In the Matter of
NORTHWEST PERMASTORE SYSTEMS, INC.,
Respondent.

Case Number 40-98
Final Order of Commissioner Jack Roberts
Issued February 3, 1999.

SYNOPSIS

Respondent, which operated a water tank construction business, failed to pay the prevailing wage rate to five employees for the work they performed on a public works contract. The Forum imposed civil penalties totaling $1524.29 for the five violations of ORS 279.350. The Forum also found that Respondent committed a single violation of ORS 279.354, which requires the filing of accurate certified payroll records, and imposed a $1000.00 penalty for that violation.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on August 6, 1998, in the conference room of the Bureau of Labor and Industries, 3865 Wolverine Street, N.E., Suite E1, Salem, Oregon. The Wage and Hour Division ("WHD") of the Bureau of Labor and Industries ("the Agency") was represented by David Gerstenfeld, an employee of the Agency. Respondent was represented by Robert L. O'Halloran, Allen, Yazbeck, O'Halloran & Hanson, Portland. Alice Pender, Respondent's corporate representative, was present throughout the hearing.

The Agency called as witnesses: Alice Pender (Respondent's president, secretary/treasurer, and owner); Lora Lee Grabe (an Agency prevailing wage rate lead worker and compliance specialist); Robert Clerihew (business representative for Ironworkers Union Local 29); Steve Nelson (business manager for Boilermakers Union Local 500); and Lee Clinton (business manager of Laborers Union Local 121).

Respondent called as witnesses: Alice Pender and Michael Poole (Supervisor, field service operations, A.O. Smith Harvestore Products)

The ALJ admitted into evidence: Administrative Exhibits X-1 through X-17; Agency Exhibits A-1 through A-8, A-14 through A-16, A-18, and A-20; and Respondent's Exhibits R-1 through R-33.

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

FINDINGS OF FACT - PROCEDURAL

1) On December 3, 1997, the Wage and Hour Division issued a Notice of Intent to Assess Civil Penalties. The Agency cited the following bases for the proposed penalties: failure to pay the prevailing wage rate ("PWR") (five alleged violations) and misclassification of workers

on certified statements of payroll record (two alleged violations). The Notice of Intent informed Respondent that it had 20 days in which to request a contested case hearing. The Notice of Intent was served on Robert L. O'Halloran, counsel for Respondent, on December 4, 1997. Six days later, the Notice of Intent also was served on Alice Pender, Respondent's registered agent.

2) Respondent filed a timely Answer on December 30, 1997. Respondent also requested a contested case hearing.

3) On January 7, 1998, the Forum received the Agency's first request for hearing. That request was revised on March 10, 1998, to indicate that the case would be presented by Agency employee Gerstenfeld.

4) On April 15, 1998, the Agency submitted a second request for hearing in this matter.

5) On April 16, 1998, the Forum issued a Notice of Hearing, which set July 28, 1998, as the first day for the contested case hearing. With the Notice of Hearing, the Forum served on Respondent the following: a) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of the Agency's administrative rules regarding the contested case process.

6) On April 24, 1998, ALJ Doug McKean ordered the Agency and Respondent each to submit a summary of the case including: a list of witnesses to be called; the identification and description of any document or physical evidence to be offered, together with a copy of any such document or evidence; and a statement of any agreed or stipulated facts.

7) By order dated May 8, 1998, the case was reassigned to ALJ Warner W. Gregg. The hearing date was reset to commence on Thursday, August 6, 1998, and the deadline for case summaries also was reset. The participants filed timely case summaries.

8) On June 3, 1998, the Forum received the Agency's request for a discovery order. The participants later completed discovery through informal proceedings, and no formal discovery order was issued.

9) By motion dated June 9, 1998, Respondent requested a setover of the hearing "to accommodate the conclusion of a pending NLRB arbitration set for July 10, 1998 which bears on the matters in dispute in this proceeding." The Agency opposed the motion. On June 11, 1998, the ALJ issued an order denying the motion on the grounds that the Commissioner would not necessarily be bound by the result in the other matter, and that the pendency of another proceeding involving similar issues did not warrant a postponement of the hearing.

10) With a June 28, 1998, cover letter, Gerstenfeld provided O'Halloran with a cassette recording of an April 1997, meeting between Pender and Agency investigators. He also informed O'Halloran of the Agency's desire to amend the Notice of Intent to "make the civil penalty amounts more factually accurate."

11) On July 27, 1998, the Agency moved to amend the Notice of Intent. Respondent filed no opposition to the motion, which the ALJ

granted at the hearing. The Amended Notice of Intent alleged eight bases for the assessment of civil penalties: seven alleged failures to pay the PWR and one misclassification of workers on certified statements of payroll record. Respondent filed an Answer to the Amended Notice on August 5, 1998.

12) On August 4, 1998, the participants submitted a statement of Stipulated Facts.

13) At the start of the hearing, counsel for Respondent stated that his client had received the Summary of Contested Case Rights and Procedures and said he had no questions about it.

14) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) On December 30, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) At all material times, Respondent was a non-union contractor duly registered with the Oregon Construction Contractors Board and was authorized to perform construction in Oregon and several other states. Alice Pender was Respondent's president, secretary, treasurer, and owner

2) The City of Yoncalla Standpipe and Waterline Extension Project ("the project") was a public works contract contracted for by the City of Yoncalla, a public agency, and was subject to Oregon's PWR laws (ORS 279.348, *et seq.* and the administrative rules adopted thereunder). The project involved installation of a 100,000 gallon water standpipe[1] and installation of waterline, sanitary sewer service line, fire hydrants, and appurtenances. Western Oregon Excavation was the prime contractor on the project.

3) Respondent was the sole bidder for the standpipe work on the project, which the bidding materials described, in pertinent part, as follows: "Furnish and erect a glass-coated, bolted steel water storage tank, including foundation, tank structure and tank appurtenances as shown on the contract drawing and described herein." The contract specified a "model 20 56 Aquastore Tank systems manufactured by A.O. Smith Harvestore Products, Inc. of DeKalb, Illinois," or "[a]lternate glass-fused-to-steel tank products, as provided by other manufacturers * * * ." Respondent was awarded the $92,096.79 subcontract for the standpipe portion of the project.

4) The contract documents for the project, which governed Respondent's work, included provisions requiring contractors and subcontractors to comply fully with ORS 279.348 through ORS 279.361, the Oregon PWR statutes.

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[1] A standpipe is a water tank with a height greater than its diameter. Throughout this order, the terms "standpipe" and "tank" are used interchangeably.

5) The Aquastore tanks produced by A.O. Smith Harvestore Products ("AO Smith") are constructed of 5-foot by 9-foot panels that are made of glass fused to steel using a proprietary process. To build a tank, a concrete and rebar foundation first is laid. Pre-formed panels are then bolted together into a ring, with a sealant placed between the sheets. The first ring of panels is embedded into the concrete foundation. More rings of panels are then constructed. As each ring is completed, it is jacked vertically above the tank foundation and first embedded ring (using another proprietary process), so that another ring can be constructed beneath it. Those two rings are connected, jacked up, and another ring is built beneath them. The process repeats until the tank has reached the specified height. Because of the jacking process, scaffolding is not needed, and the tank erection workers do not work higher than 10 feet off the ground. No welding is involved in the tank construction process. Instead, workers use impact wrenches and torque wrenches to bolt the tank panels together.

6) The AO Smith Aquastore tanks are water- and air-tight except for vents at the top.

7) AO Smith requires its tanks to be installed by "certified builders" who have attended its builders schools, where they learn how to care for and protect the glass-fused-to-steel panels. Many of Respondent's employees have successfully completed AO Smith's training. Respondent is the only licensed dealer of AO Smith products in Oregon and also has exclusive dealerships in all or part of several other states.

8) The opening date for bids on the project was August 23, 1996. Respondent's work on the subcontract commenced the week ending November 30, 1996, and was completed in January 1997. Consequently, the PWRs applicable to Respondent's work on the project are found in the July 1, 1996 Agency document titled "PREVAILING WAGE RATES for Public Works Contracts in Oregon" ("the July 1996 PWR Booklet"). That publication set the basic hourly rate for boilermakers at $23.57 and the fringe benefits rate at $8.76/hour. The PWR for Laborers, Group 2 (or "Laborers 2") was $17.44/hour plus $7.05/hour fringe benefit and $0.65/hour Zone 2 differential for sites (like this one) more than 30, but less than 40 miles from the nearest reference city.

9) During November and December 1996, some of Respondent's employees poured concrete and tied rebar for the foundation of the standpipe. Respondent did not start erecting the standpipe itself until sometime in January 1997, and the work was completed during the week ending January 25, 1997. Of the employees listed in the Notice of Intent, only those also listed on payroll records for January 1997 performed tank erection work. Steve Pender and Rick Hlavinka worked only on the foundation.

