this section shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage."

OAR 839-16-085 provides in part:

> " * * * *
>
> "(2) When the contractor or subcontractor is a corporation, the provisions of section (1) of this rule shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing wage rates.
>
> "(3) As used in section (2) of this rule, any corporate officer or corporate agent responsible for the failure to pay or post the prevailing wage rates includes, but are not limited to the following individuals when the individuals knew or should have known the amount of the applicable prevailing wages or that such wages must be posted:
>
> "(a) The Corporate President;
>
> "(b) The Corporate Vice President;
>
> "(c) The Corporate Secretary;
>
> "(d) The Corporate Treasurer;
>
> "(e) Any other person acting as an agent of a corporate officer or the corporation."

Respondent K. Gordon, corporate president of Respondent Seal-Tec, knew that each of the four public works projects discussed in this Order were public works and required Respondent Seal-Tec to pay its employees prevailing wage rates. He either knew or should have known the amount of the applicable prevailing wage. Respondent T. Gordon, corporate secretary of Respondent Seal-Tec, knew or should have known the amount of the applicable prevailing wage. Accordingly, ORS 279.361(1) applies to Respondent K. Gordon and Respondent T. Gordon, and they shall be ineligible for a period not to exceed three years from the date of publication of their names on the ineligible list to receive any contract or subcontract for public works.

OPINION

Respondent Seal-Tec and Respondent T. Gordon failed to appear at the hearing, and thus defaulted to the charges set forth in the Notice of Intent to Make Placement on List of Ineligibles. In default cases the task of this Forum is to determine if a prima facie case supporting the Agency's Notice

has been made on the record. ORS 183.415(6); OAR 839-30-185*.

Respondent Seal-Tec's and Respondent T. Gordon's only contribution to the record was the answer filed on their behalf by counsel. Where a respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. *In the Matter of Richard Niguette,* 5 BOLI 53, 60 (1986); *In the Matter of Jack Mongeon,* 6 BOLI 194, 201 (1987). Where an answer contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by credible evidence on the record. *Jack Mongeon, supra.* Having considered all the evidence on the record, I find that the Agency's prima facie case has not been effectively contradicted or overcome.

Intentional Failure to Pay Prevailing Rate of Wage

Under ORS 279.361, if a contractor "intentionally failed" to pay the prevailing rate of wage when required, then the contractor "shall be ineligible" for up to three years to receive any contract or subcontract for public works. Based on the uncontroverted evidence produced at the hearing, the Forum finds that the Agency has established a prima facie case that Respondent Seal-Tec failed to pay PWR to its workers on four public works projects. It is no defense that, after an Agency investigation and the filing of notices of claims, Respondent Seal-Tec later paid the back wages owed. *In the Matter of P. Miller and Sons Contractors, Inc.,* 5 BOLI 149, 159 (1986).

This Forum has previously held that the terms "intentionally" and "willfully" are interchangeable. *P. Miller and Sons, supra,* at 156 (citing *Starr v. Brotherhood's Relief & Compensation Fund,* 268 Or 66, 518 P2d 1321 (1974)). The Forum has also adopted the Oregon Supreme Court's interpretation of "willful" set out in *Sabin v. Willamette Western Corporation,* 276 Or 1083 (1976). "Willful," the court said, "amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent."

Here the evidence is conclusive that, at some time during Respondent Seal-Tec's involvement with each project, Respondent K. Gordon became aware that the project was a public works, and required the payment of PWR. The evidence is also conclusive that, despite Respondent K. Gordon's knowledge of that legal requirement, Respondent Seal-Tec continued to pay all of its workers far less than the applicable prevailing wage rate for the workers' trade. At the same time, Respondent Seal-Tec was submitting certified payroll records to the prime contractors, in which Respondent K. Gordon stated that "all persons employed on said project have been paid the full weekly wages earned," and that any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for workers contained therein are not less than the applicable wage rates contained in any wage determination incorporated into the contract; that the classifications set forth therein for each worker conform with work performed. Respondent K. Gordon signed these certified records, when the record amply demonstrates that such certifications were false at the time he signed them.

Respondent Seal-Tec's payroll records, prepared by Respondent T. Gordon, show that the corporation continued to pay less than PWR after times when Respondent K. Gordon knew that the jobs were public works and PWR was required. Through its officers, Respondent Seal-Tec knew what it was paying its workers ($7.00, $8.00, $10.50, and $12 per hour), intended to pay its workers those wage rates, and was a free agent.

Therefore, Respondent Seal-Tec intentionally failed to pay the prevailing rate of wage to workers employed upon public works. Pursuant to ORS 279.361, Respondent Seal-Tec is ineligible for a period of up to three years from the date of publication of its name on the ineligible list to receive any contract or subcontract for public works. Based on the facts in this record, the Forum finds it appropriate to make Respondent Seal-Tec ineligible for a period of three years.

Respondent K. Gordon Is Responsible For Failure to Pay PWR

Pursuant to ORS 279.361(2), a corporate officer who is responsible for a corporation's failure to pay PWR shall also be ineligible for up to three years to receive any public works contracts. According to OAR 839-16-085 (3), Respondent K. Gordon, who was president of Respondent Seal-Tec, would be responsible if he "knew or should have known the amount of the applicable prevailing wages." In another case applying this statute and rule, the Commissioner stated:

> "All employers are charged with knowledge of wage and hour laws governing their activities as employers. *In the Wage Claim Matter of Country Auction,* 5 BOLI 256, 267 (1985). Similarly, as noted above, the law imposes a duty upon employers to know the wages that are due to their employees. *McGinnis v. Keen,* 189 Or App 445, 459, 221 P2d 907 (1950). Contractors cannot escape their responsibilities under the law by selective ignorance or inattention." *In the Matter of Jet Insulation, Inc.,* 7 BOLI 133, 142 (1988).

The preponderance of credible evidence on the whole record persuades the Forum that Respondent K. Gordon not only should have known the amount of the applicable prevailing wages, but he did know. Each of the four contracts for public works that he signed mentioned that PWR applied to the project. Some contracts even had the PWR booklet attached. A person is presumed to be familiar with the contents of any document that bears his signature. *Broad v. Kelly's Olympian Co.,* 156 Or 216, 66 P2d 485 (1937). The contents of each of the four contracts should have put Respondent Seal-Tec and Respondent K. Gordon on notice of the PWR requirements.

* The series of Oregon Administrative Rules numbered 839-30-020 to 839-30-200 were amended and renumbered by temporary rules OAR chapter 839, division 50, effective April 12, 1993. OAR 839-30-185 regarding defaults was renumbered 839-50-330.

This Forum has previously observed that:

> "The general rule that pervades the whole doctrine of notice is that, whenever sufficient facts exist to put a person of common prudence upon inquiry, he is charged with constructive notice of everything to which that inquiry, if prosecuted with proper diligence, would have led. *American Surety Co. of New York v. Multnomah County,* 171 Or 287, 138 P2d 597, 601, 148 ALR 926 (1943)." *Jet Insulation, supra,* at 140.

Not only were there numerous references in the contract documents and specifications giving notice that contractors were required to comply with the Prevailing Wage Rate law, but these four projects were manifestly public works, let by state or local governmental agencies. There could be no mistake that the two prison projects, the state university project, and the waste water treatment plant project were public, as opposed to private, works. If Respondent K. Gordon was unaware that these were public works projects when they were bid (as he testified), he and other Respondent Seal-Tec employees either knew or should have known it soon after their work began. In a related argument, Respondent K. Gordon claimed that when he first began bidding on public works contracts in mid-1990, he was ignorant of the "Davis-Bacon Act" and the requirement of paying prevailing wage rates. This Forum has never given that defense any weight. Respondent Seal-Tec, like all employers, is charged with knowing the wage and hour laws governing its activities as an employer. Respondent K. Gordon cannot escape liability with this defense. *See, for example, Country Auction*, above, at 267.

Further, the facts reveal that Respondent K. Gordon became aware that these projects were public works, and he knew that he had to pay prevailing wage rates. He testified that he was unsure which classification was correct for the work done by Respondent Seal-Tec's employees. On some certified payroll reports he classified them as laborers, and on others he classified them as tile and terrazzo helpers. However, the argument about classification is illusory because Respondent Seal-Tec did not pay its workers at any prevailing wage rate required by any of the classifications Respondent K. Gordon claimed. Even beginning in December 1990, on the OSP project, he classified the employees as laborers, but paid them as tile and terrazzo helpers, which required a lower wage rate than laborers. He never classified or paid them properly as bricklayers on the OSP job until after it was completed and the Agency had filed a notice of claim. This was long after the Agency had advised him repeatedly of the correct classification and prevailing rate of wage.

From these facts, the Forum is persuaded that Respondent K. Gordon knew the applicable prevailing wage to be paid, and was responsible for Respondent Seal-Tec's failure to pay them. Accordingly, pursuant to ORS 279.361(2) and OAR 839-16-085(3), Respondent K. Gordon is ineligible for a period of up to three years from the date of publication of his name on the ineligible list to receive any public works contract. Based on the facts in this record, the Forum finds it appropriate to make Respondent K. Gordon ineligible for a period of three years.

Respondent T. Gordon Is Responsible For Failure to Pay PWR

Respondent T. Gordon is also subject to ORS 279.361(2) and OAR 839-16-085(3). As corporate secretary for Respondent Seal-Tec, Respondent T. Gordon would be ineligible for up to three years to receive any public works contracts if she knew or should have known the amount of the applicable prevailing wages. *Jet Insulation, supra,* at 142.

The record shows that Respondent T. Gordon was not only the corporate secretary, she was Respondent K. Gordon's wife, the corporation's bookkeeper, and responsible for the corporation's payroll. She kept the payroll ledgers, and made out the paychecks. She lived in the home where the Agency sent all of its correspondence during the investigation. She wrote the "PW Bonus" checks to the employees beginning as early as September 1990. It is certainly a reasonable inference from these uncontradicted facts that Respondent T. Gordon "knew or should have known the amount of the applicable prevailing wages," and knew that Respondent Seal-Tec was not paying these wages. As such, she shares responsibility with Respondent K. Gordon for Respondent Seal-Tec's failure to pay prevailing wage rates.

Accordingly, pursuant to ORS 279.361(2) and OAR 839-16-085(3), Respondent T. Gordon is ineligible for a period of up to three years from the date of publication of her name on the ineligible list to receive any public works contract. Based on the facts in this record, the Forum finds it appropriate to make Respondent T. Gordon ineligible for a period of three years.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, it is hereby ordered that SEALING TECHNOLOGY, INC., dba/aka SEAL-TEC, INC., and KENNETH D. GORDON, and TERI GORDON or any firm, partnership, corporation, or association in which they have a financial interest, shall be ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

In the Matter of
ANDRES IVANOV,
fdba A & I Forestry,
Respondent.

Case Number 16-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 9, 1993

SYNOPSIS

Respondent, a farm labor contractor, failed to provide to the Commissioner at least once every 35 days

certified true copies of all payroll records for work done as a forest labor contractor when he paid employees directly, in violation of ORS 658.417(3) and OAR 839-15-300(2); failed to keep conspicuously posted a notice specifying the name and address of the surety on his bond, in violation of ORS 658.415(15) and OAR 839-15-450(1); failed to give each worker a statement of the terms and conditions of employment and of the workers' rights and remedies, in violation of ORS 658.440 (1)(f); and failed to give workers written statements itemizing the total payment and the amount and purpose of deductions from each compensation payment, and statements of the applicable prevailing wage, in violation of ORS 658.440(1)(h). The violations were aggravated by Respondent's history of failing to timely submit certified payroll records, and by Respondent's willful false representation to the Agency regarding the terms of the workers' employment. The Commissioner assessed a civil penalty of $2,500 for the violations, pursuant to ORS 658.453 and OAR 839-15-505, 839-15-507, 839-15-510, and 839-15-512.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on March 2, 1993, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Andres Ivanov (Respondent) represented himself and was present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): Florence Blake, a former compliance specialist with the Wage and Hour Division (WHD) of the Agency (by telephone); Moises Coria, a former employee of Respondent; Joe Keady, an employee of the US Bureau of Land Management (BLM) (by telephone); Lesley Laing, an administrative specialist with the Farm Labor Unit (FLU) of the Agency; and Eduardo Sifuentez, a compliance specialist with the WHD of the Agency (by telephone). Juan Mendoza, appointed by the Forum and under proper affirmation, acted as an interpreter for witness Coria. Respondent testified for himself; he called no other witnesses.

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

FINDINGS OF FACT – PROCEDURAL

1) On October 16, 1992, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondent. The Notice of Intent cited the following bases for this assessment:

1. Failure to Furnish Each Worker Written Statements Describing the Terms and Conditions of the Agreement with the Worker and the Workers' Rights and Remedies: Four Violations * * * of ORS 658.440(1)(f) and OAR 839-15-310 and 839-15-360. Civil Penalty of $250 for each worker; total $1,000.

2. Operation of a Farm-Worker Camp Without the Indorsement Required by ORS 658.715(1)(a) * * * and OAR 839-14-050. Civil Penalty of $500.

3. Failure to Keep a Notice Conspicuously Posted upon the Premises Where Employees Worked Specifying Compliance with * * * ORS 658.415(15) and OAR 839-15-450. Civil Penalty of $250.

4. Failure to Timely Provide to The Commissioner Certified True Copies of All Payroll Records for Work Done as a Farm Labor Contractor * * * in violation of ORS 658.417(3) and OAR 839-15-300(2). Civil Penalty of $250.

5. Failure to Furnish a Written Statement Itemizing the Amount and Purpose of Each Deduction and of the Applicable Prevailing Wage at the Time of Each Compensation Payment to Each Worker: Four Violations * * * of ORS 658.440(1)(h). Civil Penalty of $250 for each worker, total of $1,000.

6. Willfully Making a False Representation Concerning the Terms and Conditions of Employment on Subcontract by Contractor * * * [in] violation of ORS 658.440(3)(b). Civil Penalty of $2,000.

AGGRAVATION: Contractor knew of the violation; the nature, magnitude, and seriousness of the violation.

2) The Notice of Intent was served on Respondent on November 2, 1992.

3) On November 12, 1992, the Agency received Respondent's answer to the Notice of Intent. In his answer, Respondent denied all of the allegations in the notice. He requested a hearing on the Agency's intended action.

4) On November 12, 1992, the Agency requested a hearing from the Hearings Unit.

5) On December 12, 1992, the Hearings Unit issued to Respondent and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to Respondent a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.*

6) On February 16, 1992, the Hearings Referee sent the participants prehearing instructions.

7) Pursuant to OAR 839-30-071, the Agency filed a summary of the case including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, Respondent did not submit a summary.

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* The series of Oregon Administrative Rules numbered 839-30-020 to 839-30-200 were amended and renumbered by temporary rules OAR chapter 839, division 50, effective April 12, 1993.

8) At the start of the hearing Respondent said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

9) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) Before any evidence was presented, the Hearings Referee granted the Agency's motion to drop its allegation that Respondent operated a farmworker camp without the indorsement required by law.

11) The Hearings Referee requested payroll check stubs or records from Respondent, and ordered Respondent to produce the records by March 12. The record of the hearing was left open until March 19, 1993, for the Agency to respond to those records or request the opportunity to examine Respondent's bookkeeper.

12) On March 8, 1993, Respondent provided copies of payroll stubs and WH-153 forms. Those documents were marked and are hereby received into the record. On March 17, 1993, the Agency responded to Respondent's March 8 documents. The Agency's response was marked and is hereby received into the record.

13) On March 19, 1993, pursuant to his March 2 ruling, the Hearings Referee closed the record herein.

14) On March 30, 1993, the Hearings Referee requested a statement of policy from the Agency, pursuant to OAR 839-30-175. After an extension of time, the Agency timely submitted the statement on May 10, 1993. Those documents are hereby received into the record.

15) On May 12, 1993, the Hearings Unit of the Bureau of Labor and Industries issued the Proposed Order in this matter to the participants. Respondent had 10 days to file exceptions to the Proposed Order. As of May 27, 1993, the Hearings Unit had received no exceptions.

FINDINGS OF FACT – THE MERITS

1) Respondent is a natural person who was licensed in 1991 as a farm labor contractor with a forest labor contractor indorsement,* employing persons for the purposes of forestation and reforestation. He was not licensed on the date of hearing.

2) Respondent did business as A & I Forestry, and was a sole proprietor.

3) On April 2, 1991, Respondent signed a renewal application for a forest labor contractor license. As part of that application, Respondent signed a "Certificate of Compliance" which states:

> "I, the undersigned, do hereby certify that I have READ and UNDERSTOOD the enclosed forms (Forms WH-151, "Rights of Workers"; and Form WH-153, "Agreement Between Contractor and Workers") and will, in accordance therewith, provide this information to all subject workers as required by law."

4) Respondent had a farm labor bond in effect until March 31, 1992.

5) On July 1, 1991, Respondent entered into a subcontract with Kanstantin Kuznetsov to perform precommercial thinning forestation work on Item 3, Units 8, 9, and 10 of a Bureau of Land Management contract number H952-C-1-3131 ("#3131").

6) On around July 1, 1991, Respondent and nine workers executed a written agreement regarding the terms and conditions of employment on #3131. The rate of pay was $12.00 per hour or $45.00 per acre.

7) On around July 18, 1991, Respondent's employees began work on the subcontract. The crew consisted of three crewmen and one foreman. Nicolas Juan acted as Respondent's foreman on the job. Work was completed around August 9, 1991.

8) On August 9, 1991, Respondent had four workers on #3131: Nicolas Juan, Francisco Coria, Jesus Coria-Mendoza, and Moises Coria-Villicana. The four workers agreed with Respondent to work for $45.00 per acre, which the workers split. They worked from eight to ten hours per day, and finished around six acres per day. Respondent paid the workers directly. Respondent never furnished to any of the four workers a written statement of the agreement between Respondent and the workers, or a written statement of the rights of workers.

9) Moises Coria's testimony was not reliable regarding the issue of whether Respondent gave the workers WH-151 and WH-153 forms. He told the Agency's compliance specialist at the site on August 9, 1991, that Respondent had not given him a written contract or a statement of workers rights. That statement was consistent with statements given by the other three workers. It is also consistent with a statement Respondent gave to the compliance specialist on September 12, 1991, and consistent with Coria's statement given to a compliance specialist a short time before hearing. Yet at hearing Coria testified that Respondent gave him lots of papers, and he believed he had received a WH-151 form. He could not remember getting a form WH-153. Likewise, regarding whether Respondent posted a notice of compliance with ORS 658.415 (form WH-155), Coria told an Agency compliance specialist that Respondent did not post a notice. Yet at hearing, Coria testified that he could not remember if the notice of compliance was posted. Coria showed some bias in favor of Respondent, and testified he did not want to testify at hearing against Respondent. Because his statements were inconsistent, his testimony was contradicted by other credible evidence, and he demonstrated bias, the Forum finds Coria's testimony on these issues not credible.

* ORS 658.417 requires that one who acts as a farm labor contractor with regard to the forestation and reforestation of lands must, among other things, obtain a special indorsement authorizing such activity and pay a higher fee than a farm labor contractor not involved with forestation or reforestation. OAR 839-15-004 defines such a farm labor contractor as a "forest labor contractor."

* Bureau of Labor and Industries forms WH-151, WH-153, and WH-155 are written in English. The same forms, written in Spanish, are numbered WH-151S, WH-153S, and WH-155S. Unless otherwise noted, any reference in this Order to forms WH-151, WH-153, and/or WH-155 is to be read to include forms WH-151S, WH-153S, and/or WH-155S.

10) On August 9, 1991, Florence Blake, Compliance Specialist with the Agency, visited Respondent's worksite on #3131. She saw no notices posted at the site or in a van used by the workers. On nine occasions while Respondent's workers were working on #3131, a BLM inspector inspected Respondent's units. He never saw any notices posted at any site; he did not see a notice inside a van at any site.

11) On September 12, 1991, Respondent told Florence Blake that his subcontract on #3131 was a very small job, and he did not see the need to give disclosure forms to the workers or post a bond notice of compliance with ORS 658.415 when he was a subcontractor, since that was the prime contractor's duty.

12) Respondent testified at hearing that he gave his workers WH-151 and WH-153 forms, and the Notice of Compliance form (WH-155) to post in a van at the job sites. However, Respondent's testimony is contradicted by his own statements made to the Agency's compliance specialist on September 12. In addition, it is contradicted by the credible evidence of written statements by Respondent's workers, and observations by the BLM inspector and the Agency's compliance specialist. Respondent's testimony was corroborated to some extent by Coria; however, the Forum has found Coria's testimony unreliable on these issues. Because Respondent's testimony is contradicted by his own earlier statement and by other credible evidence, and is not corroborated by any reliable evidence, the Forum finds that his testimony is not credible on the issues of whether he furnished WH-151 and WH-153 forms to the workers, and whether a WH-155 notice was posted at the job site on August 9, 1991.

13) Respondent provided the four workers written statements with their paychecks itemizing the total payment and amount and purpose of some deductions. Respondent made deductions from the workers paychecks for items such as food, gas, oil, saws, and chains. These deductions were not itemized on the written statements. Respondent did not give the workers a written statement of the applicable prevailing wage under the Service Contract Act or related federal or state law.

14) Respondent told Florence Blake on September 12, 1991, that he paid the workers $5.00 per acre for use of a van at the job sites. Respondent did not pay the workers $5.00 per acre for use of the van. Respondent told Blake that the workers did not pay him $5.00 per acre for van rental. When Blake told Respondent that all four workers said he had deducted $5.00 per acre for van rent, Respondent told Blake he would have his bookkeeper make out checks and send them right away. The Agency never received evidence of Respondent sending checks to the workers or to the Agency.

15) As discussed in part five of the Opinion, the Forum finds that Respondent willfully made false statements to the Agency regarding paying the workers $5.00 per day for the use of the van. These misrepresentations, in combination with the other inconsistencies in Respondent's testimony and the fact that important parts of his testimony were contradicted by credible evidence, cause the Forum to find Respondent's testimony not credible. Accordingly, his testimony was not believed whenever it was contradicted by credible evidence; in some cases, his testimony was not believed even when it was uncontroverted.

16) On September 18, 1991, the Agency received from Respondent a certified payroll record for the period July 17 to July 29, 1991. It showed payroll for Coria, Coria-Mendoza, Coria-Villicana, and Juan. It showed that each worker worked 50.5 hours, at a rate of $11.41 per hour, plus $.59 per hour in fringe benefits (a total of $12 per hour). Pay stubs submitted by Respondent after hearing are consistent with those hours and rate of pay. Respondent blamed his bookkeeper, Cliff West, for not mailing the certified payroll records to the Agency on time.

17) On September 18, 1991, the Agency received from Respondent a certified payroll record for the period July 31 to August 8, 1991. It showed payroll for Coria, Coria-Mendoza, Coria-Villicana, and Juan. It showed that three workers (Coria-Mendoza, Coria-Villicana, and Juan) worked 24 hours, at a rate of $10.90 per hour, plus $.59 per hour in fringe benefits (a total of $11.49 per hour). It showed that one worker (Coria) worked 18 hours, at a rate of $10.78 per hour, plus $.59 per hour in fringe benefits (a total of $11.37 per hour). Pay stubs submitted by Respondent after the hearing showed that the three workers earned $344.64, which equals approximately 30 hours each at a rate of $11.49 per hour; Coria earned $204.63, which equals approximately 18 hours at a rate of $11.37 per hour. Respondent blamed his bookkeeper for not mailing the certified payroll records to the Agency on time.

18) Thirty five days after July 18, 1991, was August 22, 1991.

19) During 1990, Respondent routinely failed to submit his certified payroll records to the Agency at least once every 35 days starting from the time work first began on contracts for the forestation or reforestation of land. Respondent blamed his bookkeeper for not mailing the certified payroll records to the Agency on time.

20) As of December 13, 1991, Respondent had submitted no certified payroll records to the Agency for any pay period after August 8, 1991.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondent was a licensed farm labor contractor, as defined by ORS 658.405, doing business in the State of Oregon as A & I Forestry.

2) Between on or about July 18 and August 9, 1991, Respondent provided crews to perform forestation labor on Bureau of Land Management Contract No. H952-C-1-3131. Respondent did not provide to the Commissioner at least once every 35 days certified true copies of all payroll records for work done as a farm labor contractor when he paid employees directly.

3) Respondent did not furnish to any worker, at the time of hiring, recruiting, soliciting or supplying, a written statement – in the English language and any other language used by Respondent to communicate with the worker – that contained a description of the terms and conditions of

employment, the written agreement between Respondent and the workers (WH-153), or the worker's rights and remedies (WH-151) as described in ORS 658.440(1)(f).

4) On August 9, 1991, on Respondent's worksite on #3131, he did not keep conspicuously posted a notice, in English or any other language used to communicate with the workers, specifying his compliance with requirements of ORS 658.415, and specifying the name and address of the surety on his bond (WH-155).

5) Respondent failed to furnish to each worker each time the worker received a compensation payment a written statement itemizing the purpose of each deduction therefrom, and stating the applicable prevailing wage under the Service Contract Act (41 USC. 351-401) or related federal or state law.

6) Respondent willfully made false representations to the Agency regarding whether he made deductions or paid the workers $5.00 per acre for use of a van at the job sites.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein. ORS 648.405 to 658.485.

2) ORS 658.440(1) provides in part:

> "Each person acting as a farm labor contractor shall:
>
> "* * * *
>
> "(f) Furnish to each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement in the English language and any other language used by the farm labor contractor to communicate with workers that contains a description of:
>
> "(A) The method of computing the rate of compensation.
>
> "(B) The terms and conditions of any bonus offered, including the manner of determining when the bonus is earned.
>
> "(C) The terms and conditions of any loan made to the worker.
>
> "(D) The conditions of any housing, health and day care services to be provided.
>
> "(E) The terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof.
>
> "(F) The terms and conditions under which the worker is furnished clothing or equipment.
>
> "(G) The name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied or employed by the farm labor contractor.
>
> "(H) The existence of a labor dispute at the worksite.
>
> "(I) The worker's rights and remedies under ORS chapter 656, ORS 658.405 to 658.485, the Service Contract Act (41 USC. 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner."

Respondent violated ORS 658.440 four times by failing to provide a written statement as described in subsection (1)(f) to the four workers employed.

3) ORS 658.415 provides in part:

> "(3) Each applicant shall submit with the application and shall continuously maintain thereafter, until excused, proof of financial ability to promptly pay the wages of employees and other obligations specified in this section. The proof required in this subsection shall be in the form of a corporate surety bond * * *, a cash deposit or a deposit the equivalent of cash. * * *
>
> "* * * *
>
> "(15) Every farm labor contractor required by this section to furnish a surety bond, or make a deposit in lieu thereof, shall keep conspicuously posted upon the premises where employees working under the contractor are employed, a notice in both English and any other language used by the farm labor contractor to communicate with workers specifying the contractor's compliance with the requirements of this section * * *."

OAR 839-15-450 provides in part:

> "(1) Every Farm and Forest Labor Contractor is required to post a notice in English and in any language used by the contractor to communicate with the contractor's workers. The notice must be posted in a conspicuous place on the job site where the contractor's employees are working and must be easily accessible to them.
>
> "* * * *
>
> "(4) The Commissioner has prepared a notice (WH-155) in English and Spanish which complies with this rule. Contractors may use any form or notice so long as it contains all the elements of Form WH-155."

Respondent violated ORS 658.415(15) and OAR 839-15-450(1).

4) ORS 658.417 provides in part:

> "In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:
>
> "* * * *
>
> "(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such information as the commissioner, by rule, may prescribe."

OAR 839-15-300(2) provides:

> "The certified true copy of payroll records shall be submitted at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made."

By failing to provide to the Commissioner a certified true copy of all payroll records for work done as a farm labor contractor, when he paid employees directly, at least every 35 days starting from the time work first began on the forestation contract, Respondent violated ORS 658.417(3) and OAR 839-15-300.

5) ORS 658.440(1) provides in part:

> "Each person acting as a farm labor contractor shall:
>
> "* * *
>
> "(h) Furnish to the worker each time the worker receives a compensation payment from the farm labor contractor, a written statement itemizing the total payment and amount and purpose of each deduction therefrom, hours worked and rate of pay or rate of pay and pieces done if the work is done on a piece rate basis, and if the work is done under the Service Contract Act (41 USC §§351-401) or related federal or state law, a written statement of any applicable prevailing wage."

Respondent violated ORS 658.440 (1)(h) eight times (twice with each worker) by failing to furnish the required statements with each compensation payment.

6) ORS 658.440(3) provides in part:

> "No person acting as a farm labor contractor * * * shall:
>
> "* * *
>
> "(b) Willfully make or cause to be made to any person any false, fraudulent or misleading representation, or publish or circulate any false, fraudulent or misleading information concerning the terms, condition or existence of employment at any place or by any person."

OAR 839-15-004(16) provides:

> "'Person' means any individual, sole proprietorship, partnership, corporation, cooperative corporation, association or other business or legal entity."

Respondent did not violate ORS 658.440(3)(b) because that subsection does not apply to false statements made by a farm labor contractor to the Agency.

7) ORS 658.453(1) provides in part:

> "In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries, in the same manner as provided in ORS 183.310 to 183.550 for a contested case proceeding, may assess a civil penalty not to exceed $2,000
>
> "* * *
>
> "(b) A farm labor contractor who fails to comply with ORS 658.415(15).
>
> "(c) A farm labor contractor who fails to comply with ORS 658.440(1) * * *.
>
> "* * *
>
> "(e) A farm labor contractor who fails to comply with ORS 658.417 * * * (3) * * *."

OAR 839-15-505 provides in part:

> "(2) 'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-15-507 provides:

> "Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation."

OAR 839-15-510 provides in part:

> "(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:
>
> "(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violation of statutes or rules;
>
> "(b) Prior violations, if any, of statutes or rules;
>
> "(c) The magnitude and seriousness of the violation;
>
> "(d) Whether the contractor or other person knew or should have known of the violation.
>
> "(2) It shall be the responsibility of the contractor or other person to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.
>
> "* * *
>
> "(4) Notwithstanding any other section of this rule, the Commissioner shall consider all mitigating circumstances presented by the contractor or other person for the purpose of reducing the amount of the civil penalty to be imposed."

OAR 839-15-512(1) provides in part:

> "The civil penalty for any one violation shall not exceed $2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances."

Under the facts and circumstances of this record, and in accordance with ORS 658.453 and related portions of ORS 658.405 to 658.475 and Oregon Administrative Rules, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for each violation found herein. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

OPINION

1. Written Statements of Working Conditions, Rights of Workers

The evidence was overwhelming that Respondent's workers were never furnished with Agency forms WH-151 or WH-153, or any like forms. Respondent's and Coria's testimony to the contrary was not credible.

Each failure to comply with a statute constitutes a separate violation. *In the Matter of Jose Solis*, 5 BOLI 180 (1986); *In the Matter of Jon Paauwe*, 5 BOLI 168 (1986); *In the Matter of Michael Burke*, 5 BOLI 47 (1985). "Each violation is a separate and distinct offense." OAR 839-15-507.

Respondent violated ORS 658.440(1)(f) each time he failed to furnish a worker with a written statement of working conditions and workers' rights and remedies at the time the worker was hired, recruited, or solicited or at the time the worker was supplied to another person (such as a farmer)

by him. *See* OAR 839-15-310(2) and 839-15-360(4).

The Agency proposed to assess a civil penalty of $250 for each worker to whom respondent failed to furnish a written statement, or a total of $1,000 for these four violations. Respondent presented no mitigating circumstances. The record concerning Respondent's history in taking all necessary measures to prevent or correct violations of statutes or rules shows that he had an ongoing problem with submitting his certified payroll records to the Agency within the time required by rule. This is an aggravating factor. There is no evidence on the record of prior violations. The magnitude and seriousness of this violation is high, since these disclosure forms serve a fundamental aspect of the statutory scheme: protecting the workers. The Forum finds that Respondent knew of these violations, since his license application proves he knew of the statute's requirement to furnish these notices to the workers, and he personally employed these workers. Also, the Forum finds Respondent's willful misrepresentation to the Agency, discussed in part five of this Opinion, to be an aggravating circumstance. Given these aggravating factors and that the workers all believed they were being paid at a rate (by the acre) different than what Respondent paid them (by the hour), these violations tempt the Forum to assess a higher civil penalty than proposed. However, the Forum assesses a civil penalty of $1,000 for the four violations found.