10) At all material times, Pender believed that tank erection work fell within the classification for Laborers 2 and that the PWR laws required Respondent only to pay Laborers 2 wages for such work. Some time ago, however, based on Pender's

discussions with other AO Smith dealers and Respondent's own experience with the United States Department of Labor ("USDOL"),[2] Respondent started compensating employees who work on tank erection by paying them Laborers 2 wages for 75% of their hours and the higher Ironworkers wages for the remaining 25% of their hours.[3] Respondent referred to this method of compensating its employees, which has been its regular practice since about 1993, as the "split wage" system.

11) Respondent's employees generally did not indicate on their timecards the numbers of hours they had spent performing tank erection work, but denominated those hours (along with hours spent on other tasks) as "labor." Pender then determined, based on her knowledge of the sort of work that had been performed on any day, the days during which employees had done tank erection work, and paid the split wage for those hours.

12) During January 1997, Respondent's employees worked the following numbers of hours performing tank erection work on the project:[4]

Employee	Straight Hours	Overtime Hours
Holbrook	84.5	2.0
Keeshan	76.5	
Meier	40.0	
Janesofsky	8.0	
Rabe	48.0	

For all this time, Respondent initially paid Holbrook, Keeshan, Janesofsky, and Meier $17.44/hour plus $7.70/hour fringe benefit and zone differential for their straight hours, and $27.14/hour plus $7.05/hour fringe benefit and zone differential for overtime. These wages are the prevailing wages for Laborers 2 listed in the July 1996 PWR Booklet. Rabe performed supervisory work, and Respondent paid him $1.50/hour more than the other workers.

13) As reflected in the previous paragraph, a relatively inexperienced payroll clerk of Respondent initially paid the workers (other than Rabe) on this project at the Laborers 2 rate for all of the time they had spent at tank erection, instead of compensating them according to the split wage system. Pender discovered the discrepancy after the Agency started its investigation of this matter, and re-

[2]Pender testified credibly that a USDOL inspector decided in 1993 that Respondent's tank erection workers on a City of Drain project should have been paid as ironworkers. The record includes no evidence of whether that finding was ever finalized or incorporated into any sort of binding legal determination. The Forum has, therefore, given no weight to the testimony on this point in determining whether Respondent paid the correct PWR to its tank erection workers on this project.

[3]At least one other AO Smith dealer apparently had settled a disputed with the USDOL by agreeing to compensate its employees using this system. That agreement applied to work performed in some state other than Oregon.

[4]Respondent's job number for this project was 9610, which is the project designation most commonly used on the employees' timesheets. Another worker, Dornhecker, also may have performed tank erection work on the project, but was not identified in the Agency's Amended Notice of Intent.

calculated the employees' wages. She determined that Keeshan and Holbrook would have been entitled to additional pay under the split wage system and paid them those extra wages. The total wages Respondent eventually paid the five workers for tank erection work they performed in January 1997 (including fringe benefit and zone differential) are as follows:

Employee	Total wages paid
Holbrook	$2308.20
Keeshan	$2027.33
Janesofsky	$201.12
Meier	$1060.40
Rabe	$1275.72

14) At no time did Respondent compensate its employees on this project at the PWR for boilermakers.

15) By letter dated March 16, 1997, Peter Christensen, with the Oregon & Southwest Washington Fair Contracting Foundation, notified the Agency of his belief that Respondent had "paid laborers' wage rates for the erection of a water standpipe." Christensen further asserted that the "`Index of Job Classifications to Supplement Prevailing Wage Rates for Public Works Contracts in Oregon'" states that standpipe repair and construction is a boilermaker's classification." Christensen included a completed complaint form with his letter to the Agency.

16) By letter dated April 3, 1997, Agency investigator Sanford Groat informed Respondent that the Agency had received a PWR complaint. Groat asserted:

"The contract indicates that the project is an standpipe and waterline extension. Workers involved in the standpipe installation should be paid as Boilermakers. According to the certified payroll that we received from the contracting agency it appears that the workers on the project were paid as general laborers. There were no Boilermakers listed on the certified payrolls."

Groat asked Respondent to submit payroll records for all workers on the project and to explain why it believed the workers properly were classified as laborers. Groat also provided Respondent with a page from the Index of Prevailing Practice stating that "boilermaker" is the correct classification for standpipe repair and construction work.[5] Before receiving Groat's letter, Pender never had seen the Index.

17) Pender responded to Groat's letter by a facsimile transmission dated April 14, 1997, stating that she would request a hearing on the matter.

18) The Agency's July 1996 PWR Booklet lists various classifications of workers, including boilermakers, ironworkers, and laborers, and specifies the PWR for each type of worker. The publication does not define what work comes within the "Boilermaker" classification. The publication states:

> "These classification titles should be used according to common practice. Try to fit your workers

[5]See Factual Finding No. 34, *infra*, for further discussion of the Index of Prevailing Practice.

into existing classifications. If you need residential construction rates, or if you have questions about how to classify workers, call the Prevailing Wage Rate Coordinator at (503) 731-4074."

19) At some point in March or April 1997, Pender called the telephone number provided in the July 1996 PWR Booklet. PWR Coordinator Hedera Trumbo informed her that the trade classification for standpipe erection was boilermaker.

20) On April 18, 1997, Groat sent Pender a copy of an Agency flier titled "Determination of Prevailing Wage Rate in Relation to the Prevailing Practice" (the "Prevailing Practice Flier"). That document states, in pertinent part:

"The practices of the majority of workers engaged in construction determine the wages to be paid for work performed in any particular classification on public works projects. If the majority of workers is found to be subject to a collective bargaining agreement, then the practices of those subject to the agreement will dictate the wage rates to be paid and worker classifications to be used for the type of work performed.

"Whether a particular type of work can be performed by workers in a particular classification is not the question when determining prevailing practice. The type of work that is performed by a worker in a particular classification, regardless of whether it can be performed by workers in another classification, is the relevant question.

* * *

"The Labor Commissioner is required to determine the prevailing wage rate, which is defined, in relevant part, as the wage rate paid to the majority of workers in any trade or occupation. To that end, the Commissioner may consider the findings of an appropriate federal agency which determines prevailing wages. The U.S. Department of Labor (USDOL) has determined that, with few exceptions, the majority of workers in every trade or occupation are covered by a collective bargaining agreement.

"The Commissioner avoids wasteful governmental duplication of existing survey information by accepting the findings of the USDOL. Those findings clearly state that the majority * * * of the workers engaged in heavy, highway or commercial construction work are union workers, and thus are covered by collective bargaining agreements. Those agreements and the body of jurisdictional dispute resolutions which have evolved from them, thus become the logical source for making determinations as to which trade classification would, in the majority of instances, do a particular type of work. This would be, by definition, the Prevailing Practice. In those few cases where USDOL determines the majority rate is not a union rate, then the Prevailing Practice would be determined by the actual practice of the majority of employees of all contractors (both union and non-union) in the

particular type of construction and area."

These policies are reiterated in a December 1993 policy statement in the Agency's field operations manual ("FOM").

21) On April 28, 1997, Pender met with Groat and Agency PWR lead worker Lora Lee Grabe to discuss classification of the standpipe erection work.[6] Groat clarified that the Agency was concerned about only the erection of the glass-fused-to-metal tank itself, and not the construction of the cement and rebar foundation. The Agency agreed not to file against the prime contractor's bond for the wages it believed Respondent owed its employees if Respondent would give the Agency checks for the disputed amounts. Pender provided the Agency with checks made out in the employees' names, with the understanding that the Agency would retain those checks in lieu of filing against the bond.

22) After the meeting, Pender asked Groat to provide her with a copy of the FOM, which he and Grabe had referenced during their meeting. The Agency did not provide the FOM because it already had given Pender the Prevailing Practice Flier, which contains the same information as the portion of the FOM that Groat and Grabe had discussed at the meeting. The Agency also provided a copy of the applicable administrative rules.