2. Posting Notice of Compliance With Bonding Requirement

The Agency charged Respondent with failing to conspicuously post a notice of compliance with ORS 658.415 at his worksites on #3131. The evidence was uncontroverted that, on August 9, 1991, when the Agency's compliance specialist inspected the site where Respondent's subcontract was being performed, no notice of compliance was posted. The BLM inspector's testimony was that he never saw such a notice posted at any of Respondent's worksites during the performance of the subcontract. The Forum has found that Respondent failed to post the notice, in the form of a WH-155 or in any other form. Respondent's testimony that he gave the form to the workers to post in the van does not change the fact that no notice was posted. Even if Respondent's testimony were true, and if the workers failed to follow his directions, such facts would not eliminate the violation. Respondent is ultimately responsible for complying with the statute's requirements, and can not avoid liability for a failure to do so by delegating such responsibilities to the workers.

Further, even if Respondent's assertion (that he gave the forms to the workers, and they failed to post them) were true, the Forum would find no mitigation from that fact because the evidence was convincing that a notice was never posted during the performance of the contract, and Respondent visited the worksites numerous times. Respondent had many opportunities to comply with his duty to post the notice. The fact that the notice was not posted during the entire period of performance

aggravates the violation. The aggravating factors cited in part one of this opinion (regarding his history and the lack of prior violations) also apply here, and to the assessment of penalties for the other violations discussed below in this opinion. The Agency proposed to assess a civil penalty of $250 for this violation of ORS 658.415(15). The Forum hereby assesses that penalty.

3. Certified Payroll Records

Oregon law requires forest labor contractors to submit to the Commissioner certified payroll records when the contractor pays the workers directly. The records must be submitted in such form and at such times and shall contain such information as the Commissioner, by rule, prescribes. ORS 658.417(3). The Commissioner has adopted a rule requiring certified payroll records to be submitted "at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made." OAR 839-15-300(2). The Commissioner has construed this rule to require a contractor to submit these records at least once every 35 days from the time the contractor begins work on each contract. *Paauwe, supra*, at 173. Agency policy regarding the method of calculating the 35 day period states:

1. Contractors must submit wage certification reports at least once every 35 days from the time the contractor begins work on each contract.

2. The first report is due no later than 35 days from the time the contractor begins work on each contract and must include whatever payrolls the contractor has paid out at the time of the report.

3. The second report is due no later than 35 days following the end of the first 35 day period on each contract and must include whatever payrolls had been issued as of the time of the report.

4. If the contract lasts more than 70 days, succeeding wage certification reports must include whatever payrolls the contractor has paid out at the time of the report, with the reports due at successive 35 day intervals, e.g., 105 days and 140 days from the time the contractor begins work on the contract.

Statement of Agency Policy, dated May 10, 1993.

Credible evidence showed that Respondent started work on the BLM subcontract on July 18, 1991. Twenty-two days later, on August 9, 1991, all work was finished. Respondent submitted two certified payroll records on September 18, 1991. These two records (covering two biweekly payroll periods) should have been submitted by no later than August 22, 1991, which was 35 days after work began. Respondent was 27 days late with his submissions. Based on the credible evidence in the record, the Forum has found that Respondent violated ORS 658.417(3).

The Agency proposed to assess a $250 civil penalty for this violation. Evidence showed that Respondent had repeatedly submitted late certified payroll records during the previous year, 1990. This fact aggravates the violation, which the Forum finds is moderate. Accordingly, the Forum assesses a $250 civil penalty, as proposed.

4. Itemized Statement of Deductions and Statement of Prevailing Wage

Respondent provided copies of his pay stubs for the four workers involved in this case, and the Agency provided a copy of a pay stub received by one of the workers. In addition, the workers' written statements to the Agency and Respondent's testimony provide conclusive proof that Respondent deducted money from the workers' earnings for food and other items. Such deductions were not itemized on the pay stubs. Based upon this convincing evidence, the Forum concludes that Respondent failed to furnish to each worker a written statement itemizing the purpose of each deduction each time the worker received a compensation payment. Further, Respondent did not give any worker a written statement stating the applicable prevailing wage under the Service Contract Act (41 USC. 351-401) or related federal or state law.

While the evidence is weak regarding which deductions should have been itemized on which check stubs, there is no question that with each of the eight paychecks Respondent violated ORS 658.440(1)(h) by failing to state the prevailing wage rate. Accordingly, the Forum has found eight violations. The Agency alleged four violations, and proposed a civil penalty of $1,000 ($250 for each violation). The Forum again finds the aggravating factors described above in this opinion, and finds the magnitude and seriousness of these violations to be low. Accordingly, the Forum assesses a civil penalty of $1,000 for four violations.

5. Willfully Made False, Fraudulent or Misleading Representation

The Forum has held that ORS 658.440(3)(b) does not apply to misrepresentations made by a farm labor contractor to the Agency. *See* Conclusion of Law number 6. However, if such a misrepresentation were made, it would constitute an aggravating circumstance to consider when assessing civil penalties for other violations. In addition, it would reflect badly on Respondent's credibility and character. For these reasons, the Forum will describe its reasoning in finding that Respondent made a misrepresentation to the Agency during the investigation of this matter.

The issue here is whether Respondent willfully made a false representation to the Agency about paying or charging the workers $5.00 per acre for the use of the van. Three bits of evidence support Respondent's position that he paid the workers for use of the van. First, Respondent testified that he did so. Second, his WH-153 says that this was his agreement with the workers. Third, the workers apparently told the BLM inspector that they would get "$40.00 an acre and $5.00 for their van."

However, convincing evidence indicates that Respondent made no such payments. First, all four workers gave written statements to the Agency that Respondent deducted $5.00 per acre from each of their paychecks for rent on the van, which they used for transportation and to sleep in. These statements were contradicted by Respondent, and Coria testified that he did not pay to sleep in the van, and that the van belonged to Nicolas Juan. If it was true that Juan owned the van, it would make little sense for him to pay (through payroll deductions) for the use of his own van. In addition, the written statements are contradicted by the BLM inspector's report of the wage agreement, and by Respondent's WH-153. However, even if Respondent did not deduct money for the van, the issue remains as to whether Respondent paid the workers for the use of the van. The workers' signed statements contradict Respondent's representation that he did.

Second, Respondent's WH-153, which says (in handwriting) that the job would be paid at "$12.00 per hour or $45.00 per acre. and $5.00 per acre for van," is questionable due to the "." after the first "acre." It appears to the Forum that the phrase "and $5.00 per acre for van" was added after the first phrase was written. Thus, the Forum finds the reliability of the writing on the WH-153 questionable as an expression of the workers' agreement with Respondent.

Third and most important, Respondent's pay stubs provide no support for his representation to the Agency that he paid the workers $5.00 per acre for use of the van. Respondent's pay stubs show that Respondent paid his workers by the hour, not by the acre, despite the workers' understanding of the agreement. The pay stubs show no payments to the workers for the van.

Based on the evidence described above, the Forum finds that Respondent made a false representation to the Agency's compliance specialist concerning the terms of the workers' employment. In addition, the Forum finds that it was a willful misrepresentation because Respondent is presumed to know the affairs of his farm labor business operation, he knew what he paid the workers, and he knew that his statement to the Agency was not true. The Forum finds that Respondent made the false representation knowingly, intentionally, and voluntarily, and thus willfully. *In the Matter of Leonard Williams*, 8 BOLI 57, 74 (1989).

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, ANDRES IVANOV is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2162, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500), plus any interest thereon that accrues at the annual rate of nine percent between a date ten days after the issuance of this Order and the date Respondent complies with this Order. This assessment is the sum of the following civil penalties against Respondent: $1,000 for the four violations of ORS 658.440(1)(f), $250 for one violation of ORS 658.415(15), $250 for one violation of ORS 658.417(3), and $1,000 for four violations of ORS 658.440(1)(h).

In the Matter of
SYLVIA (aka Silvia) MONTES
and Nicolaz Almonte, Respondents.

Case Number 29-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 13, 1993.

SYNOPSIS

Respondents, who were partners, failed to pay two wage claimants all earned wages when due upon termination, in violation of ORS 653.025(3) (minimum wage) and ORS 652.140(2). Respondents' failure to pay the wages was willful, and the Commissioner ordered them to pay civil penalty wages, pursuant to ORS 652.150. ORS 68.210, 68.250, 68.270, 652.140(2), 652.150, 653.025(3), 653.055.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 18 and 19, 1993, at the Bureau's offices, 721 SE Third, #2, Pendleton, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Librado Perez and Rodrigo L. Torres (Claimants) were not present at the hearing. Sylvia* Montes (Respondent Montes) and Nicolaz Almonte (Respondent Almonte) were present throughout the hearing and represented themselves.

The Agency called the following witnesses (in alphabetical order): Becky Correa, co-owner of Crop Plus; Harold Nakano, Comptroller for Mikami Brothers; Librado Perez, Claimant (by telephone); Magdalena Perez, Claimant Perez's wife (by telephone); Paul Shirley, mechanic for Mikami Brothers; Gabriel Silva, an Agency Compliance Specialist; and Rodrigo Torres, Claimant (by telephone).

Respondent called the following witnesses (in alphabetical order): Respondent Almonte; Ruben Chavez, coworker of Respondent Almonte at Mikami Brothers; Beatriz Morales, daughter of Respondent Montes (by telephone); Respondent Montes; Maria Orozco, a former tenant in Respondents' house (by telephone); Rafael Orozco, Respondent Montes's son-in-law (by telephone); Juan Carlos Rangel (by telephone); and Margarito Rodriguez, former employee of Respondents (by telephone).

Juan Mendoza, appointed by the Forum and under proper affirmation, acted as an interpreter for Respondents, Claimants, and several witnesses called by the Agency and Respondents.

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

* Respondent's first name is spelled two ways in the exhibits: "Sylvia" and "Silvia." Notably, her own checks are printed with "Silvia Montes," yet she signed them "Sylvia Montes."

FINDINGS OF FACT – PROCEDURAL

1) On November 5, 1991, Claimant Perez filed a wage claim with the Agency. He alleged that he had been employed by Respondents and that they had failed to pay all wages earned and due to him.

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

3) On November 6, 1991, Claimant Torres filed a wage claim with the Agency. He alleged that he had been employed by Respondents and that they had failed to pay all wages earned and due to him.

4) At the same time that he filed the wage claim, Claimant Torres assigned to the Commissioner, in trust for Claimant, all wages due from Respondents.

5) On August 4, 1992, the Commissioner of the Bureau of Labor and Industries served on Respondents an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination found that Respondents owed a total of $8,782 in wages and $5,565 in civil penalty wages. The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

6) On August 24, 1992, Respondents, through their attorney, filed an answer to the Order of Determination. Respondents' answer contained a request for a contested case hearing, and denied that Respondents owed Claimants the amount of unpaid wages determined by the Agency, and further set forth the affirmative defense that Respondents were financially unable to pay such wages.

7) On January 14, 1993, the Agency sent the Hearings Unit a request for a hearing date. On January 20, 1993, the Hearings Unit issued a Notice of Hearing to the Respondents, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200. On April 8, 1993, the Hearings Unit sent the participants a copy of the Forum's temporary contested case hearings rules, OAR chapter 839, division 50, effective April 12, 1993.

8) On April 19, 1993, the Hearings Referee issued a discovery order to the participants directing them each to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by May 10, 1993. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency submitted a timely summary. Respondents failed to submit one.

9) On May 3, 1993, the Agency moved for a discovery order, with an attached affidavit and exhibits showing the Agency's attempts to obtain Respondents' records through an informal exchange of information. On May 5, the Hearings Referee granted the Agency's motion and issued a discovery order directing Respondents to provide, among other things, "[a]ny and all records of hours worked by [both Claimants] * * *." Respondents were ordered to provide those records by May 12, 1993. Respondents did not provide any records before the hearing.

10) On May 6, 1993, Respondents' attorney withdrew. The Hearings Referee sent the May 5, 1993, discovery order directly to Respondents. On May 14, Respondents retained the services of another attorney, who withdrew on May 17, 1993.

11) On May 17, 1993, Respondents' second attorney requested a postponement of the hearing because he would not have sufficient time to obtain the documents requested by the Agency. The Hearings Referee denied Respondents' request, pursuant to OAR 839-50-150(5), because Respondents had not shown good cause for a postponement.

12) At hearing, Respondent Montes offered a document which she purported to be a record of dates and hours worked by Claimant Torres. The Agency objected to admission of the document because of Respondents' failure to comply with two discovery orders. The Hearings Referee found that Respondents did not offer a satisfactory reason for having failed to provide the document and found that excluding the document would not violate the duty to conduct a full and fair hearing, because the document was unreliable. Accordingly, the Hearings Referee refused to admit the document into evidence, pursuant to OAR 839-50-200(8).

13) During the hearing, the Agency moved to amend the Order of Determination to reflect an agreement alleged to exist between Claimant Perez and Respondents for reimbursing Claimant's expenses for the use of his pickup truck for work. Claimant Perez alleged that Respondent Montes agreed to pay Claimant $30.00 per day for the use of his truck during work. Respondents consented to the amendment, and pursuant to OAR 839-50-140(2), the Hearings Referee granted the motion.

14) At the start of the hearing, the Hearings Referee had the interpreter translate the entire "Notice of Contested Case Rights and Procedures." Thereafter, Respondents said they had no questions about it.

15) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

16) The Hearings Referee left the hearing record open to allow the interpreter to translate three documents into English. Mr. Mendoza provided the translations to the Forum, and on June 3, 1993, the Hearings Referee closed the record. Those documents are hereby received into the record.

17) On June 10, 1993, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the certificate of mailing, including Respondents. Participants had 10 days to file exceptions to the proposed order. On June 21, 1993, the Hearings Unit received Respondents' exceptions, postmarked June 19, 1993. Respondent's exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondents, as partners, operated a farm produce trucking business located in Stanfield, Oregon. They employed one or more persons in the State of Oregon as mechanics and truck drivers.

2) From July 29 to October 28, 1991, Respondents employed Claimant Perez as a mechanic and truck driver to haul onions and potatoes. Claimant was hired for an indefinite period. Respondents furnished all of the equipment and supplies Claimant Perez used on the job. Respondents controlled how Claimant Perez was to perform his duties. On or about July 29, 1991, Respondent Montes and Claimant Perez entered into an oral agreement that Claimant would perform work for $8.00 per hour. There was no agreement to pay overtime. In addition, Respondent Montes and Claimant Perez agreed that Respondent Montes would pay Claimant $30.00 per day for each day that Claimant used his own pickup truck while working for Respondents. Claimant Perez worked for only the Respondents during all times material. He derived no benefits other than wages and reimbursement for his truck from his work for Respondents.

3) Claimant Perez's records and testimony, which are accepted as fact, reveal that during the period between July 29 and October 28, 1991, he worked a total of 1,221.5 hours in 91 days, and used his truck for work on 90 days. He commonly worked between 12 and 14 hours per day, and sometimes worked up to 18 hours in a day.

4) On occasion when Claimant Perez was near his son's school as class ended, he would pick up his son and either take him home, where others would then watch him, or take him to the fields where Claimant was working, and the boy would sleep in Claimant's truck. During the period July 29 to October 28, 1991, Claimant did not work on two Sundays. During that period, on one Sunday, Claimant Perez and friends went to a river. Also during this period, Claimant sometimes played a piano near Respondent Montes's house. There were some mechanical repairs to Respondents' trucks that Claimant Perez received help with. In addition, Respondent Almonte did maintenance and made repairs on his trucks during the time Claimant Perez worked for him. On occasion, Claimant Perez drove Respondents' pickup trucks.

5) Claimant Perez earned $9,772 in wages (1221.5 hours times $8.00 per hour), plus $2,700 for the use of his truck (90 days times $30.00 per day), which equals $12,472 ($9,772 plus $2700). Respondents paid him a total of $2,990.* Respondents owe Claimant Perez $9,482 ($12,472

* Respondent Montes produced 15 checks at hearing, which the Hearings

minus $2990) in earned and unpaid compensation.

6) Claimant Perez quit without notice on October 28, 1991.

7) Civil penalty wages, computed in accordance with Agency policy, are as follows: $9,772 (the total wages earned) divided by 91 (the number of days worked during the claim period) equals $107.38 (the average daily rate of pay). This figure of $107.38 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of $3,221.40, rounded to $3221 pursuant to Agency policy. Reimbursable expenses are not included in the calculation of civil penalty wages.

8) From September 9 to September 21, 1991, Respondents employed Claimant Torres as a truck driver.

9) Respondent Montes and Claimant Torres entered into an oral agreement that Claimant would perform work at the rate of $15.00 per truck load. There was no agreement to pay overtime. Respondents directed Claimant to keep a record of his hours worked.

10) At times material, the minimum wage in Oregon was $4.75 per hour, pursuant to ORS 653.025(3).

11) Claimant Torres's records and testimony, which are accepted as fact, reveal that during the period between September 9 and September 21, 1991, he worked 157 total hours in 12 days. He commonly worked between 12 and 14 hours per day.

12) Claimant Torres earned $745.75 in wages (157 hours times $4.75 per hour, the applicable minimum wage). Respondents paid him a total of $564.25. Respondents owe Claimant Torres $181.50 in earned and unpaid compensation.

13) Claimant Torres quit without notice on September 21, 1991.

14) Civil penalty wages, computed in accordance with Agency policy, are as follows: $745.75 (the total wages earned) divided by 12 (the number of days worked during the claim period) equals $62.15 (the average daily rate of pay). This figure of $62.15 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of $1,864.50, rounded to $1,865 pursuant to Agency policy.

15) Another employee of Respondents', Rodrigo Diaz, worked 244 hours between September 30 and October 28, 1991. He typically worked between 12 and 14 hours per day, at the agreed rate of $5.00 per hour. It was common for workers to work 12 to 14 hour days during the harvest season.

Referee inspected. Montes claimed they represented wage payments to Claimant Perez. Because many of the checks have "trucks" (in Spanish) noted on them, the Forum does not find that they represent wage payments, since Claimant Perez was given Respondents' checks to purchase truck parts. The Forum has credited the following checks as compensation to Claimant Perez (the checks were written in Spanish): #1935, marked "food," for $20.00; #1947, marked "mechanic," for $70.00; #1992, marked "mechanic," for $200; #2107, marked "driver," for $500; and #2112, marked "mechanic," for $2,200. These checks total $2,990.

16) Respondents kept no time record for either Claimant.

17) Respondent Montes told both Claimants that the reason she could not pay their earned and due wages was because she did not have the money.

18) Respondents did not provide any evidence for the record of a financial inability to pay Claimants' wages at the time they accrued.

19) The Hearings Referee paid special attention to all of the witnesses during their testimony and evaluated the testimony for its inherent probability, its internal consistency, whether or not it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible. The Hearings Referee also looked for evidence of bias. Based upon that evaluation, the Forum has found the testimony of the Claimants to be credible. As with many of the witnesses, Claimants experienced some memory loss. Where that made their testimony unreliable, the Forum gave it no weight.

20) Respondent Montes's testimony was not reliable or credible. Her testimony was inconsistent on important points, often contradicted by Claimants' testimony, and sometimes contradicted by Respondent Almonte. For example, she testified at various times that (1) she and Claimant Perez had agreed to split the profits from the trucking business at the end of the harvest season, (2) she agreed to pay him as a driver by the load, (3) she had no agreement with him for his labor as a driver, (4) she had no agreement with him for an hourly wage rate, and finally (5) she agreed to pay him $4.75 per hour. In other words, she alleged several different, contradictory employment agreements (or lack of agreements) with Claimant Perez. In addition, some of the records produced by Respondent Montes, such as the alleged receipts for wages, were utterly unreliable. Respondent Montes admitted that the wage receipts were not accurate. They were written in a manner that suggests they were created to deceive the Forum. Further, she claimed to have records of the hours worked by Claimant Torres, yet did not bring them to the hearing; such testimony was simply incredible, given the two discovery orders issued to Respondents by the Forum to produce such records, and other evidence, including a statement by Respondent Almonte, showing that Respondents kept no such records. Accordingly, the Forum has disbelieved all of her testimony except that which was corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondents were persons who, as partners, employed one or more persons in the State of Oregon.

2) Respondents employed Claimant Perez from July 29 to October 28, 1991, as a mechanic and truck driver. Respondents and Claimant had an oral agreement whereby Claimant's rate of pay was $8.00 per hour. The employment agreement included reimbursement for the use of Claimant Perez's pickup truck at $30.00 per day.

3) Claimant Perez quit without notice on October 28, 1991.

4) Claimant Perez worked 1,221.5 hours in 91 days, and used his truck for work on 90 days.

5) Claimant Perez earned $9,772 in wages, plus $2,700 for the use of his truck, which equals $12,472. Respondents paid him a total of $2,990, and owe him $9,482 in earned and unpaid compensation.

6) Respondents willfully failed to pay Claimant Perez all wages within five days, excluding Saturdays, Sundays, and holidays, after he quit, and more than 30 days have elapsed from the date his wages were due.

7) Civil penalty wages for Claimant Perez, computed in accordance with Agency policy and ORS 652.150, equal $3221.

8) Respondents employed Claimant Torres from September 9 to 21, 1991, as a truck driver. Respondents and Claimant had an oral agreement whereby Claimant's rate of pay was $15.00 per load.

9) The state minimum wage during 1991 was $4.75 per hour.

10) Claimant Torres quit without notice on September 21, 1991.

11) Claimant Torres worked 157 hours in 12 days.

12) Claimant Torres earned $745.75 in wages. Respondents paid him a total of $564.25. Respondents owe Claimant Torres $181.50 in earned and unpaid compensation.

13) Respondents willfully failed to pay Claimant Torres all wages within five days, excluding Saturdays, Sundays, and holidays, after he quit, and more than 30 days have elapsed from the date his wages were due.

14) Civil penalty wages for Claimant Torres, computed in accordance with Agency policy and ORS 652.150, equal $1,865.

15) Respondents made no showing that they were financially unable to pay Claimants' wages at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Respondents were employers and Claimants were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.405.

3) Prior to the commencement of the contested case hearing, the Forum informed the Respondents of their rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

4) The actions or inactions of Respondent Montes, a partner of Respondent Almonte, are properly imputed to Respondent Almonte. ORS 68.210, 68.250, 68.270.

5) ORS 653.025 requires that:

> " * * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:
>
> "* * *
>
> "(3) For calendar years after December 31, 1990, $4.75."

Respondents failed to pay Claimant Torres the minimum wage rate of $4.75 for each hour of work time.

6) ORS 652.140(2) provides:

> "When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondents violated ORS 652.140(2) by failing to pay Claimants all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimants quit employment without notice.

7) ORS 652.150 provides:

> "If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondents are jointly and severally liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimants when due as provided in ORS 652.140.

8) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimants their earned, unpaid, due, and payable wages and civil penalty wages, plus interest on both sums until paid.

OPINION

1. Compensation Due

This case boiled down to a dispute about agreed rates of pay and numbers of hours worked by the two wage claimants. In wage claim cases such as this, the Forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying his burden of proof, the court analyzed the situation as follows:

> "An employee who brings suit under 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with

liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-88.

Here, ORS 653.045 requires an employer to maintain payroll records. Respondents kept no such records of Claimants' work. Pursuant to the analysis then, the employee, or in this case the Agency, has the burden of first proving that the employee "performed work for which he was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This Forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work -- where that testimony is credible. *See In the Matter of Sheila Wood,* 5 BOLI 240, 253-54 (1986); *In the Matter of Dan's Ukiah Service,* 8 BOLI 96, 106 (1989). Here, the Claimants' testimony and other evidence was credible. The Forum concludes that Claimants were employed and were improperly compensated, and the Forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimants. The Respondents did not produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens Pottery Co.,* 328 US at 686-88.

Respondents suggested in their answer that Claimant Torres was not "actively an employe [sic] of Employer," however, that assertion was not supported by any evidence. ORS 653.025 prohibits employers from paying their workers at a rate less than $4.75 for each hour of work time. ORS 653.055(1) provides that

> "[a]ny employer who pays an employee less than the [minimum wage] is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer; * * * and (c) For civil penalties provided in ORS 652.150."

ORS 653.055(2) states that

> "[a]ny agreement between an employee and an employer to work at less than the [minimum wage] is no defense to an action under subsection (1) of this section."

Credible evidence based on the whole record establishes that Respondents paid Claimant Torres at a rate less than $4.75 per hour for all hours worked. The wage agreement between Respondents and Claimant Torres -- to pay him at the rate of $15.00 per load -- is no defense. Respondents produced no evidence to refute the number of hours Claimant Torres claimed he worked for Respondents.

With respect to Claimant Perez, he claimed he had an agreement with Respondent Montes to be paid $8.00 per hour. Although she disputed this agreement, Respondent Montes's testimony was not credible. No other evidence persuasively refuted Claimant's claim.

Evidence showed that on occasion when he was near his son's school as class ended, Claimant Perez would pick up his son and either take him home, where others would watch him, or take him to the fields where Claimant was working, and the boy would sleep in Claimant's truck. During the period July 29 to October 28, 1991, Claimant did not work on two Sundays. During that period, on one Sunday, Claimant Perez and friends went to a river. Also during this period, Claimant sometimes played a piano near Respondent Montes's house. There were some mechanical repairs to Respondents' trucks that Claimant Perez received help with. In addition, Respondent Almonte did maintenance and made repairs on the trucks during the time Claimant Perez worked for him. None of this evidence, however, necessarily contradicts the hours of work claimed by Perez, because (1) he had enough free time, including two

Sundays off, in addition to his claimed work hours for personal activities, such as a trip to the river and for playing a piano; (2) his inability to complete some truck repairs himself does not refute the hours of work he claimed; and (3) the fact that Respondent Almonte worked on his trucks does not compel the inference that Claimant Perez did not also do the mechanical work he claimed to have done.

Given that Respondents have no record of Claimants' hours worked, that Respondent Montes's testimony was not credible, and that Respondents' other evidence regarding Claimants' work habits was too indefinite to adequately refute their claims, the Forum may rely on the evidence produced by the Agency regarding the numbers of hours worked and rates of pay. The Forum finds that Claimants' evidence of their hours worked is the best evidence available and is sufficiently reliable to permit the Forum to make the findings of fact contained in this Order.

On occasion, Claimant Perez drove Respondents' pickup trucks. However, without more evidence, this fact does not refute Claimant's credible testimony that he used his pickup truck for work on all but one of the days he worked for Respondents. Regarding the reimbursement for the use of Claimant Perez's pickup truck, job-related reimbursable expenses are properly included in a wage claim under ORS chapter 652. Oregon law provides that the Commissioner of the Bureau of Labor and Industries has authority to enforce wage claims, which are defined in ORS 652.320(9) as "* * * claim[s] * * * for compensation for the employee's own personal services." It is the policy of the Bureau of Labor and Industries that unpaid job related expenses can be included in a wage claim if there has been an explicit agreement between the parties that the employer would pay for such expenses or if the employer does in fact pay other such expenses. *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264, 273, 278 (1982).

A preponderance of the credible evidence on the whole record shows that Respondents employed Claimants during the periods of their wage claims, and willfully failed to pay them all wages, earned and payable, when due. That evidence, which established that Respondents owe Claimant Perez $9,482 and Claimant Torres $181.50, was credible, persuasive, and the best evidence available, given Respondent Montes's lack of credibility and Respondents' failure to produce credible records to refute the claims. Having considered all the evidence on the record, the Forum finds that the Agency has presented a prima facie case, which has not been effectively contradicted or overcome. The record establishes that Respondents violated ORS 652.140 as alleged.

2. Civil Penalty Wages

Awarding a civil penalty turns on the issue of willfulness. The Attorney General has advised the Commissioner that "willful," under ORS 652.150, "simply means conduct done of free will." A.G. Letter Opinion No. 6056 (September 26, 1986). Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 279 Or 1083 (1976). "A financially able employer is liable for a penalty when it has willfully done or failed to do any act which foreseeably would, and in fact did, result in its failure to meet its statutory wage obligations." A.G. Letter Opinion, *supra*. Respondents have a duty to know the amount of wages due to an employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983).

The evidence established that Respondent Montes knew she owed Claimant Perez wages. She testified that she expected him to come to her at the end of the harvest season so that they could settle on what she owed him, but that he did not come back; later, she testified that she had overpaid him. Although her testimony was inconsistent, some of it reflects an acknowledgment that she had not paid Claimant Perez all wages owed. Thereafter, when demand was made for Claimant Perez's wages, she intentionally failed to pay them. Similarly, Respondent Montes knew what rate she was paying Claimant Torres, intended to pay him that amount, and, after demand was made for the wages due, intentionally failed to pay them. There was no evidence that Respondent Montes was not a free agent. Thus, Respondents must be deemed to have acted willfully under this test and are liable for civil penalty wages under ORS 652.150.

The Agency's policy is to exclude reimbursable expenses from the wages used to calculate a civil penalty. *In the Matter of Central Pacific Freight Lines, Inc.*, 7 BOLI 272, 280 (1989). Civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68, 72 (1988).

3. Financial Inability

Respondents alleged that they were financially unable to pay Claimant. This Forum has repeatedly held that it is a respondent's burden to show the respondent's financial inability to pay a claimant's wages at the time they accrued. *See* ORS 652.150, 183.450(2); OAR 839-50-260(3); *see also In the Matter of Jorrion Belinsky*, 5 BOLI 1, 10 (1985); *In the Matter of Mega Marketing*, 9 BOLI 133, 138 (1990). Respondents failed to show that they were financially unable to pay Claimants' wages at the time they accrued.

4. Respondents' Exceptions

Respondents filed timely exceptions to the proposed order. Their many exceptions can be grouped into three categories. First, Respondents complain that much of the testimony and other evidence presented at hearing was not translated correctly. The Forum is not persuaded by this complaint because, in addition to the Forum's appointed interpreter (Juan Mendoza), two other bilingual persons were always present in the hearing room: Gabriel Silva, the Agency's Compliance Specialist, and Rebecca Garcia, an interpreter of Respondents' choosing. The Hearings Referee made it clear to the participants, and in particular to Respondents, that if at any time there was a question about any translation during the hearing, to alert

the Hearings Referee. On a few occasions, both Mr. Silva and Ms. Garcia assisted Mr. Mendoza with clarifications. The Hearings Referee granted every one of Ms. Garcia's requests to assist Respondents with information or clarifications. Respondents sought and received clarifications from Ms. Garcia. Aside from these requests for assistance, Respondents made no objection during the two days of hearing to Mr. Mendoza's translations. That was the time to make such objections and seek clarification on the record. The Forum will not now entertain such objections.

Second, in their exceptions Respondents assert new facts and ask to be able to present new evidence that was not presented on the record during the hearing. Respondents allege a variety of bad acts by the Claimants and the Agency, none of which was offered as evidence in the hearing, and they ask for a new hearing. Respondents offer no credible reason why the evidence they wish to present now could not have been gathered prior to the hearing, why some of that evidence was not produced prior to hearing as twice ordered by the Hearings Referee, and why such evidence was not presented during the hearing. Accordingly, the Forum declines to reopen the record. OAR 839-50-410.

OAR 839-50-380(1) states in part that, "[a]ny new facts presented or issues raised in such exceptions shall not be considered by the commissioner in preparation of a final order." Accordingly, the Forum has not considered any of Respondents' newly presented facts or issues. Respondents had a full and fair opportunity to obtain counsel and to present their evidence during the hearing. This final order is based solely on evidence presented at that hearing and matters officially noticed, pursuant to OAR 839-50-320.