23) On July 15, 1997, Pender informed Groat that other glass-fused-to-steel bolted tank erectors and other bolted steel tank erectors had told her that their employees generally were classified as laborers, not boilermakers. She stated further:

> "The exception is when they go on an all-union closed shop project, and they have to have at least one or two of the crew be union, then the classification is either SHEETMETAL WORKERS OR IRONWORKERS. At no time is it Boilermakers! And in those cases the employer chooses the classification which they deem to be most appropriate!
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> "With the exception of the pressure vessel tanks, the Boilermakers gave jurisdiction in the mid-30's to the Ironworkers for bolted tanks, so when and if a classification other than Laborer is used, it is ironworker, and then only for a portion of the tank work.
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> * * *
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> " * * * And to avoid even any question we have always paid a portion of the work on the tank as Ironworkers. I went back to talk with Pamela Graham, our Payroll Clerk, regarding the information I had brought to you, since it only showed Laborers pay and not Ironworkers for tank work. She did not know how we missed paying that. I then had her check every other prevailing wage rate project we have done to insure that the split between classes were in fact paid, and they have been. I would not be adverse to making up the difference between the split wages for the crew * * *

[6] At the time of hearing, Grabe had been the Agency's PWR lead worker since January 1997 and had been a compliance specialist for about nine years.

and will pay them regardless of the outcome of this dispute."

24) By letter dated July 16, 1997, Groat asked Pender to submit the names and telephone numbers of the people with whom she had spoken so the Agency could confirm the information in Pender's letter. On July 21, Pender responded that she would get back to Groat once she was able to consult with counsel, since she did not want to expose other contractors to Agency action. The next day, Groat sent a letter to Pender explaining that the Agency process is complaint-driven. He also asked Pender to provide the name of the person who stated that the boilermakers union had given up jurisdiction over this type of work. Pender never provided that information to Groat, and the Forum has given no weight to her assertion that the boilermakers union had relinquished jurisdiction

25) On July 28, 1997, Pender asked Groat to provide her with "a copy of the certified payrolls for each and every public works project in the last three (3) years on a project that included erection of a bolted tank" and "copies of each and every project the Boilermakers worked on in the State of Oregon for the last three (3) years." About a week later, Groat sent Pender a letter that stated, in pertinent part:

> "The Bureau of Labor is not conducting an investigation of the classification which applies to the work performed by your employees on the subject public works project. The Bureau already has determined that the work in question is classified a [*sic*] boilermakers work. Since you have disputed that classification, the Bureau has requested that you supply any and all information which reflects that your workers were classified properly as laborer's group two. The burden of proving that another classification applies in any manner, is the employer's.
>
> As previously stated, you must submit information which substantiates that it is the prevailing practice of the laborer's union to claim that work. As of this date we have not received any information from you that would substantiate your position."

Groat also explained that the Agency did not maintain certified payrolls for public works contracts. The letter stated further that the Agency would request, at an administrative hearing, liquidated damages and civil penalties in addition to the unpaid prevailing wages, in a total amount of $6,214.50.

26) Sometime during the summer of 1997, Groat left the Agency to become a police officer and Grabe assumed responsibility for the investigation of Respondent.

27) By letters dated August 25, 1997, the Agency informed John Meier, Timothy Janesofsky, Erich Rabe, William Keeshan, Patrick Holbrook, Frank Janesofsky, Donald Barrow, and Richard Hlavinka that it would be taking legal action against Respondent, and asked the employees to complete and return wage assignment forms if they wished the Agency to pursue the unpaid wages and liquidated damages due them. The employees did not return those forms and did not pursue wage claims against Respondent. One employee

may have told Grabe that he believed he had been compensated properly. Neither Grabe nor Groat interviewed any of the employees.

28) At some point, Pender issued a memorandum to employees stating that the boilermakers classification applied only to work with pressurized vessels and, therefore, did not apply to the type of work that Respondents' employees performed in erecting the AO Smith standpipes. Pender issued the memorandum in response to questions from employees. She also told them that if they believed they were entitled to boilermakers' wages, they should pursue the wage claims. Pender told employees they could use letters from the Agency as toilet paper if they wished.

29) During an August 25, 1997, telephone conversation, Pender informed the Agency that Respondent did not accept the results of the Agency's investigation of the appropriate PWR. The Agency then returned the checks Respondent had provided for the amount of disputed wages.

30) At some point, Respondent submitted a certified payroll record ("CPR") for work done on the project during the week ending January 25, 1997. That record accurately reflected the hours that employees had worked on the project and the wages they initially had been paid. Because of the error in not paying the usual "split wage," however, the CPR stated that all work performed had been "laborer" work. As noted in Factual Finding No. 13, *supra*, Respondent later paid Keeshan and Holbrook additional wages they were due under Respondent's split wage system. Respondent did not file an amended CPR reflecting the payment of those additional wages, but did send the Agency a summary of wages paid. The Agency has accepted as fact Respondent's summary of the "corrected" wages it paid its workers.

31) In 1996 and early 1997, pursuant to then-applicable law, the Commissioner accepted USDOL findings that the majority of workers involved in heavy, highway, and commercial construction were union workers. At that time, therefore, the prevailing wage rates and practices (such as labor classification) were determined to be the union practices. Accordingly, the Commissioner used local collective bargaining agreements and accompanying jurisdictional evidence to determine the appropriate classification for any given type of work.[7]

32) At all material times, the erection of a water storage standpipe was considered "heavy" construction in the City of Yoncalla area, meaning that union practices for that type of work were the prevailing practices. In addition, the wages and practices of boilermakers, ironworkers, sheetmetal workers, and laborer's unions were found to be the prevailing wages and practices for those trades.

33) The Commissioner's determination of PWRs and prevailing practices are reflected in the July 1996 PWR Booklet and Index of Prevailing Practice. The underlying USDOL findings were not introduced

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[7] PWRs now are based on state surveys, but the first rate book incorporating the results of a state survey was not published until February 1997.

into evidence at the hearing, and Grabe had not reviewed them.

34) Grabe explained that, in determining the appropriate classification for a particular type of work, her general practice was to rely on the PWR Booklet and prior precedent. If those sources did not address the work in question, she looked to the Index of Prevailing Practice, which lists worker classifications. The Index is not an internal Agency document and generally is made available to members of the public who request it. Grabe referred to the Index during this investigation and instructed Groat to refer to it.

35) The July 1996 PWR Booklet does not list a trade called "standpipe erection." Page 9 of the 1996/1997 Index of Prevailing Practice states that persons involved in "Standpipe Repair and Construction" should be classified within the trade of "Boilermakers." That portion of the 1996/1997 Index existed prior to July 1996 and remained in effect through 1997. The Index was produced by the Agency's PWR coordinator, Helena Trumbo.

36) The Index's classification of standpipe erection as boilermakers' work is consistent with union jurisdictional practice in the City of Yoncalla area. Boilermakers Union Local 500 has jurisdiction throughout Oregon, including the Yoncalla area. The boilermakers claim jurisdiction over the erection of water tanks, including those that are bolted together and constructed of glass fused to steel. Those tanks fell within the boilermakers' jurisdiction throughout 1996 and 1997. In January 1997, the business manager of Local 500 (Steve Nelson) wrote a letter to Christensen confirming the boilermakers' jurisdiction over all vessels requiring "tight joint." He further stated that "[t]he type and method of construction you described makes no difference whatsover," since "[t]he bolting of vessels has been around for over 100 years and the jacking process that allows the workman to remain on the ground has been in existence in excess of 25 years." At the hearing, Nelson testified credibly that anything that is waterproof is considered "tight-joint" and, therefore, is claimed by the boilermakers.

37) In about July 1997, Groat contacted the boilermakers union as part of his investigation and made the following notes regarding his conversation with Nelson:

> "I called the union to discuss the water tanks that were built by Northwest Permastore. I advised him of the information that I received and the glass to fused steel tanks. I described the process as described to me by the ER. Says that is all Boilermakers work, they are the ones who build the tanks and have built most of the municipal water tanks in the area and are in the process of building one in Camas right now. Says that the Ironworkers have been trying to claim this work but any time they are building storage container that is air, water, gas tight it is within the jurisdiction of the Boilermakers. I explained what the ER said and he indicated that is not true that type of work is always Boilermakers work."

In a letter to Groat, Nelson confirmed that the construction of standpipes is the work of boilermakers.

38) Nelson's assertions regarding the boilermakers' jurisdiction are consistent with a 1926 agreement between the international boilermakers and ironworkers unions. The agreement specifies that the boilermakers' jurisdiction includes "steam, air gas, oil, water, or other liquid tanks or containers requiring tight joint, including tanks of riveted, caulked or welded construction in connection with swimming pools." A later agreement clarified that ironworkers retained jurisdiction over the construction of certain catwalks, stairways, and ladders that were supported by something other than the tanks (such as the ground). These agreements are effective throughout Oregon and remained valid and in force during all of 1996 and 1997. The boilermakers union does not have a similar agreement with the laborer's union.

39) Ironworkers Union Local 29 has jurisdiction throughout Oregon and some of southwest Washington. Construction of water tanks and standpipes, including those constructed by bolting together glass-fused-to-steel panels, does not fall within the ironworkers' jurisdiction.

40) Laborers Union Local 121 has jurisdiction in 21 Oregon counties, including the county where Yoncalla is located. The construction of water tanks and standpipes, including those constructed by bolting together glass- or ceramic-fused-to-steel panels, is not within the laborers' jurisdiction and has not been for many years. Nor does the laborers' union claim that work in Oregon.

41) Since 1984, the boilermakers have constructed potable water tanks on public works contracts in Oregon and southwest Washington. Nelson testified credibly that the boilermakers have constructed many more than seven such tanks, and could not say whether they had worked on more or fewer than 100. Nelson was not aware of how many of those projects were performed in 1996, but knows that the boilermakers built one water tank for the City of Seaside that year. He did not know what percentage of the Oregon market for municipal water tanks has been constructed utilizing boilermaker labor. The boilermakers have not been employed on any of Respondent's projects in the last 10 years. They have worked on erection of at least two non-pressurized bolted-together water-storage tanks coated with enamel or epoxy. Those tanks were manufactured by Peabody, a division of AO Smith. AO Smith does not require Peabody tanks to be constructed by certified builders, and the construction process does not incorporate the jacking system used to construct the AO Smith Aquastore tanks.

42) For a brief time in 1997, the Oregon Employment Department circulated a document that included the following definition of the work performed by boilermakers:

> "Construct, assemble, maintain, and repair stationary steam boilers and boiler house auxiliaries. Align structures or plate sections to assemble boiler frame tanks or vats, following blueprints. Work involves use of hand and power tools, plumb bobs, levels, wedges, dogs, or turnbuckles. Assist in testing assembled fittings, such as safety valves, regulators, auto-

matic-control mechanisms, water columns, and auxiliary machines."

That document also stated that ironworkers include workers "who erect metal storage tanks."

43) In some other states, the USDOL has determined that Ironworker and/or Laborer 2 is the correct PWR classification for erection of AO Smith Aquastore tanks. The Agency does not consider determinations from other jurisdictions to be persuasive evidence of the prevailing practice in Yoncalla, Oregon.

44) Respondent paid its workers at laborer's rates because Pender believed that was the common practice in the trade of constructing glass-fused-to-steel potable water tanks. Pender reached that conclusion through her conversations with other AO Smith dealers,[8] her knowledge that she was the only AO Smith dealer in Oregon, and her belief that Respondent had constructed most of the bolted-together municipal water tanks constructed in Oregon during the last 10 years. Pender also believed that the type of work Respondent's employees performed was more like the work generally performed by laborers than it was the types of work generally performed by boilermakers or ironworkers.

45) The testimony of all witnesses was credible. Although each non-Agency witness had some sort of economic interest in the outcome of this dispute, none of their testimony was exaggerated or overly self-serving. Each witness gave straightforward testimony regarding matters of which they had personal knowledge, and frankly admitted when they could not answer certain questions.

46) The only significant factual dispute concerned Respondent's share of the Oregon market in the construction of water tanks over the last 10 years. The testimony on this point was somewhat unclear. Nelson, the business manager of Boilermakers Union Local 500, testified that Respondent *had not* constructed virtually all of the municipal water tanks built in Oregon in the last 10 years. Pender at first appeared to give contrary testimony, suggesting that Respondent *had* erected all but one of the public works potable water tanks constructed in the last 10 years in Oregon. She then clarified her testimony, stating that, of the 30 to 40 tanks that are bid each year, 30% to 50% are welded tanks, 15% to 20% are concrete tanks, and Respondent builds the rest. The Forum finds only that Respondent built most of the *bolted-together municipal* tanks that were constructed in Oregon within the last 10 years and that Respondent built almost all of these bolted-together tanks that also were constructed of glass-fused-to-steel panels. The Forum makes no finding regarding Respondent's share of *all* water tanks built in Oregon during that time-frame. Although all the witnesses appeared to testify honestly, the Forum was not convinced that any witness had sufficient knowledge of the water-tank construction industry as a whole to make precise statements on that subject. Nor was there sufficient evidence for the Forum to make findings regarding the

[8]Pender testified credibly that no other AO Smith dealers pay boilermaker wages to their workers .

wages typically paid to workers who construct all types of water tanks.

ULTIMATE FINDINGS OF FACT

1) Respondent bid on and received a subcontract on a public works project, namely the City of Yoncalla Standpipe and Waterline Extension Project.

2) Respondent's employees performed standpipe erection work on the project in January 1997. The Commissioner properly determined that the local prevailing practice at that time was to classify such work as boilermakers' work. In January 1997, the PWR for boilermakers was $23.57/hour plus $8.76/hour fringe benefit.

3) Respondent paid its employees less than the PWR for boilermakers.

4) Respondent filed at least one CPR that inaccurately classified its employees as laborers instead of as boilermakers.

5) Pender knew prevailing wages were required on the project and caused Respondent to pay the workers at wage rates under the appropriate PWR. If Pender had called the telephone number identified in the 1996 PWR Booklet as the number to call to discuss PWR classification questions, she would have discovered that the correct classification for standpipe erection workers was "boilermaker."

CONCLUSIONS OF LAW

1) Respondent employed workers upon public works in Oregon. The Commissioner of the Bureau of Labor and Industries has jurisdiction over Respondent and the subject matter herein. ORS 279.348 to 279.365.

2) The actions, inactions, statements, and motivations of Pender, Respondent's president, secretary, treasurer, and owner, properly are imputed to Respondent.

3) *Former* ORS 279.348(1)[9] provided:

> "`Prevailing rate of wage' means the rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries. In making such determinations, the commissioner may take into consideration findings of an appropriate federal agency which determines prevailing wages and bargaining agreements in force in the locality for particular trades or occupations. If there is not a majority in the same trade or occupation paid at the same rate, the average rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to workers in the same trade or occupation shall be the prevailing

[9]In 1997, the legislature made significant amendments to ORS 279.348(1), requiring the Commissioner to "rely on an independent wage survey to be conducted once each year" in determining the prevailing rate of wage. *See* 1997 Or Laws Ch. 810, sec. 1. Those amendments are not relevant to this matter, which involves wages paid prior to their effective date.

rate. If the wage paid by any contractor or subcontractor to workers on any public work is based on some period of time other than an hour, the hourly wage shall be mathematically determined by the number of hours worked in that time period. If it appears to the commissioner data necessary to determine the prevailing rate of wage in a locality is not available or is not sufficient, the Commissioner of the Bureau of Labor and Industries may adopt the prevailing rate of wage as determined by the Secretary of Labor of the United States."

Former ORS 297.359(1)[10] provided:

"The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality under ORS 279.348 at least once each year and make this information available at least twice each year. The commissioner may amend the rate at any time."

The Commissioner properly determined that the prevailing practice in Yoncalla, Oregon, at all material times, was to classify tank erection workers as boilermakers. The Commissioner properly determined that the PWR for boilermakers was $23.57/hour plus $8.76/hour fringe benefit.

4) ORS 279.350(1) provides:

"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. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of contributions of a type referred to in ORS 279.348(4)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279.348(4)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage."

Respondent committed five violations of ORS 279.350(1) by failing to pay the prevailing rate of wage to five workers who performed tank erection work on the Yoncalla project. The Commissioner has the authority to impose civil penalties for these violations. ORS 279.370(1); *former* OAR 839-16-530(3)(a).

5) ORS 279.354(1) provides:

"The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate

[10]The legislature also amended this statute in 1997. 1997 Or Laws Ch. 810, sec. 2.

> of wage or less than the minimum hourly rate of wage specified in the contract * * *. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid."

Respondent violated ORS 279.354(1) by submitting a CPR inaccurately stating that five workers on the project were laborers when, in fact, their correct classification was boilermakers. The Commissioner has the authority to impose a civil penalty for this violation. ORS 279.370(1); *former* OAR 839-16-530(3)(e).

OPINION

Violations of the PWR laws

Respondent acknowledges that it did not pay boilermakers' wages to five workers who performed standpipe erection work on the Yoncalla standpipe project. Credible evidence in the record establishes that the Index of Prevailing Practice reflects the Commissioner's prevailing practice determinations. The 1996/1997 Index classified standpipe erection workers as boilermakers. The Forum infers that the prevailing practice at all material times was to classify standpipe erectors as boilermakers. Based on these facts, the Forum concludes that Respondent committed five violations of ORS 279.350(1).