Third, Respondents repeat arguments they made during the hearing. Based upon the facts found, the conclusions of law reached, and the reasoning explained in the opinion above, the Forum hereby rejects Respondents' arguments that are inconsistent herewith.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders SYLVIA MONTES and NICOLAZ ALMONTE to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR LIBRADO V. PEREZ in the amount of Twelve Thousand Seven Hundred and Three Dollars ($12,703), representing $9,482 in gross earned, unpaid, due, and payable wages, and $3,221 in penalty wages, plus interest at the rate of nine percent per year on the sum of $9,482 from December 1, 1991, until paid and nine percent interest per year on the sum of $3,221 from January 1, 1992, until paid; and

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR RODRIGO L. TORRES in the amount of Two Thousand Forty-Six Dollars and Fifty Cents ($2,046.50), representing $181.50 in gross earned, unpaid, due, and payable wages, and $1,865 in penalty wages, plus interest at the rate of nine percent per year on the sum of $181.50 from October 1, 1991, until paid and nine percent interest per year on the sum of $1,865 from November 1, 1991, until paid.

In the Matter of
Byung Tea Jun and Tae Jong Joo, partners, fdba
ROSE MANOR INN,
Respondents.

Case Number 33-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 13, 1993.

SYNOPSIS

Respondent Jun assigned a black 14-year-old male Complainant to sweep the grounds instead of his regular job of housekeeper because of his race and sex. Because Complainant perceived a negative racial atmosphere and that the assignment as a racially based demotion, he quit. The Commissioner found the resignation to be a constructive discharge and awarded Complainant $1,045 in back wages. The Commissioner also found that Complainant was extremely shocked, embarrassed, hurt, frustrated, and disappointed by the racial put-down and, noting that this was Complainant's first job and acknowledging his youth, awarded Complainant $6,000 for emotional distress. ORS 659.030(1)(a) and (b).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on April 13, 1993, in the Bureau of Labor and Industries conference room 1004, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Byung Tea Jun and Tae Jong Joo, Partners (Respondents)*, formerly doing business as Rose Manor Inn, were represented by Thomas P. Walsh, Attorney at Law. Respondent Byung Tea Jun was present throughout the hearing. Michael Montgomery (Complainant) and his father and guardian ad litem, Willie Montgomery, Jr., were present throughout the hearing and were not represented by counsel. Ms. Eun-Sook Morey of Pacific Languages, Inc., Portland, appointed by the Forum, acted as interpreter under proper affirmation for the Korean speaking Respondent.

The Agency called the following witnesses in addition to Complainant (in alphabetical order): former Rose Manor head housekeeper De Etta

* Throughout this Order, "Respondent" refers to Respondent Jun; "Respondents," plural, refers to both partners.

Fuhrman; Rose Manor laundry worker Ruth Hendryx; Senior Civil Rights Investigator Jane MacNeill; and Complainant's father and guardian ad litem Willie Montgomery, Jr. Respondents' only witness was Respondent Byung Tea Jun.

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

FINDINGS OF FACT – PROCEDURAL

1) On July 31, 1991, Complainant Michael Montgomery filed a verified complaint with the Agency, and on January 13, 1992, Complainant, through his guardian ad litem Willie Montgomery, Jr., filed an amended verified complaint with the Agency. Each complaint alleged that he was the victim of the unlawful employment practices of Respondents.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondents in violation of ORS 659.030(1)(a) and (b).

3) The Agency initiated conciliation efforts between Complainant and Respondents, conciliation failed, and on February 3, 1993, the Agency prepared and served on Respondents Specific Charges, alleging that Respondents had discriminated against Complainant in the terms and conditions of his employment and constructively discharged him due to his race and sex in violation of ORS 659.030(1)(a) and (b).

4) With the Specific Charges, the following were served on Respondents: a) Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process (OAR 839-30-020 to 839-30-200); and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On February 23, 1993, Respondents timely filed their answer, and on March 29, 1993, Respondents filed their amended answer.

6) Pursuant to OAR 839-30-071, Respondents on April 1, 1993, filed their Summary of the Case, and the Agency on April 6, 1993, filed its Summary of the Case. Also on April 1, 1993, counsel for Respondents requested a Korean interpreter for Respondent.

7) On April 7, 1993, the Hearings Referee appointed a Korean speaking interpreter and the Agency filed a motion to strike relating to Respondents' amended answer. On April 8, the Agency filed written argument on the motion and the Hearings Unit received Respondents' response to the Agency's motion.

8) Effective April 12, 1993, the Commissioner adopted temporary Oregon Administrative Rules 839-50-000 to 839-50-420, governing contested case hearings. Those rules applied to all pending proceedings, including this proceeding. All procedures herein on or after April 12, 1993, including the hearing and the post-hearing process, are in accordance with those rules.

9) On April 12, 1993, the Hearings Unit received Respondents' motion to strike the Agency's case summary or, in the alternative, to make the damage calculation therein more definite and certain. On that date, the Hearings Unit also received the Agency's response to Respondents' motion.

10) At the commencement of the hearing, counsel for Respondent stated that Respondent had received the Notice of Contested Case Rights and Procedures with the Specific Charges and had no questions about it.

11) Pursuant to ORS 183.415(7), Respondent and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) At the commencement of the hearing, the Hearings Referee allowed the Agency's motion striking Respondents' purported bona fide occupational requirement defense regarding Complainant's age for the reason that no age discrimination against an individual 18 years of age or older was alleged, and Respondents thus merely asserted a legitimate, nondiscriminatory reason. That ruling is confirmed. The Referee denied Respondents' motion to strike or make more definite the Agency's damage computations as to Complainant's alleged mental suffering (former OAR 839-30-071(2)(a), now OAR 839-50-210(1)(f)), ruling that the rule addressed lost wages and other expenses caused by the alleged unlawful act, and that Respondents had notice of the amount claimed and of the general nature of the mental suffering distress alleged, and had not exercised the opportunity to clarify the claim through deposition or other discovery. That ruling is confirmed.

13) At the close of the Agency's case, the Agency moved to amend the amount of Complainant's wage loss to conform to the proof, from $955 to $1,045. The Hearings Referee granted the motion, and that ruling is confirmed. In turn, Respondent moved to deduct from any wage loss the amount earned by Complainant at the odd jobs and yard work to which he testified. Because no specific amounts were in evidence and because there was no proof or suggestion that any earnings could not have been earned during off hours from Complainant's part-time position with Respondents, the motion was denied and that ruling is also confirmed.

14) The Proposed Order, which included an Exceptions Notice, was issued on May 27, 1993. Exceptions were to be filed by June 6, 1993. Respondents timely filed exceptions which are dealt with as explained in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondents owned, operated, and did business as Rose Manor Inn, a motel in Portland, Oregon, which engaged or utilized the personal service of one or more employees. Respondents reserved the right to control the means by which such service was performed.

2) In early June 1991, Complainant, a black male born March 11, 1977,

was 14 years of age. Through his school, he had obtained a work permit from the Bureau of Labor and Industries shortly after his 14th birthday. He wanted to get a job immediately and was anxious and willing to work.

3) Willie Montgomery, Jr., Complainant's father, had worked 13 years as a Tri-Met bus driver. He was raising Complainant and his sister, age 17, by himself. He was very pleased with his son's eagerness and willingness to work, but insisted that he wait until summer recess.

4) Respondent Byung Tea Jun, age 58, was born in Seoul, Korea. He was poor as a boy and attempted to work on the docks during the Korean war. He was told he was too young to move boxes on the docks and was given sweeping and package marking jobs, with which he was happy. Respondent retired after 24 years in business in Korea and came to the United States, where he bought into Rose Manor Inn on January 10, 1991. At the time of hearing, Respondent had been in the United States two years and four months. He found different cultures and different thinking. He gave examples, such as the hand gesture beckoning one to come might mean the opposite in Korea, and that it was unlawful in Korea to have auto headlights on during daylight.*

5) Respondent experienced embezzlement, bad checks, and drug-related problems from the first motel managers he hired. He felt that some employees were disrespectful to him because of his Korean origin (he used the term "oriental" and described himself as "a yellow person"). Rose Manor Inn had a high turnover of employees, particularly housekeepers. Respondent found that many "drug people" used the motel. It was also used for prostitution activity. Respondent experienced difficulty and confusion in identifying "drug people" and prostitutes. There was "lots of drinking and fighting." Respondent believed it was his place to keep order at the motel. He stated he suffered a nervous breakdown. Needles, condoms, and empty liquor bottles were often found in the rooms. Customers sometimes damaged the rooms. Portland police were frequently called to quell fights or disturbances between customers or to assist in ejecting uncooperative customers. Respondent received a notice from the City of Portland Police in May 1991 that the motel would be closed by the city if the drug activity continued.

6) Disturbances between customers requiring police intervention at Rose Manor Inn most usually happened at night or in the early morning when the housekeeping staff was not on duty.

7) When school adjourned for the summer, Complainant asked his father to take him to the Oregon State Employment Service (OSES) office to look for summer employment. OSES had a special section listing employment suitable for 14-year-old applicants. Available at the time was work at the Hillsboro Airport, about 30 miles from Complainant's home, and a housekeeping job at Rose Manor Inn, which

* Respondent read a handwritten statement in English into the record. He was then examined and cross-examined under affirmation with the assistance of the interpreter.

was about a 20-minute bus ride from his home and only three to four blocks from his father's work.

8) Complainant, accompanied by his father, went to the Rose Manor Inn and applied for the housekeeper, or maid, position on June 13, 1991. He was hired by the head housekeeper, known to him as "Vickie," to work four hours per day, 20 hours a week, at $4.75 an hour with Monday and Tuesday off.

9) Complainant and his father returned to OSES and thanked the clerk there. Complainant was overjoyed to have a job. Over the next few days he kept his father advised of his training, progress, and duties. He felt good about the job and himself.

10) On June 14, his first day of work, Complainant reported to the laundry area where the other housekeepers showed him how to load up the linen and supply carts. Vickie, the head housekeeper, assigned rooms for cleaning and showed him how to change linen, make beds, clean bathrooms and showers, vacuum the floors, dust, and replace air fresheners. Vickie checked the completed rooms for cleanliness.

11) Clean rooms were considered to be the most important aspect of the motel business.

12) While Complainant was being trained and supervised by Vickie, they encountered Respondent who, while holding his hand out to indicate measurement of Complainant's height, commented that Complainant was "only a boy," or "a little boy," or words to that effect. Complainant was about 5'8" tall at that time. Vickie told Respondent that Complainant had a work permit issued by the Agency and had been referred to the job by OSES. She told Complainant that Respondent was one of the owners, but not to pay any attention to his remarks. After working June 14th under Vickie's direction, Complainant worked on his own for the next two days.

13) Respondent acknowledged that he first saw Complainant in the parking lot moving a room servicing cart and that he thought that Complainant was very young, "a little boy."

14) Ruth Hendryx had worked at Rose Manor Inn for five years at the time of hearing. She was in charge of the laundry when Respondents were the owners. She had over six months' experience as a housekeeper.

15) In the days he worked as a housekeeper, Complainant did not usually find needles, liquor bottles, and other debris. Hendryx assisted him much of the time in stripping beds.

16) At times material, Hendryx went from room to room gathering linen for laundering. She did not check Complainant's work, but several times she observed Complainant doing beds and bathrooms and vacuuming. She would at times assist him by stripping the beds. She thought he was doing a good job.

17) Respondent Tae Jong Joo's wife worked occasionally in housekeeping. As wife of one of the owners, she would confirm the room cleaning to see if anything was done wrong. When she cleaned rooms herself, she was accompanied by her three children, who were first grade age and younger.

18) When Mrs. Joo did the work of a housekeeper, she did not always do the rooms in the way she demanded of others, possibly because she had the young children with her. Mrs. Joo did not speak English.

19) Mrs. Joo followed Complainant around and checked his work. Sometimes she remade a bed. She never communicated in any way to Complainant that any of his work was not satisfactory. Complainant was doing the work as it was assigned by Vickie. He asked Vickie why Mrs. Joo remade the beds. Vickie said she didn't know.

20) Mrs. Joo did not complain to Respondent about Complainant's work.

21) The housekeepers obtained supplies and equipment near the laundry. On June 16, Complainant heard Respondent remark to laundry supervisor Hendryx to the effect that "boys don't work in motels and clean rooms."

22) When Hendryx told Respondent that males could act as maids as well as females, Respondent said, "Well, black boys don't clean rooms." She reminded him that Complainant had been referred by the employment office as qualified. She told Respondent that Complainant had a work permit and was doing a good job. Respondent did not reply.

23) Respondent told Complainant that he was not cleaning rooms properly. Respondent told him to complete the day cleaning rooms, but that he would sweep the lot and driveway on his next workday. While Respondent told Complainant he was not cleaning rooms right, both Vickie and Hendryx had told Complainant that he was doing a good job. Complainant remembered what Vickie had told him about ignoring Respondent's remarks and said nothing to Respondent.

24) Hendryx suggested to Complainant that he had a discrimination charge against Respondent. On June 16, Complainant's father was at work when Complainant came there and told him about Respondent's "black boys" remark. Complainant's father left his work and met Complainant at Rose Manor Inn. He talked to Hendryx, who told him that Respondent had said "black boys don't clean rooms." She told him that Complainant was doing well on his job. She was angry and again suggested that Complainant report the incident to the Agency. Complainant finished his day and went home.

25) Willie Montgomery went to the office to find Respondent. When he could not, he returned to work.

26) Complainant's days off were June 17 and 18. When he reported to work on the 19th, he reported to the laundry area as usual to get his supplies and equipment.

27) Respondent came to the laundry area with two replacements. He sent Complainant to the office for a kitchen broom and a push broom. Respondent then showed Complainant where, what, and how to sweep. He told Complainant to sweep the sidewalk, parking lot, and grounds.

28) When Respondent handed him a broom, Complainant told Respondent that he had been hired to clean rooms, not to sweep the grounds. Respondent left Complainant with the brooms.

29) Complainant went to the office. He could not find Respondent there. He told the general manager, whom he knew as "Debbie," that he was quitting and he left for home.

30) Complainant returned home almost in tears and very disappointed. He told his father that he was given a broom and told to sweep and pick up paper. When he told Respondent he was a housekeeper, he was left to sweep anyway. Complainant was very hurt. Working as housekeeper for Respondents was his first job other than neighborhood odd jobs such as yard work. He had hoped to start to pay his way through life and to have his own clothes and pocket money. But he was employed only five days.

31) Complainant was insulted by Respondent's remarks and embarrassed at being demoted to sweeping the grounds. He had been told by Vickie that he was doing a good job as a housekeeper. Hendryx had observed that Complainant was doing a good job and that his supervisor, Vickie, thought so. No one was aware of any customer complaints about cleaning.

32) Complainant considered sweeping a lowly job. When he was assigned to sweep, it did not appear to him that any recent sweeping had been done. He was not told that Respondent did the sweeping. He believed that the assignment to sweeping was a racial put-down, that he would not have been so assigned if he were not a black male. He wanted to work, but he did not want to work in what he saw, at his age and in his limited work experience, as a negative racial atmosphere. He doubted that there was enough work of that type to ensure him of the four hours per day he had been promised. Respondent had not mentioned any duties in addition to sweeping. Complainant quit because he was shocked by the change which made him uncomfortable. He knew he was doing a good job, but Respondent told him otherwise. That embarrassed him and made him feel stupid. He felt like he was being made fool of, to look like a clown, in being made to sweep the streets and by Respondent's claim that he was not doing his job right. He knew that the rooms he did were clean and that he had been told he was doing well. He was afraid he couldn't get another job. He cried because he was angry, hurt, and frustrated.

33) Following his employment with Respondents, Complainant had no medical treatment or counseling.

34) Complainant again looked for work. OSES had no more jobs for 14 year olds. He consulted newspaper want ads. He could not get into a minority summer employment program because his family income was too high. Looking for work again bothered Complainant. His motivation and his self-esteem were lessened. He was tense and nervous because he feared a repetition of his experience with Respondents.