Respondent's sole argument against this conclusion is that the Commissioner's classification of the workers as boilermakers was faulty because it was based on union jurisdictional agreements, rather than on a field survey of industry practices. Such an argument has no place in this forum. In *State ex rel. Roberts v. Miller*, 50 Or App 423, 623 P2d 1081 (1981), the Court of Appeals considered a PWR wage claim brought by the agency on assignment from an employee of the defendant employer. The employer had contractually agreed to pay wage "prescribed under the provisions of ORS 279.348 through 279.356 and the laws amendatory thereto." 623 P2d at 1082. Nonetheless, it defended against the wage claim on the ground that "the commissioner had failed properly to determine the `prevailing rate of wage' in the `locality' in which the work, labor and services were performed." *Id.* at 1081. The Court of Appeals did not address the merits of this argument, finding that the employer had waived its right to make such a claim: "Having agreed to be bound by the wage determination, defendant could not challenge it in this action at law brought by [the Agency as] the assignee of a wage claim." *Id.* at 1082.

Here, too, Respondent agreed to be bound by the PWR laws in effect at the time. Those laws included the Commissioner's determination, reflected in the Index of Prevailing Practice, that standpipe erection workers properly were classified as boilermakers. Having bound itself to that determination, Respondent cannot challenge it in this forum. *Miller*.

In any event, Respondent's argument misconstrues the nature of the Agency's burden of proof in this case.

ORS 279.350 requires contractors and subcontractors on public works projects to pay at least "the prevailing rate of wage." *Former* ORS 279.348(1) defined "prevailing rate of wage" as "the rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, *as determined by the Commissioner of the Bureau of Labor and Industries*." (Emphasis added). Thus, to prove five violations of ORS 279.350, the Agency had to prove only that Respondent had not paid five workers the PWR *as determined by the Commissioner*. The Agency did that by demonstrating: 1) that the Index of Prevailing Practice classified standpipe erection workers as boilermakers; and 2) that Respondent had not paid five of its standpipe erection workers the PWR for boilermakers.

The Agency was not required to also prove that the Commissioner followed proper statutory procedure in determining the prevailing wage rate. Even if the Agency had that burden, however, it would be met by the evidence in this record, which demonstrates that the Commissioner acted within the scope of his authority. *Former* ORS 279.348 specifically permitted the Commissioner to "take into consideration findings of an appropriate federal agency which determines prevailing wages and bargaining agreements in force in the locality for particular trades or occupations" in determining the PWR and prevailing classification practice. The uncontroverted evidence demonstrates that the Commissioner did just that, by relying on USDOL findings that, in the City of Yoncalla area, the prevailing practices for heavy, highway, and non-residential construction work were the union practices.

Respondent asserted, as its first affirmative defense, that the Commissioner's classification was incorrect:

> "It is not and has not been the `prevailing practice' of the construction industry in Oregon to classify as `Boilermakers' workers engaged in the type of work carried out by Erich Rabe, Tim Janesofsky, Pat Keeshan, Patrick Holbrook, John Meier, Steve Pender and Richard Hlavinka on behalf of Respondent."

(Exhibit X-17).[11] Even assuming that *Miller* allows such a defense, Respondent did not meet its burden of proving it. Respondent presented no credible evidence to controvert the Agency's evidence that the boilermakers' union claims jurisdiction over the erection of bolted-together water tanks in the Yoncalla, Oregon area, whether or not those tanks are airtight or pressurized. Respondent's evidence regarding the union practices in other states simply has no relevance to the determination of the prevailing practices in Oregon. Nor does its evidence regarding a short-lived Employment Department definition of boilermakers' work, developed

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[11]Respondent's sixth affirmative defense is similar, except that it incorrectly attempts to place the burden of proving the prevailing practice on the Commissioner. If Respondent may pursue this argument at all in this forum, it has the burden of proving that the Commissioner's determination of prevailing practice was incorrect.

and distributed for some unknown purpose presumably unrelated to the PWR laws.

Respondent's real argument is that, whatever the union jurisdictional practice may be, the actual industry practice in Oregon is to pay laborers' wages to standpipe erection workers. Even if this argument had legal merit,[12] it would fail on the facts. As explained in Factual Finding No. 46, the Forum was not convinced by Pender's testimony regarding Respondent's share of the water storage tank construction business in Oregon. Because Respondent did not prove what percent of all water tanks it had built, the fact that it pays its workers the split laborers/ironworkers wage does not prove that is the prevailing (or majority) practice for tank erection work. This result is not changed by the fact that Respondent constructed most of the *bolted-together* municipal tanks built in Oregon within the last few years. The Commissioner has determined that *all* standpipe erection workers are boilermakers, and nothing in the record persuades the Forum that workers who erect bolted-together tanks should be classified differently.[13] If Respondent believed its workers perform a function so unique that they should not be classified with other standpipe erection workers, it should have applied for the addition of a trade pursuant to OAR 839-016-0006.

In sum, the Agency proved that Respondent committed five violations of ORS 279.350(1) by failing to pay five standpipe erection workers the PWR for boilermakers. The Agency also proved that Respondent committed a single violation of ORS 279.354(1) by submitting a CPR inaccurately stating that five workers on the project were laborers when, in fact, their correct classification was boilermakers.

Respondent's other affirmative defenses

As its second affirmative defense, Respondent asserted that "the Commissioner has acted inconsistently with an established prior agency practice by proposing that civil penalties be assessed against respondent," because it has not been the prevailing practice of the construction industry to classify the type of work performed by Respondent's employees as boilermaker work. Respondent did not, however, identify any "prior agency practice" that would have permitted it to pay laborers' wages to its standpipe erection workers. Having pointed to no change in Agency practice, Respondent cannot prevail on this theory.

Respondent's third affirmative defense is merely a restatement of its first two affirmative defenses and requires no further discussion. In its fourth affirmative defense, Respondent argued that the Commissioner may not rely on union jurisdictional assertions in determining prevailing

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[12]Because *former* ORS 279.348 explicitly permitted the Commissioner to rely on union jurisdictional practices, Respondent's argument is misplaced as a matter of law. *See also Miller*.

[13]Worker classifications necessarily are somewhat general. As Grabe testified, the Commissioner has not established a separate classification for workers who install oak doors using pneumatic nail guns and 8-pound nails -- those workers are classified as carpenters.

practice. That argument fails for the reasons set forth above. Respondent's fifth and seventh affirmative defenses are that "the Commissioner has erroneously interpreted and applied a provision of law" and that "[t]he Commissioner has failed to state a claim for which relief may be granted." Respondent did not elaborate upon those defenses at the hearing and did not establish that the Agency's case suffered from any such defects.

Civil penalties

The Commissioner has authority to impose a civil penalty not to exceed $5000.00 for each violation of ORS 279.348 to 279.380 and the administrative rules adopted pursuant thereto. ORS 279.370(1). The Agency has promulgated a rule specifying the minimum penalties to be imposed for PWR violations:

> "(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty shall be calculated as follows:
>
> "(a) An equal amount of the unpaid wages or $1,000, whichever is less, for the first violation[.]"

The Agency sought this minimum penalty, in an amount equal to the unpaid wages, for each of Respondent's failure to pay the PWR. Given Respondent's cooperation with the Agency and the fact that it has no prior violations, the Forum agrees that the minimum penalty is appropriate. *See former* OAR 839-16-520.

The Forum, therefore, orders Respondent to pay a civil penalty in an amount equal to the wages it failed to pay Holbrook, Keeshan, Janesofsky, Meier, and Rabe for tank erection work they performed in January 1997. Respondent should have paid each of those employees at the boilermakers rate of $32.33/hour for straight time and $44.12/hour for overtime.[14] The following table shows the total wages Respondent should have paid the employees:

Employee	Hours worked	Boiler-maker rate	Boiler-maker wages
Holbrook	84.5 straight hours	$32.33/ hour	$2731.89
	2.0 overtime hours	$44.12/ hour	$88.24 $2820.13
Keeshan	76.5 straight hours	$32.33/ hour	$2473.25
Janesofsky	8.0 straight hours	$32.33/ hour	$258.64
Meier	40.0 straight hours	$32.33/ hour	$1293.20
Rabe	48.0 straight hours	$32.33/ hour	$1551.84

The differences between what Respondent did pay, and what it should have paid, are as follows:

[14] $23.57/hour plus $8.76/hour fringe benefit for straight time; $35.36/hour plus $8.76/hour fringe benefit for overtime.

Employee	Boiler-maker wages	- Wages paid	= Un-paid wages
Holbrook	$2820.13	$2308.20	**$511.93**
Keeshan	$2473.25	$2027.33	**$445.92**
Janesofsky	$258.64	$201.12	**$57.52**
Meier	$1293.20	$1050.40	**$232.80**
Rabe	$1551.84	$1275.72	**$276.12**

The Forum assesses these unpaid wages as the civil penalty for Respondent's five violations of ORS 279.350(1), in a total amount of **$1557.71**.