35) Complainant's father saw that the situation continued to affect his son in looking for other work. His son was discouraged and didn't want to get out to look. The summer jobs were gone, and he had less confidence. He had worked just long enough to miss what was available. Complainant had suffered an extreme disappointment. He had no job that summer while others

his age had jobs, although none worked in motels. Complainant's father understood his son's feelings. As a black man, he had experienced different treatment. He called the Agency on his son's behalf on June 19.

36) Complainant started high school after Labor Day, 1991. He had planned on using the earnings from Rose Manor Inn for clothes and entertainment. He had limited earnings from yard work, car washing, and child care during the summer of 1991, but nothing from regular employment.

37) In June 1991, Complainant was about 5'8" tall and had a slender build. At time of hearing, he was close to 5'11", had turned 16, and had participated in football, baseball, and wrestling in high school while a full-time student maintaining a " B" or better average. He was recruited by one of his teachers to teach and tutor other students in math on a daily basis at Saturday Academy, a 1992 volunteer program. He acknowledged that his self-image had improved since 1991.

38) At times material, Respondent appeared to understand English and usually to understand conversations. He would ask for clarification if he did not understand.

39) Respondent told the Agency investigator that in his country, men did the outside work and women did the inside work. Respondent recalled his statement as being that the wife was concerned with inside work, and the husband with outside work.

40) There were no written job descriptions for the housekeeping staff. In the summer of 1991, Respondent generally did the sweeping and landscaping and the head housekeeper was in charge of the garbage. Respondent Tae Jong Joo was in charge of maintenance.

41) Respondent wanted women for housekeepers. He said housekeeping was women's work and that it was their job to clean. When the head housekeeper hired a black male named Bobby, Respondent told her he had trouble before with black males as housekeepers and that he was being sued for using the term "boy."

42) Respondent said Bobby could take out garbage, sweep cigarette butts out of the parking lot, and do hallways. Bobby was totally inexperienced and was let go after a few weeks.

43) Hendryx did not know that Complainant had filed a complaint with the Agency until Respondent mentioned that Complainant had done so because Respondent had called him too young. Hendryx told Respondent that was not what she had heard Respondent say.

44) If Complainant had worked at Rose Manor Inn past June 19, 1991, until the beginning of school the week of Labor Day, a period of 11 weeks, he would have earned $1,045 (11 weeks x 20 hours per week x $4.75 per hour).

45) Respondent's testimony was not wholly credible. Respondent testified that he thought Complainant was too young to work in housekeeping in the motel and that he would be too young in Respondent's country. He didn't think Complainant should see the needles, condoms, and bloody sheets. He stated that he gave Complainant Respondent's own job so that

Complainant would not be exposed to the drugs and prostitution revealed in the rooms, which was not good for young boys. But his partner's wife cleaned the same rooms accompanied by three small children. He stated that he gave Complainant an easy job that he had done himself and which Respondent did not consider lowly or demeaning. He stated that he did not know about work permits and that no one had explained to him that children could work. Respondent did not recall that Complainant said anything when he was told to sweep. "I said too young, must sweep outside. I sort of chose the best way. I didn't think sweeping a low job, [I] did it myself." Respondent testified that Complainant could have assisted with landscaping and minor maintenance in addition to his sweeping duties, but there was no evidence that he made any attempt to communicate these additional aspects of Complainant's assignment. Respondent said he thought Complainant would be happier outside. Respondent did not want Complainant in the bedrooms with adult women: "[I] don't like little boy looking at some kind of – you know, this may tempt boy that way – I think I concerned just parentwise, that's all." Respondent stated he was concerned about customer perception, seeing a "little boy" working around the rooms inside would mean a "bad reputation, I think." Respondent testified that when he learned English, he learned that "boy" meant male and "girl" meant female, but he also denied absolutely referring to males as boys and females as girls in a conversation with Agency representatives in December 1991. On June 16, when he told Complainant that he would be sweeping after that day, Respondent stated that Complainant had not been doing the rooms correctly, but at hearing he admitted that he had no such information. Based upon the inconsistencies cited, the Forum has found credible only those portions of Respondent's testimony which appear verified by other credible evidence or inference in the record.

46) The testimony of the Agency's witnesses was generally credible. Although De Etta Fuhrman had been discharged from Respondents' employ in early 1992, her testimony was nonetheless credible and generally corroborated by other evidence or inference in the record. At times it confirmed Respondent's testimony. Complainant and his father both testified forthrightly, as did Ruth Hendryx. Hendryx and Complainant reported variously, but consistently, as to the remarks Respondent made concerning Complainant. Complainant reported them as "boys don't work here," and "black boys don't work here," referring to housekeeping; as "boys don't work here," and "black boys don't clean rooms;" as "boys don't clean rooms" and "black boys don't clean rooms;" and as "Boys don't work in motels and clean rooms" and "Well, black boys don't clean rooms." Hendryx testified to "black boys don't clean rooms," "black boys don't do housekeeping, black boys sweep sidewalks," and "black boys don't do housekeeping, can sweep sidewalks." While the exact words vary, the thoughts conveyed are the same, and the Forum has concluded that both gender and race were involved.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondents owned, operated, and did business in Oregon as Rose Manor Inn, a motel engaging and utilizing the personal service of employees and reserving the right to control the means by which that service was performed.

2) Complainant is a black male who was 14 years old in June 1991, when he was employed by Respondents as a housekeeper or maid, working four hours per day, five days a week, at $4.75 an hour.

3) Complainant performed his duties cleaning motel rooms satisfactorily.

4) Respondent Byung Tea Jun transferred Complainant from his room cleaning assignment to sweeping the parking lot and grounds.

5) Respondent changed the terms and conditions of Complainant's employment because of Complainant's race and sex.

6) Complainant perceived the transfer as a demotion and as motivated by his gender and race. To Complainant, the negative racial atmosphere constituted an intolerable working condition. Complainant resigned.

7) Respondent's claim that Complainant's performance as a housekeeper was unsatisfactory was pretextual; Respondent's claim that Complainant was too young to be a housekeeper was pretextual.

8) Complainant lost wages he would otherwise have earned in the amount of $1,045 because he was forced to resign.

9) Complainant suffered emotional upset, embarrassment, damaged personal dignity, frustration, anger, and distress because of the sudden and undeserved demotion to sweeping duties and resultant resignation.

CONCLUSIONS OF LAW

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

2) ORS 659.040 provides, in pertinent part:

> "(1) Any person claiming to be aggrieved by an alleged unlawful employment practice, may * * * make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the * * * employer * * * alleged to have committed the unlawful employment practice complained of and which complaint shall set forth the particulars thereof."

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

3) ORS 659.030 provides, in pertinent part:

> "(1) For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:
>
> "(a) For an employer, because of an individual's race * * * [or] sex * * * to bar or discharge from employment such individual. * * *
>
> "(b) For an employer, because of an individual's race * * * [or] sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Respondents' reassignment of Complainant from housekeeper to sweeping duties because of Complainant's race and sex was a violation of ORS 659.030(1)(b).

Because the race- and sex-based reassignment created for Complainant intolerable working conditions, his resignation was constructively a discharge within the meaning of and a violation of ORS 659.030(1)(a).

3) Pursuant to ORS 659.010(2) and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award to this Complainant, as a means to eliminate the effects of the unlawful practice found, money damages for wage loss and for emotional distress sustained and to protect the rights of Complainant and of others similarly situated. The sum of money awarded and the other actions required of Respondents in the Order below are appropriate exercises of that authority.

OPINION

The Agency has established by a preponderance of the evidence that Respondents, through Respondent Jun, a partner, altered the terms and conditions of Complainant's employment because of Complainant's sex, male, and Complainant's race, black. Respondents' defense centered around Complainant's chronological age and what appeared to be a presumption on Respondent Jun's part that motel work, particularly at Rose Manor Inn, was inappropriate for that age. But Complainant had a work permit and was referred to the position by the state employment office. Respondent Jun's protestations that he was unfamiliar with work permits and working teenagers are not wholly credible. Someone at Rose Manor, in Respondents' name, must have listed the housekeeper position with OSES, even if that was done without Respondent Jun's actual knowledge. Presumably, the position was approved for age 14. Regardless, Complainant's youth could not justify Respondent's insensitivity. The Forum is mindful that Respondent Jun had been in America only a few months at times material. But he had, in that short time, acquired a business. With such opportunity goes the responsibility to obey this nation's civil rights laws. Respondents, like all employers, are presumed to know the law and are required to abide by it.

Complainant considered the change of duties to constitute a rejection of his efforts at his original job of housekeeper, a job he enjoyed and had reason to believe he did well. He thought the change was a demotion to a less desirable status. He felt demeaned and belittled by being assigned to sweep the streets. Because of the nature of Respondent's remarks, he believed that his race, as well as his sex, was Respondent's reason. He was not informed that there might be any additional duties in connection with his new assignment of sweeping the grounds. He reasonably believed that he could not be so occupied four hours a day and that sweeping was thus a demotion in earning potential as well as in self-esteem.

Faced with this racially based diminution of his position, Complainant decided to resign. He had intended to work as a housekeeper until the

beginning of school in the fall, but he did not feel he could continue in the face of what he saw as an intolerable, negative racial atmosphere. It is well established in this Forum that where an employer through unlawful discrimination makes an employee's working conditions so intolerable that the employee feels compelled to resign rather than further endure those conditions, a constructive discharge has occurred. It is not necessary that the employer overtly intend that the employee quit: The employer need only intend the unlawful conditions. Where unlawful different treatment has made an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has encompassed a constructive discharge in violation of ORS 659.030(1)(a). *In the Matter of City of Umatilla,* 9 BOLI 91 (1990), *aff'd without opinion, City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

Complainant had planned to continue in his housekeeper job with Respondents until school began in the fall of 1991, a period of 11 weeks. In 20 hours he would earn $95 a week. His wage loss was $1,045.

Complainant testified to severe emotional upset as the result of the sudden and unwarranted rejection of his work and the change to a less desirable job. He was in tears and very hurt and disappointed. At age 14, this was his first job. It proved a negative introduction to the world of work. He felt insulted and embarrassed at being demoted to sweeping, which he considered to be a lowly job. He thought the assignment to sweeping was a racial put-down. He was shocked, uncomfortable, embarrassed, and felt stupid. He felt as if he was being made a fool of in being made to sweep the streets and by Respondent's claim that he wasn't doing his job right. He was apprehensive because he doubted that there was enough work. He quit because he did not want to work in a negative racial atmosphere.

After he left the job he cried because he was angry, hurt, and frustrated. He had no medical treatment or counseling. His motivation and his self-esteem were lessened. He was tense and nervous because he feared a repetition of his experience. He was discouraged and didn't want to look for work; he had less confidence. He had suffered an extreme disappointment and had no job while others had jobs. His discomfort lasted into the fall.

Complainant's emotional upset was profound. This Forum has noted that the youth and inexperience of a victim of unlawful employment practices are factors to consider in fashioning remedy. "The [Commissioner's] order explains the award of damages by emphasizing [complainant's] youth and the fact that this was his first employment experience." *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564 (1979), *rev den,* 287 Or 129 (1979). The sum of $6,000 is an appropriate award in this matter.

Respondents' Exceptions

Respondents filed numerous exceptions to the factual findings of the Proposed Order. Findings of Fact – the Merits 17, 28, and 45 have been revised for clarification. The remaining Findings of Fact to which Respondents except are supported by the evidence in the whole record. Evidence includes inferences. *In the Matter of Sierra Vista Care Center,* 9 BOLI 281 (1991), *aff'd, Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

Respondents also excepted to the Ultimate Findings of Fact, challenging the finding that Complainant's performance was satisfactory and that the transfer of his duties created a negative racial atmosphere. There was no convincing evidence that Complainant's job performance was unsatisfactory. Respondent Jun testified that he had no information that Complainant was not doing the rooms correctly at the time he transferred Complainant. In Respondents' exceptions, the suggestion is made that he had such information but "he did not want to make it an issue at the hearing." While evidence includes inferences, it cannot include issues not raised.

Complainant testified to his perception that Respondent Jun's motivation for the transfer was Complainant's race. The words attributed to Respondent Jun gave rise to Complainant's perception, as did Complainant's view of the nature of the work assigned: sweeping the grounds. As a black youth of his age and limited work experience he saw a negative racial atmosphere and the new duties as a demotion from duties for which he was hired and which he had performed. He did not see enough work in the sweeping duties and was not informed of any other work or that he would continue to be employed four hours a day. Believing that the demotion was due to his race, he resigned because he did not want to continue in such an atmosphere.

Respondents' exception to the lost wage award is without merit. The award is intended to eliminate the effects of Respondents' practice. The mental suffering award is also intended to eliminate such effects. Removal from the housekeeping duties with the suggestion that he performed them unsatisfactorily was insulting, embarrassing, and emotionally upsetting to Complainant. Again, his age and experience were factors as to the severity of the upset. Awards for mental suffering depend on the facts presented by each complainant. Employers must take complainants as they find them. *In the Matter of Courtesy Express, Inc.,* 8 BOLI 139 (1989); *In the Matter of Lee's Cafe,* 8 BOLI 1 (1989).

Respondents' exceptions suggest that the seriousness of Respondents' offense did not approach that of the employer in *Fred Meyer, supra,* and that therefore the award proposed is excessive. The facts in *Fred Meyer* arose in 1972, almost 20 years before those in this case. Mental suffering awards are based on the effects of the unlawful act(s) translated into current dollars as a measure of damage. The *Fred Meyer* award would be woefully inadequate today. The award in this case is not excessive and is affirmed.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, BYUNG TEA JUN and TAE JONG JOO are hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Willie Montgomery, Jr., as guardian ad litem of Michael Montgomery, a minor, in the amount of:

a) ONE THOUSAND FORTY-FIVE DOLLARS ($1,045), representing wages Complainant lost between June 19 and September 1, 1991, as a result of Respondents' unlawful practice found herein; PLUS

b) INTEREST AT THE ANNUAL RATE OF NINE PERCENT on said amount from September 1, 1991, until paid, computed and compounded annually; PLUS,

c) SIX THOUSAND DOLLARS ($6,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondents' unlawful practice found herein; PLUS

d) Interest on said damages for mental distress, at the legal rate, accrued between the date of this Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Cease and desist from discriminating in any manner against any employee because of that employee's race and/or sex.

In the Matter of
LEBANON PUBLIC SCHOOLS,
Respondent.

Case Number 28-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 20, 1993.

SYNOPSIS

Complainant's good faith testimony at an unemployment compensation hearing conducted pursuant to ORS chapter 657 did not play a key role in Respondent's decision to cease employing Complainant as an on-call substitute school bus driver. While terminating a casual employment relationship based on an unlawful reason is an unlawful employment practice, the Commissioner held that the Agency failed to meet its burden of proving that the school district's action had an unlawful basis. ORS 659.035.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on April 8 and 9, 1993, in the Bureau of Labor and Industries conference room, 3865 Wolverine Street NE, Suite E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Lebanon Public Schools (Respondent) was represented by Nancy Hungerford, Attorney at Law. Respondent's Director of Personnel and Curriculum, Stephen Williams, was present throughout the hearing. Grace Brigham (Complainant) was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses in addition to Complainant (in alphabetical order): Complainant's husband, Clyde Brigham; Complainant's friend Juanita Craggett; school assistant Lonnie Harris; school bus driver James Kraemer; school bus driver Retha Larson (by telephone); Oregon School Employees Association field representative Harold Keith Lawhorn (by telephone); former bus dispatcher and current transportation supervisor Gerald McVein; former substitute school bus driver Crystal Nale (by telephone); and bus mechanic Roger Rognlien.

Respondent called the following witnesses (in alphabetical order): former Superintendent William G. Lane; former Administrator of Operations Kenneth Kirkelie; former Lebanon resident Linda Sample (by telephone); former Assistant Superintendent Joe Weiss; Director of Personnel Stephen Williams.

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

RULING ON EVIDENCE

During the hearing, Respondent attempted to introduce copies of correspondence purporting to outline settlement terms discussed during the Agency's investigation of Complainant's administrative complaint. Counsel for Respondent sought to establish that at the time neither Complainant nor the Agency made any claim for mental suffering damages and that the claim for such damages in the Specific Charges was inconsistent with that earlier position. The Hearings Referee on his own motion refused to admit the evidence, ruling that specific settlement offers and counter-offers are not admissible regarding the merits of a claim. The Hearings Referee accepted the documents as an offer of proof by Respondent. That ruling is confirmed, and the documents are not relied upon or referred to in fashioning this Order.