For the single violation of ORS 279.354(1), the Agency sought a penalty of $1000.00. The Forum agrees that a **$1000.00** penalty is appropriate under the circumstances of this case, taking into account the factors listed in *former* OAR 839-16-520.

Respondent's exceptions

Respondent filed extensive exceptions to the factual findings in the proposed order. Many of those exceptions do not actually challenge the facts found, but rather argue that the Commissioner should not rely on those facts (exceptions to proposed factual findings 16, 19, 20, 31, 32, 33, 37, and 39). Except as noted below, these exceptions are rejected because the challenged findings are supported by substantial evidence in the record and provide ample support for the legal conclusions in this Final Order.

In response to Respondent's exceptions to proposed factual findings 16 and 35, finding 35 has been clarified to state explicitly that the portion of the Index of Prevailing Practice that is in the record existed prior to July 1996, remained in effect through 1997, and was produced by the Agency's PWR coordinator. There is no requirement for "formal adoption" of the Index.

Respondent takes exception to factual finding 31 on the ground that substantial evidence does not support the findings that "[i]n 1996 and early 1997, pursuant to then-applicable law, the Commissioner accepted US-DOL findings that the majority of workers involved in heavy, highway, and commercial construction were union workers" and that "the Commissioner used local collective bargaining agreements and accompanying jurisdictional evidence to determine the appropriate classification for any given type of work." To the contrary, Grabe testified to these precise facts. The Agency's Prevailing Practice Flier also provides support for these findings.

Respondent takes exception to factual finding 34 on the ground that "[t]here was nothing in the PWR Booklet nor did Grabe testify to any `prior precedent' of classifying the work at issue as `boilermakers' for PWR purposes." Finding 34 has been clarified to state that, in using the PWR Booklet and prior precedent, Grabe was merely describing her general practice, not necessarily what she did to determine the PWR for standpipe erection workers in this case.

In challenging factual finding 36, Respondent asserts that there is no evidence that any boilermakers union employees have erected any standpipes in Oregon within the last 10 years. That is not correct; as set forth in factual finding 41, boilermakers have erected standpipes during the relevant time period. The remainder

of Respondent's challenge to factual finding 36 amounts to a recitation of facts that either are already incorporated into the findings, or which the Forum finds have little significance. Respondent's exception to proposed factual finding 37 is misplaced, as it mischaracterizes a quote from a letter as a finding by the ALJ.

Respondent excepts to proposed factual finding 38 on the ground that the ironworkers' union representative conceded that he was unfamiliar with glass-fused-to-steel tanks and that he had no knowledge of actual practices in this state. Respondent further asserts that the union representative "conceded that union jurisdictional agreements do not govern PWR practices." The first two alleged concessions are not relevant to the material fact found in the paragraph -- the existence of a written jurisdictional agreement between the boilermakers and ironworkers that includes certain terms specified in the finding. The union representative's belief regarding the legal significance of jurisdictional agreements in relation to PWR matters simply carries no weight.

In purporting to challenge proposed factual finding 41, Respondent attacks facts that the ALJ did not find. The exception is denied.

In challenging proposed factual finding 43, Respondent asserts facts close to those found in the proposed order. The term "PWR" has been added to the finding to clarify its meaning. In challenging proposed factual finding 44, Respondent makes an assertion of fact almost identical to the facts found in proposed finding 46 (on page 21, lines 1 and 2, of the proposed order). The exception is denied because the matters Respondent wishes the Forum to assert already are contained in the order.

Finally, in part of its challenge to factual finding 46, Respondent again attacks facts that the ALJ did not find. Respondent also asserts accurately, as the ALJ found, that Respondent constructed most of the bolted-together municipal water tanks built in Oregon during the last ten years. In response to the remainder of this exception, the Forum has added the finding that Respondent built almost all of the bolted-together, *glass-fused-to-steel* municipal water tanks built in Oregon during the last decade.

Respondent's challenges to the first proposed ultimate factual finding mirror its challenges to the proposed opinion, which are addressed later in this Final Order. Respondent takes exception to the second sentence of the fifth proposed ultimate finding, stating that it amounts to "sheer speculation." To the contrary, the finding is a fair inference from factual findings 16, 19, 34, and 35.

Without elaboration, Respondent challenges the third, fourth, and fifth proposed conclusions of law on the ground that there is insufficient evidence to support them. Those exceptions are denied.

As Respondent states correctly in its first exception to the proposed opinion, "the crux of the dispute" related to whether the Commissioner properly had determined that the PWR classification for the work at issue was "boilermaker." The proposed opinion has been changed to remove

the suggestion that Respondent challenged only whether the Commissioner's classification determination was *correct*, and not whether the Commissioner had, in fact, made *any* determination regarding the appropriate classification.

In its second exception to the proposed opinion, Respondent questions the relevance of the decision in *State ex rel Roberts v. Miller*, 50 Or App 423, 623 P2d 1081 (1981). According to Respondent, *Miller* is inapposite because it dealt with the prevailing wage rates, not prevailing classification practices. The distinction between the cases has no legal significance. *Miller* stands for the proposition that an employer cannot collaterally challenge the Commissioner's determination of prevailing practices once it has agreed to abide by the PWR laws. It does not matter whether the challenged practice relates to wages or to trade classification.

In its third exception to the proposed opinion, Respondent challenges the burden of proof assigned to the Agency in this case. The opinion contains an adequate discussion of how the Agency met its burden, and the exception is denied.

Finally, Respondent incorporates its objections to the proposed factual findings and conclusions. Those exceptions have been dealt with earlier in this opinion.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370, and as payment of the civil penalty for its violations of ORS 279.350 and 279.354, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Northwest Permastore Systems, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND FIVE HUNDRED TWENTY-FOUR DOLLARS AND TWENTY-NINE CENTS ($2524.29), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondent complies with the Final Order.

In the Matter of

MIKE L. SULFFRIDGE, Mike Sulffridge Contracting, Inc., and A & B Cutters, Inc.

Case Numbers 11-98, 12-98

Final Order of the Commissioner

Jack Roberts

Issued February 3, 1999.

SYNOPSIS

Respondent A & B Cutters Inc. violated ORS 658.410(1) and ORS 658.417(1) by operating as a farm/forest labor contractor without a proper license or indorsement. All Respondents violated ORS 658.417(3) and ORS 658.440(1)(g) by failing to provide timely certified payroll records, by failing to enter written agreements with some workers, and by entering written agreements with other workers that did not contain all required elements. As majority shareholder of A & B Cut

ters, Inc., and sole shareholder of Mike Sulffridge Contracting, Inc., Respondent Mike Sulffridge is equally responsible for the violations committed by those corporate respondents and is jointly and severally liable for the resulting civil penalties. The Commissioner ordered Sulffridge and A & B Cutters, Inc. to pay $12,000.00 in civil penalties and ordered Sulffridge and Mike Sulffridge Contracting, Inc. to pay $12,500.00 in civil penalties for the various violations of the farm/forest labor contracting statutes.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on June 9, 1998, in the conference room of the Oregon Employment Department, 846 SE Pine Street, Roseburg, Oregon. The Wage and Hour Division of the Bureau of Labor and Industries ("the Agency") was represented by Alan McCullough, an employee of the Agency. Respondents all were represented by Harry Gandy, Attorney at Law. Mike Sulffridge, of the corporate Respondents, was present throughout the hearing.

The Agency called as witnesses Respondent Mike Sulffridge and Agency compliance specialist Katy Bayless.

Respondent called as witnesses Respondent Mike Sulffridge, as well as former Respondent employees Rick Sulffridge, Angela Sulffridge, Ben Sulffridge, Marie Knapple, Carl Sylvester, David Vasquez, and Melvin Ganger.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-29 and Agency Exhibits A-1 to A-70 and A-72 to A-82. Respondents offered no exhibits.

Having fully considered the entire record in this matter, I, Jack 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 1, 1997, the Agency issued a "Notice of Intent to Assess Civil Penalties" to Respondents Mike L. Sulffridge, Mike Sulffridge, dba A & B Cutters, and A & B Cutters, Inc. (the "A & B Respondents"). This Notice of Intent (hereinafter, the "A & B Notice of Intent") cited twelve bases for the assessment of a total of $131,000.00 in civil penalties for alleged violations of ORS 658.410, 658.415, 658.417, and 658.440. The A & B Notice of Intent further stated that Respondents had 20 days from the date they received the Notice to request a contested case hearing.

2) The A & B Notice of Intent was served on Mike Sulffridge, registered agent for A & B Cutters, Inc., on July 3, 1997.

3) By letter dated July 11, 1997, Alan McCullough, case presenter for the agency, confirmed to Harry Gandy, attorney for the A & B Respondents, that those Respondents

had an extension of time through August 1, 1997,[1] in which to file an answer and request for hearing. McCullough granted the A & B Respondents another extension of time on July 30, 1997, bringing the deadline for filing an answer to August 15, 1997.

4) The Hearings Unit received the A & B Respondents' Answer, Affirmative Defenses, and Request for Hearing on August 15, 1997. The A & B Respondents denied each of the alleged violations and asserted an affirmative defense as follows:

> "For an AFFIRMATIVE DEFENSE, Respondents generally deny performing services as a farm labor contractor, as such services are defined in the Oregon Revised Statutes and the attendant administrative rules, with regard to forestation and reforestation without a valid farm labor contractor's license. Respondent A & B Cutters, Inc. admits providing on a temporary lease basis, and in exchange for compensation, employees to Mike Sulffridge Contracting, Inc. which did perform such services, but which was validly licensed to do so."

The A & B Respondents requested a contested case hearing.

5) On September 5, 1997, the Hearings Unit received the Agency's request for a hearing in Case No. 11-98. On October 15, 1997, the ALJ issued to the A & B Respondents and the Agency a "Notice of Hearing" for Case No. 11-98, which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent to the A & B Respondents a "Summary 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 839-050-0000 through 839-050-0440.

6) On July 1, 1997, the Agency issued a separate "Notice of Intent to Assess Civil Penalties" to Respondents Mike L. Sulffridge and Mike Sulffridge Contracting, Inc. (the "MSC Inc. Respondents"). This Notice of Intent (hereinafter, the "MSC Inc. Notice of Intent") cited eight bases for the assessment of a total of $142,000.00 in civil penalties for alleged violations of ORS 658.417 and 658.440. The MSC Inc. Notice of Intent further stated that Respondents had 20 days from the date they received the Notice to request a contested case hearing.

7) The MSC Inc. Notice of Intent was served on Mike Sulffridge and Mike Sulffridge Contracting, Inc., on July 3, 1997.

8) By letter dated July 11, 1997, Alan McCullough, case presenter for the agency, confirmed to Harry Gandy, attorney for the MSC Inc. Respondents, that those Respondents had an extension of time through August 1, 1997,[2] in which to file an answer and request for hearing. McCullough granted the MSC Inc.

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[1]The letter states that the deadline was August 1, 1996, but it is clear from the context of the letter that the deadline actually fell in 1997.

[2]The letter states that the deadline was August 1, 1996, but it is clear from the context of the letter that the deadline actually fell in 1997.

Respondents another extension of time on July 30, 1997, bringing the deadline for filing an answer to August 15, 1997.

9) The Hearings Unit received the MSC Inc. Respondents' Answer, Affirmative Defenses, and Request for Hearing on August 15, 1997. The MSC Inc. Respondents denied each of the alleged violations and requested a contested case hearing.

10) On September 5, 1997, the Hearings Unit received the Agency's request for a hearing in Case No. 12-98. On October 15, 1997, the ALJ issued to the MSC Inc. Respondents and the Agency a "Notice of Hearing" for Case No. 12-98, which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent to the MSC Inc. Respondents a "Summary 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 839-050-0000 through 839-050-0440.

13) On October 20, 1997, the ALJ issued discovery orders to the participants in both Case No. 11-98 and Case No. 12-98 directing them each to submit a summary of the case, including: 1) a list of the witnesses to be called; 2) the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence; and 3) a statement of any agreed or stipulated facts. The summaries were due by February 13, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summaries.

14) On December 4, 1997, the Agency asked the ALJ to issue a discovery order allowing the Agency to depose Mike Sulffridge. Respondents did not oppose the motion, and the ALJ issued the requested discovery order on December 5, 1997.

15) On December 4, 1997, the Agency also moved to consolidate the hearings in Case No. 11-98 and 12-98. By letter dated December 5, 1997, the ALJ notified all Respondents that they should respond to the motion by December 15, 1997, if they opposed it. The Hearings Unit received no response by that date, and the ALJ granted the consolidation motion. The ALJ scheduled the consolidated hearing to commence on February 24, 1998, in the conference room of the Oregon Employment Department, 846 SE Pine Street, Roseburg, Oregon.

16) By joint motion dated January 26, 1998, the participants asked for a postponement of the consolidated hearing. The ALJ granted the motion and issued an Amended Notice of Hearing setting the consolidated hearing for June 9, 1998. The ALJ also ordered the participants to submit their case summaries by May 29, 1998. The Hearings Unit received the Agency's case summary on May 29, 1998. The Hearings Unit did not receive Respondents' case summary, which was dated and postmarked June 1, 1998, until June 3, 1998.

17) On April 24, 1998, the Agency moved for leave to amend the Notices of Intent in Case Nos. 11-98 and 12-98. The ALJ granted that order on May 7, 1998.

18) In Case No. 11-98, the First Amended Notice of Intent alleged six bases for a total of $31,000.00 in civil penalties against the A & B Respondents:

i) "Acting as a Farm Labor Contractor with Regard to the Forestation and Reforestation of Lands without a Valid Farm Labor Contractor's License or Forestation Indorsement. ORS 658.410; ORS 658.417(1); OAR 839-15-125."

ii) "Acting as a Farm Labor Contractor with Regard to the Forestation and Reforestation of Lands without a Valid Farm Labor Contractor's License or Forestation Indorsement. ORS 658.410; ORS 658.417(1); OAR 839-15-125."

iii) "Failure to Provide a Certified True Copy of All Payroll Records for Work Done as a Farm Labor Contractor at Such Times as Prescribed by the Commissioner. ORS 658.417(3); OAR 839-15-300."

iv) "Failure to Provide a Certified True Copy of All Payroll Records for Work Done as a Farm Labor Contractor at Such Times as Prescribed by the Commissioner. ORS 658.417(3); OAR 839-15-300."

v) "Failure to Execute a Written Agreement With Workers at the Time of Hiring and Prior to the Worker Performing Any Work. ORS 658.440(1)(g); OAR 839-15-360." (eleven violations)

vi) "Failure to Execute a Written Agreement With Workers at the Time of Hiring and Prior to the Worker Performing Any Work. ORS 658.440(1)(g); OAR 839-15-360." (twelve violations)

The Agency also alleged aggravating circumstances: "Respondent Mike Sulffridge was licensed as a farm labor contractor from 1990 into 1997 and should be well aware of the licensing and certified payroll requirements. Respondents' multiple violations aggravate the seriousness of each violation."

19) In Case No. 12-98, the First Amended Notice of Intent alleged three bases for a total of $43,750.00 in civil penalties against the MSC Inc. Respondents:

i) "Failure to Provide a Certified True Copy of All Payroll Records for Work Done as a Farm Labor Contractor at Such Times as Prescribed by the Commissioner. ORS 658.417(3); OAR 839-15-300." (eight violations)

ii) "Failure to Execute a Written Agreement With Workers at the Time of Hiring and Prior to the Worker Performing Any Work. ORS 658.440(1)(g); OAR 839-15-360." (seventeen violations)

iii) "Failure to Execute a Written Agreement With Workers at the Time of Hiring and Prior to the Worker Performing Any Work. ORS 658.440(1)(g); OAR 839-15-360." (forty-three violations)

The Agency also alleged aggravating circumstances:

"Respondents was [*sic*] licensed as a farm labor contractor from 1990 into 1997. Respondents have been warned by BOLI representatives in the past on several

occasions about the necessity of submitting certified payroll records. Respondents were asked by BOLI representatives to submit certified payroll records for the work performed in 1996 and failed to do so until May 23, 1997. Respondents' submission of certified payroll records for work performed in the spring of 1997 was similarly late. Failure to submit certified payroll records and enter into written agreements and/or written agreements conforming to ORS 658.440(1)(g) regarding the workers' rights, remedies, and terms and conditions of employment are all multiple, serious violations. Respondents' multiple violations aggravate the seriousness of each violation."

20) By order dated May 7, 1998, the matter, which had been assigned to ALJ Douglas A. McKean, was reassigned to ALJ Warner W. Gregg.

21) On May 27, 1998, the Agency moved to further amend the Notice of Hearing in Case No. 12-98 to change paragraph 1(2) to read: "Unidentified State or Private Contract (October 1996)." Respondents did not oppose the motion, which the Forum hereby grants.

22) At the start of the hearing, Respondents' attorney said his clients had received and read the Summary of Contested Case Rights and Procedures and had no questions about it.