FINDINGS OF FACT – PROCEDURAL

1) On May 1, 1991, Complainant Grace Brigham filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 659.035.

3) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on January 19, 1993, the Agency prepared and served on Respondent Specific Charges, alleging that Complainant's testimony at an unemployment compensation hearing played a key role in Respondent's decision to terminate her employment in violation of ORS 659.035.

4) With the Specific Charges, the following were served on Respondent: a) Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process (OAR 839-30-020 to 839-30-200); and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On February 8, 1993, Respondent timely filed its answer and a motion to change the location of the hearing from Eugene to the Salem-Albany area, together with its motion for production by the Agency of documentary and physical evidence.

6) On February 9, 1993, the Hearings Referee issued a ruling changing the site of the hearing to Salem and directed the Agency to make available to Respondent pertinent portions of the Agency's investigative file. The ruling was accompanied by an amended Hearings Notice noting the revised location.

7) On March 29, 1993, the Agency filed its supplemented summary of the case, pursuant to OAR 839-30-071, together with the Agency's response to Respondent's request for production. On April 1, 1993, by fax and by regular mail, Respondent filed its summary of the case pursuant to OAR 839-30-071.

8) At the commencement of the hearing, counsel for Respondent stated that Respondent had received the Notice of Contested Case Rights and Procedures with the Specific Charges and had no questions about it.

9) Pursuant to ORS 183.415(7), Respondent and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) Effective April 12, 1993, the Commissioner adopted temporary Oregon Administrative Rules 839-50-000 to 839-50-420, governing contested case hearings. Those rules applied to all pending proceedings, including this proceeding. All post-hearing procedures herein are in accordance with those rules.

11) The Proposed Order, which included an Exceptions Notice, was issued on May 18, 1993. Exceptions were to be filed by May 28, 1993. Respondent timely filed exceptions which are dealt with as explained in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent operated and maintained public schools in Lebanon, Oregon, and engaged or utilized the personal service of one or more employees. Respondent reserved the right to control the means by which such service was performed.

2) At times material, Respondent provided school bus transportation to and from school for kindergarten through 12th grade pupils. Complainant was employed by Respondent as an on-call substitute school bus driver from 1989 to the fall of 1990. She drove various routes as assigned.

3) As a substitute bus driver, Complainant was a temporary and intermittent or "casual" employee and not a member of Oregon School Employees Association (OSEA), the bargaining representative for Respondent's bargaining unit employees. She did not have rights under the bargaining agreement between Respondent and OSEA.

4) Regular (i.e., permanently employed) school bus drivers were members of OSEA protected by the bargaining agreement and had certain rights, including a right to "just cause" termination and to seniority in the event of reduction in force or lay off.

5) In early 1990, Respondent was undergoing budget difficulties. School transportation was to be partially funded for the 1990-1991 school year by a special levy to be voted upon in June 1990. Failure of the levy would affect transportation for the upper grades.

6) On June 6, 1990, Complainant acknowledged receipt of a notice from Respondent that Respondent intended to observe its customary summer recess and that she would be employed again in the fall. She signed a form acknowledgment to that effect. School adjourned around June 10.

7) Pre-election discussion of the effect of failure of the transportation levy led Complainant to believe that there would be no substitute bus driver positions available in the fall of 1990 because the number of routes would be curtailed, regular drivers would be subject to lay off, and laid off regular drivers would get any available substitute assignments. The levy failed in an election on or about June 26, and Complainant filed for unemployment compensation (UC benefits) on June 29, 1990.

8) The Albany Democrat-Herald newspaper reported on July 5, 1990, that Respondent's Assistant Superintendent Weiss stated on or about June 27 that the levy failure had forced lay off of eight high school bus route drivers who were reassigned to elementary school routes based on seniority. Drivers with less seniority became permanent substitute drivers, and previous permanent substitutes were laid off.

9) On July 23, 1990, the initial administrative decision on Complainant's unemployment claim by the State of Oregon Employment Division (Division) denied benefits based upon the presumed assurance that she would be re-employed in the fall after the summer recess.

10) On July 26, 1990, Complainant requested a hearing over Division's administrative decision, pointing out the layoff situation caused by the failed levy.

11) On August 23, 1990, a hearing by telephone was held over the denial before a Division referee. Complainant testified at the hearing, as did Joe Weiss, Respondent's Assistant Superintendent in charge of personnel who had oversight of UC benefit claims. The Division referee determined that with the failed levy, the resultant layoff, and the tentative nature of another planned levy election in September, Complainant did not have reasonable assurance that she would be employed by an educational institution during the 1990-1991 school year. A decision was mailed August 24 to Respondent's agent and Complainant, stating that benefits were denied. A "typographic error" was corrected by a

mailing on August 28, 1990, which correctly stated that benefits were allowed.

12) On September 12, Respondent's agent, the Gibbens Company, requested that the State of Oregon Employment Appeals Board (EAB) review the August decision. EAB upheld the Division referee on October 9.

13) At times material, Respondent's bus routes and stops usually remained the same from school year to school year, subject to some variation based on the pupil population served. At the beginning of the school year, Respondent provided each driver with the route and the stops, but not with the identity of the individual pupils using each bus or stop. A driver did not have a list of the pupils assigned to the driver's bus. Assignment of a pupil to a particular bus was done by the school and not by the driver.

14) At times material, Respondent had a policy that each bus-riding pupil must exit the bus on the homeward run at his or her regular stop, usually that nearest his or her residence. Authorization by the school, usually based on written parental permission, was required when a pupil sought to exit at another stop or use a different bus. Older pupils sometimes attempted to circumvent this requirement. On such occasions, the driver was to report the deviation and the pupil was dealt with by the school. The buses were radio equipped and a driver was to check with the dispatcher if younger pupils became confused as to the proper stop or somehow took the wrong bus. If a pupil missed a stop or was on the wrong bus, and thus remained on the bus, the driver was to return the pupil to school at the end of the run. Once familiar with a route and the pupils on it, regular drivers generally knew where each pupil should get off. Substitute drivers might not. Complainant was familiar with Respondent's policy regarding pupils exiting the bus on the homeward run.

15) For a few weeks at the beginning of each school year, bus-riding kindergarten pupils and other new primary grade pupils who rode the bus wore tags on their clothing for the homeward bus run. The tags identified their address or designated alternate stop for the information of the driver. A teacher or school aide determined which bus an individual pupil should ride, based on the tag information and consultation with the driver as to the stops on the particular route. The teacher or aide then placed the student on the appropriate bus. The driver was guided by the tag unless there was an obvious discrepancy.

16) Complainant was called by Respondent to drive as a substitute during the first three weeks of the 1990-1991 school year (September 4 to 21), temporarily replacing an absent regular driver.

17) During the first week, on September 6, 1990, the third day of school, a five-year-old Greenacres School kindergarten pupil was placed on Complainant's bus on the homeward run. He lived on Hansard Street, near the stop at 9th, Tangent, and Hansard on the route she was driving. Complainant learned later that his name was John Aldrich.

18) Lonnie Harris, a school aide at Greenacres School, put the Aldrich boy on Complainant's bus. She put

children on buses according to a list developed by the kindergarten teacher (either Ms. Brown or Ms. Garber). Harris did not specifically recall the boy's tag, but had independent knowledge that he lived on Hansard and should take Complainant's bus to get home. She had no reason to think that he was to be transported differently. She noted that the child was upset and crying. She did not know what bus he rode the day before.

19) Harris learned later that young Aldrich should have gone to the Rainbow Day Care Center (Rainbow) to meet a baby-sitter.

20) Rainbow was not on Complainant's route. The boy should have been on a different bus.

21) Complainant noted that the boy was in tears. A fourth grade pupil said he would help, that the boy lived near him. Complainant was told the Hansard address by Harris, and saw the Hansard address on the boy's tag. Complainant knew he had not ridden her bus the day before.

22) Linda Sample lived in the Lebanon area in September 1990. She was a child care provider for the Aldrich family. On September 6, she waited for John Aldrich at Rainbow where his mother had told her to pick him up. He had arrived on the two previous days on a bus driven by Nola. He was not on that bus on September 6, and Nola told Sample that John didn't get on. Nola tried to radio Respondent's dispatcher, but could not get through.

23) A Rainbow employee who telephoned Greenacres told Sample that if John was on the wrong bus he would be returned to Greenacres. Sample went to the school and spoke with the school secretary, Brigitte Martin. The child had not returned.

24) Sample then drove to the vicinity of the Aldrich home, found the child, and returned with him to Greenacres.

25) At times material, William G. Lane was Superintendent of Respondent. He and Assistant Superintendent Weiss were present at Greenacres on September 6, 1990, as part of a routine school opening observation of each school. They were confronted by an angry and upset Sample and were told that a child was let off at the wrong stop by the bus driver. She told them that the child had the correct tag, and again expressed her anger. The child also appeared to be upset.

26) Although he did not recall what was on Aldrich's tag, Weiss stated that it was of fairly good size and was hung around the boy's neck. The only other instance of a child being let off at the wrong stop that Weiss recalled resulted in discipline of a regular driver.

27) At hearing, none of those present at Greenacres on September 6 could recall what was written on the tag.

28) Lane told Sample she was right to be upset if a driver let the child off at the wrong stop.

29) Respondent's current transportation supervisor, Gerald McVein, was, at times material, Respondent's transportation dispatcher. He made sure each bus route was staffed by assigning substitute drivers when needed. He assisted in employee evaluation but was not a management employee. He was supervised by Kenneth

Kirkelie, Respondent's Administrator of Operations, who oversaw transportation.

30) When Complainant finished her run, McVein informed her of the problem over the Aldrich child and told her that Lane was upset. Complainant told him that Harris had placed the child on her bus. Complainant went to see Lane and apologized because he had been upset. She did not acknowledge that she was at fault. Lane was unable to recall Complainant's version of the incident, but thought she did not show proper concern.

31) McVein told Complainant to be more careful, to pay attention to the tags, and if there was any question, to try to reach him or return the pupil to school. He denied being told by administration that they were upset due to Complainant's unemployment appeal. He did not recall telling Complainant that Respondent's administration was probably upset for that reason. He did not recall telling Complainant that her effort to collect UC benefits was probably the cause of her termination.

32) A decision to discontinue using Complainant as a driver was made after investigation to determine what happened and whether it could recur. The investigation took several days. Lane and Weiss received calls from Mrs. Aldrich. They had talked to Martin and Staples. They did not talk to Harris or McVein. They made no notes or other documentation of their investigation or findings. Both emphasized that Complainant was a casual "at will" employee without collective bargaining protection.

33) After Kirkelie learned of the Aldrich incident, Weiss and Lane asked him about availability of substitute bus drivers, describing to him what he characterized as a situation causing "flack," coming mainly from the child's mother. Kirkelie replied that there were plenty. Lane then directed him to contact McVein and tell him not to schedule Complainant again. Complainant had been assigned for a total of three weeks due to a regular driver's absence. Kirkelie believed that Respondent's policy and legal obligation was to allow assigned subs to finish the time assigned.

34) Kirkelie received some calls from concerned parents. He attributed the problem to a substitute driver and assured them that Respondent was doing all it could to prevent it from happening again. He told McVein not to use Complainant any more, but sought and received Lane's approval of the completion of the three-week assignment.

35) Weiss stated that the reasons for deciding not to use Complainant again as a substitute were: a) letting the boy off improperly, and b) other drivers were available.

36) Complainant completed the three-week assignment. Thereafter, she continued reporting periodically to Respondent's bus dispatch facility, from late September to mid-November. She was unaware of any decision not to assign her further. She thought that due to the budget, there was less substitute driving available. She collected a paycheck on or about September 30 (for early September) and on or about October 31 (for late September). No one told her at either time that she was no longer on call.

37) Kirkelie's office overlooked the bus dispatch area. He noted that Complainant continued to come to the dispatch office. He consulted with Weiss as to whether she should be advised that she would no longer be assigned.

38) In mid-November, following instructions from Weiss, Kirkelie informed Complainant that she would no longer be used as a substitute driver. When she asked why, he told her because of the Aldrich incident and "other things." In a later meeting with Lane and Kirkelie, she was told the decision had been made earlier. It was clear to her at that time that they would not change the decision.

39) Kirkelie did not recall the mid-November conversation with Complainant beyond informing her that she would not be called to drive.

40) In a later conversation with McVein, Complainant understood him to suggest that perhaps her UC benefits claim had angered Respondent's administration.

41) As Respondent's dispatcher from April 1981 to September 1992, McVein could recall only two substitutes who were discontinued. One of them was a poor driver who was retested, the other had repeated problems controlling pupils. McVein had talked to other drivers, both regular and substitute, about letting pupils off at the wrong stop. None were let go. McVein had no occasion prior to Complainant's situation to discuss any wrong stop issue with Kirkelie.

42) Other than the wrong stop incident, there were no complaints about Complainant's performance. McVein thought he could continue working with her, but his opinion was not sought.

43) At times material, Retha Larson was a permanent bus driver for Respondent. She formerly had worked as a substitute, during which time she let a pupil off at a wrong stop without parental or other authorization. She continued working as a substitute. Later, after she became a permanent driver, she received UC benefits due to layoff. She did not testify before a Division referee.

44) Crystal Nale was a substitute bus driver for Respondent between February and September 1990. She let a pupil off at a wrong stop. She continued working as a substitute. She did not file for UC benefits during the 1990 summer recess.

45) James Kraemer was a substitute bus driver for Respondent from 1989 to 1991. In 1989 and 1990, he drove routes (more than one) which included Rainbow as a stop. There were pupils on each route who used that stop every day. There were pupils who used it occasionally when the parent notified school staff, who in turn told the driver. He reported instances to Respondent when pupils got off at a wrong stop and he knew about it. Many times the children indicated to the driver where a particular pupil was to get off.

46) Kraemer participated in several "intense" discussions between the drivers and McVein in the spring of 1990 as to whether drivers, permanent or temporary, were entitled to UC benefits

in the event of failure of the transportation levy.

47) Kraemer applied for UC benefits in July 1990. Benefits based on his earnings with Respondent were denied on August 23 for the summer recess period. He was granted benefits based on other employment. He asked for a hearing, which was held on September 26. A Division referee affirmed the August 23 administrative decision on September 28. The EAB denied Kraemer's October 18 appeal on November 20. The Division referee's denial was based on "reasonable assurance" of resumption of employment coupled with actual offers of substitute driving in late August and early September.

48) Kraemer and Weiss testified in Kraemer's hearing. Following the referee decision favoring Respondent, Kraemer was again used as a substitute driver, beginning October 9.

49) At times material, Harold Keith Lawhorn was the OSEA field representative for classified bargaining unit members working for Respondent. Complainant was not a union member and as a substitute bus driver had no representation rights through the union. At the request of Larson, a union member and officer, Lawhorn agreed to assist Complainant with her UC benefit claim, which Respondent had appealed. He submitted a brief to EAB.

50) At or near the same time, Lawhorn and Lane met to discuss layoffs. Lane also introduced the subject of possible removal from the agreement the prohibition against Respondent contracting out bargaining unit work. As to UC benefit claims, Lane mentioned Complainant's name specifically. Lane expressed anger that Lawhorn was helping Complainant with her UC benefit claim. Lane appeared very angry that a casual made any claim for UC benefits. There was a heated discussion. Lawhorn explained that with regular members not working, there was no way Respondent could give Complainant reasonable assurance of re-employment. There were eight or more regular drivers subject to layoff. Lane was upset that anyone filed over a recess period, but he appeared "absolutely furious" that Complainant did so as a casual.

51) On a later occasion, Weiss asked Lawhorn why he was representing Complainant. Weiss appeared upset also. Lawhorn gave Weiss the same explanation he had given Lane.

52) Lane recalled meeting with Lawhorn in the fall of 1990 but did not recall that the conversation included UC benefit claims. He admitted he could have questioned Lawhorn about representing non-union employees ("Keith seems to enjoy representing anybody against the district") and that he could have been angry about bus drivers filing for UC benefits during summer recess. Some employees, not just drivers, filed for UC benefits every summer recess and were not successful due to the provision regarding reasonable assurance of continued employment. Lane acknowledged that employees had a right to file for UC benefits, but he did not believe they had a right to receive UC benefits during a summer recess. He believed that Lawhorn encouraged these unsuccessful claims as a form of harassment. He acknowledged that his relationship with Lawhorn was strained. He did not acknowledge discussing Complainant's UC benefit claim with Lawhorn. He stated that such a claim was incidental and petty and would not be the basis for discontinuing using Complainant as a substitute.

53) On June 17, 1991, Lane wrote a letter on behalf of Respondent in response to the Agency's notice of Complainant's administrative complaint. In part, it stated:

> "Mrs. Brigham was given many chances to meet our employment standards but the manner in which she drove the bus and accepted the responsibility for the children on her bus was below our standards. She let a five (5) year old student off the bus in an area that was a considerable distance from his home. Mrs. Brigham had a bus list that indicated where every child was to be let off and she did not follow it. She also had been given directions that if there was any doubt as to where the small children live, they are to be brought back to the school or District Office. She did not do this even though she admitted to me that the child did not know where he lived. When the child was reported missing, Mrs. Brigham appeared to be very unconcerned and couldn't remember where she had let the child off."

The information in the letter was based on information from Kirkelie and Martin and the investigation of the Aldrich incident. Lane explained that "many chances" meant that each time a substitute drives is a chance to meet the employment standards.

54) At times material, the Gibbens Company, Inc. was Respondent's representative on UC benefit claims. It was Respondent's policy, implemented by Gibbens, to oppose all UC benefit claims filed during any customary school recess. Gibbens handled the claims, advised Respondent of hearing dates, and consulted with Weiss prior to hearing, where he generally testified. Weiss routinely informed Lane concerning the status of such hearings and the result. He did so regarding the claims in the summer of 1990 by Respondent's school bus drivers, including Complainant's claim. Lane was usually not involved in individual UC benefit claims. Both regular and substitute drivers filed following the June failure of the transportation levy.

55) At times material, Roger Rognlien was a bus mechanic for Respondent. He was a qualified driver and drove a school bus as a substitute in emergencies, perhaps six times a year. He was also the OSEA Local 263 grievance chairman. He was unaware of any driver being disciplined for letting a pupil off at the wrong stop. In the fall of 1990, Weiss came to Rognlien's shop and questioned the propriety of OSEA field representative Lawhorn helping Complainant to obtain UC benefits, since Complainant was not a union member. Rognlien thought that Weiss coming to Rognlien's shop indicated that Weiss was quite unhappy about it. Usually, Weiss called Rognlien into the administrative office if he wanted to speak to him.

56) Weiss did not appear to be just generally protesting Lawhorn

representing a non-union worker; he was very specific as to Complainant.

57) In early October, Complainant began a job as a temporary substitute school bus driver with Mayflower Transportation, a transportation provider which contracted with another school district. In January 1991 she learned that she could work at the Mayflower job on a permanent basis. Neither in October nor later was she ever a school district employee.

58) Complainant was shocked and surprised at being removed from the driver list. She had found the pay and hours to her liking. Respondent's location was much closer to her home than another part-time bus driving job she had in another school district. She had planned on working into a permanent position with Respondent. She became frustrated and depressed, was angry and tearful. She was determined to learn the real reason for the termination. She had never been disciplined before. She didn't think that the reason she'd been given was the right one. She was embarrassed when asked why she left Respondent. The sudden loss of her job with Respondent brought about a behavioral change: she was angry and cried easily and argued with her husband.

59) Juanita Craggett was a longtime acquaintance of Complainant. She knew that Complainant worked for Respondent and was happy there. The job was close to Complainant's Lebanon home. By telephone, Complainant told her about being laid off, that she didn't have a job any more. She sounded nervous and upset, was talking in an abnormally high-pitched voice and sounded ready to cry. Two days later, Complainant visited Craggett. She talked again about the layoff and was very upset. She was crying and appeared devastated because she had lost a job she liked.

60) Clyde Brigham is Complainant's husband. Complainant originally took the job with Respondent in order to get into full-time driving. She told him in November 1990 that she had been fired. At the time she was crying and appeared very hurt and depressed. The depression over her discharge continued into 1993. She talked of it "all the time" and was in tears frequently. She became hard to get along with, to the extent that he suggested she try to put it aside and forget it. The loss of the full-time opportunity with Respondent in Lebanon hurt her badly. She continued to feel hurt by what she considered to be a sudden and undeserved termination of the relationship with Respondent.

61) Respondent's removal of Complainant from the on-call status deprived her of opportunity for earnings. There was no precise evidence of loss of earnings, no wage loss was sought, and none is found.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was an Oregon school district operating and maintaining public schools, which engaged or utilized the personal service of one or more employees, reserving the right to control the means by which such service was performed.

2) From 1989 to fall 1990, Complainant was employed by Respondent as an on-call substitute school bus driver.

3) Due to the failure of a school levy, Complainant filed for unemployment compensation benefits on June 29, 1990. Benefits were denied for the period of the normal summer recess.

4) On August 23, 1990, Complainant testified in good faith* at an unemployment compensation hearing conducted pursuant to ORS chapter 657 and was allowed unemployment compensation benefits for the summer recess period.

5) On September 12, 1990, Respondent appealed the allowance of benefits to Complainant.

6) In mid-September 1990, Respondent determined to cease using Complainant as an on-call substitute bus driver. Complainant was informed in mid-November.

7) Respondent's decision to discontinue using Complainant was due to Respondent's perception that she had breached a district pupil transporting policy.

CONCLUSIONS OF LAW

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

2) ORS 659.035 provides, in pertinent part:

> "(1) It is an unlawful employment practice for:
>
> "(a) An employer to in any manner discriminate or retaliate against an employee with regard to terms, conditions or privileges of employment for the reason that the employee has testified in good faith at an unemployment compensation hearing conducted pursuant to ORS chapter 657;
>
> "* * *
>
> "(2) Complaints may be filed by employees and this section shall be enforced by the Commissioner of the Bureau of Labor and Industries in the same manner as provided in ORS 659.040 to 659.110 and 659.121 for the enforcement of an unlawful employment practice. Violation of subsection (1) of this section subjects the violator to the same civil and criminal remedies and penalties as provided in ORS 659.010 to 659.110, 659.121 and 659.505 to 659.545."

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

3) Complainant's good faith testimony at the hearing of August 23, 1990, entitled her to the protection of ORS 659.035.

4) The conduct of Lebanon Public Schools in removing Complainant from on-call status was not in retaliation for her good faith testimony and was not a violation of ORS 659.035(1)(a).

5) The actions, inactions, statements, and motivations of William G. Lane, Kenneth Kirkelie, and Joe Weiss are properly imputed to the Respondent herein.

OPINION

The Specific Charges alleged a violation of ORS 659.035, an unlawful employment practice. The Forum has not had occasion previously to hear a

* There was no evidence or suggestion that Complainant's testimony was other than in good faith.

case involving that statute or to construe its meaning. The statute prohibits retaliation by an employer for protected activity on the part of an employee; namely, the giving of testimony at an unemployment compensation hearing or other hearing conducted pursuant to ORS chapter 657.

The Forum has ample prior experience in delineating and applying the concept of retaliation. *See, e.g., In the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67 (1990) (ORS 659.030(1)(f), retaliation for opposition to unlawful practices); *In the Matter of Sierra Vista Care Center*, 9 BOLI 281(1991), *aff'd, Colson v. Bureau of Labor and Industries*, 113 Or App 106, 831 P2d 706 (1992) (ORS 659.410, retaliation for invoking the procedures of the worker's compensation system); *In the Matter of Arkad Enterprises, Inc.*, 8 BOLI 263 (1990), *aff'd, Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991) (ORS 654.062(5), retaliation for opposition to health and safety hazards).

Complainant's Employee Status

Complainant worked as a temporary substitute bus driver for Respondent on an on-call, casual basis. She was entitled only to hourly pay without fringe benefits for the time actually spent at bus driving duties, had no guarantee of any minimum number of hours of work in any given time period, acquired no seniority or other job status, and was not a member of a bargaining unit protected by union contract. She was an "at-will" employee.

Respondent argued, and Respondent's former administrators seemed to believe, that due to her "at-will" status Complainant was not truly Respondent's employee and could not be discharged or laid off. That position is incorrect. An "at-will" employee, having no guarantee of continued employment, nonetheless has an employer and an employment relationship with that employer. That relationship may be terminated at any time for any reason or for no stated reason, but only so long as the reason is not unlawful. *In the Matter of Franko Oil Company*, 8 BOLI 279 (1990), citing *Holien v. Sears, Roebuck and Co.*, 298 Or 76, 689 P2d 1292 (1984).

Repeated assignments of casual work by an employer to an individual who is not a regular employee but who is one of several employees on an on-call list constitutes an ongoing albeit intermittent employment relationship. The discontinuance of that relationship is a discharge for the purposes of ORS chapter 659 and related statutes. A decision by an employer to terminate a casual or intermittent employment relationship on a basis prohibited by ORS chapter 659 and related statutes is an unlawful employment practice.

Respondent's Performance Defense

Where unlawful discrimination is alleged, an employer may interpose one or more nondiscriminatory reasons for an action which the employee alleges was unlawfully motivated. If the Agency shows by a preponderance of evidence based on the whole record that a discriminatory motive was the actual cause of the action complained of, the Agency has met its burden and liability attaches to the Respondent for the action taken. ORS 183.450(5); *In the Matter of Sunnyside Inn*, 11 BOLI 151, 165 (1993). Where the employee's protected class status is one

of several factors contributing to the employer's action (i.e., there are mixed motives), the Forum determines whether the employee's protected class membership played such a sufficient part, or "key role," in the employer's action so as to be said to have caused the action. OAR 839-05-015; *In the Matter of 60 Minute Tune*, 9 BOLI 191 (1991), *aff'd without opinion, Nida v. Bureau of Labor and Industries*, 119 Or App 508, 852 P2d 974 (1993); *Colson, supra; Arkad, supra.*

In this case, Complainant's employment was terminated by the employer. Respondent argued, and presented evidence establishing, that Complainant's removal from the on-call list was due to an incident involving a young (five-year-old) student whom Complainant let off of her bus contrary to Respondent's policy. Respondent's Superintendent and Assistant Superintendent were present when the accusation arose, talked to the student's child care provider, and determined that Complainant was at fault. The child care provider was visibly upset and made the trip to the school for the purpose of reporting the "wrong stop" incident to responsible authorities. The child care provider and, subsequently, the child's mother focused on the driver in their emotional confrontations with Respondent's administrators. Respondent's administrators received phone calls from Ms. Aldrich and other concerned parents and generally took "flack" as a result of the incident.

Evidence which was available but unsought at the time might have cast doubt on the correctness of the administration's assessment of responsibility: the child was placed on the wrong bus for his day care destination, but the right one for his home. The placement was made by the school. Complainant took the child to his home stop. Complainant recalled that the child's destination tag listed the home address, while none of the others involved could recall what it said.

However, whether the administration's assessment of blame for the incident was reasonable or not is relevant only to the extent that it bears on the likelihood that the wrong stop incident was the actual nonretaliatory reason for the Respondent's adverse action. The Forum is convinced that the wrong stop incident, combined with the personal involvement of the Superintendent and the public relations difficulties the incident created with parents, was the direct cause of Complainant's termination.

Testimony of Complainant at an Unemployment Compensation Hearing

Under ORS chapter 657, an initial determination of eligibility for unemployment benefits becomes final unless a hearing on the determination is timely requested by the employer or claimant. ORS 657.265, 657.270. A hearing on an initial determination is "an unemployment compensation hearing conducted pursuant to ORS chapter 657" as contemplated by ORS 659.035(1)(a). The mere filing of a claim, successful or not, does not invoke this statute's protection; it is the next step, the hearing and an individual's good faith testimony, that triggers the prohibitions of ORS 659.035. Complainant's good faith testimony at such a hearing brought her within the scope of the statute. While the statute unquestionably protects an employee

whose testimony supports a former coworker's claim, its language applies also to a claimant who testifies. If an employer makes an adverse employment decision about any employee because the employee has testified in an unemployment compensation hearing, an unlawful employment practice has occurred.

In this case, Complainant filed for unemployment benefits when she learned that funding for bus transportation the next fall had failed. The claim was denied, she asked for a hearing, and testified at the hearing. The Employment Division referee found that she had no reasonable assurance of re-employment in the fall due to the failed levy and allowed benefits. OAR 437-30-075. At approximately the same time that Respondent chose to discontinue Complainant's on-call status, Respondent appealed the referee decision. Respondent's Superintendent resented unemployment claims during normal recess periods, believing benefits should not be allowed, and particularly resented claims by casual employees who had no permanent status with the district. He showed additional resentment toward Complainant's claim because of what he considered to be the union's gratuitous involvement.

Despite Respondent's admitted hostility toward UC benefit claims by casual workers during the summer recess, the Agency has failed to show by a preponderance of the evidence in the whole record that Complainant's good faith testimony in her unemployment compensation hearing played a key role in Respondent's decision to cease using her as an on-call substitute bus driver. Among the substitute drivers who filed for UC benefits, only Complainant and Kraemer had actually testified at a UC benefit hearing. Kraemer's UC benefit filing and hearing were later in time than Complainant's, but Kraemer was a frequently assigned substitute both before and after the result of his appeal was known, despite his testimony in support of his claim.

In Complainant's case, the first notice of the hearing result received by Respondent's agent, and eventually by Respondent, showed that Complainant's benefits were denied. The corrected referee decision, showing that benefits were allowed, was mailed to Respondent's agent on August 28, 1990. Complainant began driving on her extended substitute assignment on September 4. The record is silent as to when she was assigned. The record is also silent as to when Respondent received notice of her successful claim. Contrary to the Proposed Order, the Forum will not infer that she was assigned before the administration knew that the hearing in which she had given testimony had changed the decision on UC benefits. Similarly, Kirkelie's understanding of Respondent's obligation to allow a substitute to complete an assignment once made is not contradicted on this record.

While the Forum must often infer the fact of discriminatory intent from other facts on the record, it will not infer without an evidentiary basis the facts which support the inference of discriminatory intent. This is particularly so where credible evidence exists to support the Respondent's nondiscriminatory reason for the adverse action.

While there is evidence in this record of Respondent's hostility toward UC benefit claims by casual workers, and which might be used to support an inference of retaliatory intent, there is no evidence establishing the timing of Respondent's knowledge of the outcome of Complainant's appeal or that Respondent had a practice of truncating existing assignments of substitute drivers upon grounds such as the wrong stop incident.

At best, the Agency has established Respondent's hostility to claims such as that submitted by Complainant and a particular concern in Complainant's case with the involvement of union officials on behalf of an unrepresented employee. However, neither hostility to UC benefit claims nor to what Respondent viewed as meddling by the union are violations of ORS 659.035(1)(a). The Forum finds nothing in the record to indicate that there was anything about the Complainant's testimony at the UC benefit hearing which prompted her dismissal.

It is the Forum's view that Complainant had the misfortune of having her wrong stop incident reported directly and forcefully to Respondent's Superintendent. This distinguishes her case from the other wrong stop incidents in the record which did not result in discharge. Respondent's dispatcher, McVein, had handled these matters previously and, while they had been dealt with firmly, they had not been considered grounds for termination. Indeed, left to handle the incident independently, it seems clear that McVein would not have taken or recommended the adverse action at issue here. (*See* Finding of Fact 42.) The Superintendent, however, with no union protections to contend with and seeing Complainant's discharge as a simple solution to a public relations problem, took the expedient step of termination. Whatever the Forum may think Respondent's handling of this affair or its fairness in dealing with Complainant, it does not constitute a violation of ORS 659.035(1)(a).

ORDER

NOW, THEREFORE, as Respondent Lebanon Public Schools has not been found to have engaged in any unlawful practice charged, the complaint and the specific charges against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).