23) In addition, the participants stipulated that: 1) references to Mike Sulffridge, dba A & B Cutters (or just "A & B Cutters") were to be removed and replaced with "A & B Cutters, Inc." (hereinafter, "A & B"); 2) A & B was not a licensed contractor; 3) all of the contracts identified in Case No. 11-98 were contracts of Mike Sulffridge Contracting, Inc.; 4) in Case No. 11-98, workers used by Mike Sulffridge Contracting, Inc., were leased from A & B in those instances where A & B was involved, and that was the extent of A & B's involvement; 5) A & B did not submit any certified payroll records; and 6) the Agency would not seek "double penalties" for failure to timely submit certified payroll records for United States Forest Service Contract No. 53-04-N7-5-26; in other words, it would not seek to penalize both the A & B Respondents and the MSC Inc. Respondents for any such violation.

24) The Agency's case presenter also informed the ALJ and Respondents that Exhibit A-74 contained typographical errors to be corrected as follows: after the name Javier Hernandez, the phrase "A-1 through A-18" should be "A-12 to A-18"; after the name Cary Nash, the phrase "A-1 through A-14" should be "A-12 through A-14"; and the exhibit should indicate that Mel Ganger did sign a WH-153 agreement.

25) The Agency moved to amend the First Amended Notice of Intent in Case No. 11-98 by removing Mel Ganger's name from paragraph 5. The Agency made a corresponding motion to reduce the amount of penalty by $1000.00. The ALJ granted these motions.

26) The Agency also moved to amend the First Amended Notice of Intent in Case No. 12-98 by: adding Mel Ganger's name to the list of workers in paragraph 3 (and increasing the penalty by $250.00); removing

Juan Cardenas's name from the list of workers in paragraph 2 (reducing the penalty by $1000.00); and removing Chad Conley's name from paragraph 3 (reducing the penalty by $250.00). The ALJ granted the motions.

27) The Agency further moved to amend the First Amended Notice of Intent in Case No. 12-98 to add the names of three workers (Hien Clausen, Todd Wisbey, Eulalio Aguilar) to paragraph 3 and to add the names of three other workers (Teddy Steele, Richard McCoy, and Michael Takhbar) to paragraph 2. Respondents objected to these motions, and the ALJ denied them as untimely

28) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

29) On November 20, 1998, the ALJ issued a proposed order that included an Exceptions Notice allowing ten days for filing exceptions to the proposed order. After receiving extensions of time, Respondent filed timely exceptions on January 13, 1999, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) Respondent Mike Sulffridge owns 100% of the shares of Respondent Mike Sulffridge Contracting, Inc. ("MSC Inc."), which he incorporated in 1984. At all material times, Sulffridge and MSC Inc. were licensed as farm/forest labor contractors in Oregon and employed one or more persons within the state. Reforestation is MSC Inc.'s main business.

2) Since he became licensed as a farm/forest labor contractor, Sulffridge has been aware that Oregon law requires such contractors to submit certified payroll records ("CPRs") at least once every 35 days. Sulffridge delegated that responsibility to his bookkeeping service.

3) In 1990, the Agency sent a letter to MSC Inc. and Mike Sulffridge stating that they had not submitted CPRs for reforestation contracts as required by Oregon law. The Agency notified Sulffridge and MSC Inc. that this violation could result in serious penalties, including license revocation or denial.

4) In February 1991, the Agency sent another letter to Sulffridge stating that his bookkeeping service was "sending in extremely late, and defective certified payrolls * * *." The Agency reminded Sulffridge that the law required payrolls to "be sent in at least every 35 days." The compliance specialist who signed the letter stated that she had, "on more than one occasion," explained the reporting requirements to Sulffridge's bookkeeping service.

5) At some point, Sulffridge's bookkeeper told him that A & B Cutters, Inc., another reforestation company, was going out of business. On January 5, 1995, Sulffridge purchased the majority of A & B shares[3] and became its president. Sulffridge acquired A & B because its workers' compensation premiums were considerably lower than those paid by MSC Inc.

6) For a period of time, Sulffridge had A & B pay the wages of individu-

[3]Cary Nash, one of Sulffridge's employees, purchased the remaining shares of A & B.

als who performed labor on contracts held by MSC Inc., so that A & B's lower workers' compensation rates would apply to the work done on those jobs. When MSC Inc. was paid on a contract, it would transfer enough money to A & B to cover the wages of the individuals who had worked on the contract. Sulffridge viewed this arrangement as having A & B "run the payroll" for MSC Inc.; he did not view the individuals working on MSC Inc. contracts as A & B employees. At the hearing, however, Sulffridge agreed that the individuals paid by A & B had been employees of A & B.

7) A & B did not provide or lease employees to any entity other than MSC Inc. It never bid on a contract. It had no transactions or business other than supplying laborers to MSC Inc.

8) A & B did not execute any written agreements with workers.

9) Mike Sulffridge or an MSC Inc. foreman generally was present at each MSC Inc. job site, whether the workers received their paychecks from MSC Inc. or from A & B.

10) MSC Inc. entered Contract No. 53-04-N7-5-26 with the United States Forest Service ("USFS") to perform labor in the Rogue River National Forest, and work on that contract was performed from October 9th through 20th, 1995.

11) MSC Inc. did not submit CPRs for the payroll periods August, September, and October 1995 until February 20, 1997. Those CPRs stated incorrectly that all work performed in those months had been done on land owned by the USFS, on Contract No. 53-04-N7-5-26.

12) On December 19, 1997, MSC Inc. submitted amended CPRs for October 1995, the only month during which work actually was performed on USFS Contract No. 53-04-N7-5-26. The documents state, and the Forum accepts, that the following individuals acted as "General Forest Laborer[s]" on USFS Contract No. 53-04-N7-5-26 during the relevant time periods:

Jonathan Alvarez

Thomas Bedell

Tony Carstensen

Jason Farmer

Steve Knighten

Tim Harper

Jose Lozano

David Vasquez

Mike Montooth

Bill Wallace

Clay Plummer

From the description of these individuals' work as general forest labor, Sulffridge's testimony that reforestation work was MSC Inc.'s main business, and his testimony that at least some of the workers were piling slash, the Forum infers that the listed individuals performed labor in the forestation or reforestation of lands. That inference is confirmed by the testimony of David Vasquez, one of the workers, who testified credibly that he performed general forestry work, including building trails, piling slash, and running chain saws. At least some of the listed individuals received paychecks from A & B, and some received paychecks from MSC Inc.

13) The Forum has accepted Sulffridge's testimony that three additional individuals worked on the USFS contract in October 1995: David McCoy, Billy Jackson, and Cary Nash. No documents in the record indicate that these individuals performed general forest labor, and Sulffridge testified credibly that the contract involved some work that did not qualify as forestation/reforestation labor. The Agency did not meet its burden of proving that these three individuals engaged in the forestation or reforestation of lands with regard to this particular contract.

14) The record includes all of the employment agreements with workers that Sulffridge was able to locate. It is possible that MSC Inc. entered some additional agreements that are not in the record, and those agreements were misplaced either by Sulffridge or his bookkeeping service. Given Sulffridge's lack of attention to record-keeping, however, and the legal requirement that he retain the agreements for three years,[4] the Forum finds by a preponderance of the evidence that, where the record contains no agreement for a particular worker, that worker never entered an agreement with MSC Inc.[5]

15) The following individuals listed in paragraph 12, *supra*, did not sign an employment agreement with MSC Inc. prior to beginning work on USFS Contract No. 53-04-N7-5-26:

Jonathan Alvarez[6]

Thomas Bedell

Bill Wallace

16) Of the individuals listed in paragraph 12, *supra*, the following signed employment agreements prior to beginning work on USFS Contract No. 53-04-N7-5-26, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

Tony Carstensen

Jason Farmer

Tim Harper

Steve Knighten

Jose Lozano

Mike Montooth

Clay Plummer

David Vasquez[7]

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[4]*See former* OAR 839-15-400(1), (2)(j). The rule has been renumbered to OAR 839-015-0400, but has not changed substantively since at least 1990.

[5]The Forum has made one exception to this finding, in the case of David Vasquez. *See* Finding No. 16, *infra*.

[6]The record includes only one contract for Alvarez, dated March 1, 1997, and Sulffridge testified credibly that he rarely entered new agreements with workers when their jobs changed. From those facts, the Forum infers that the March 1997 contract is the first (and perhaps only) contract that Alvarez signed.

[7]Although Vasquez's employment agreement is not in the record, he testified credibly that he signed one that did not specify work locations. Vasquez could not recall whether the contract specified more than one pay rate, and he testified credibly that he was paid at more than one rate while he worked on MSC Inc. contracts. Because no other MSC Inc. employment agreement identified work locations or more than a single pay rate, the

17) MSC Inc. performed BLM Contract No. P6-0516, a fire trail contract, in April 1996. That contract involved creating fire lanes at clearcuts and digging fire barriers around areas to be burned. No mechanical roadside brushing was done on the fire trails. All employees on that contract were paid by A & B.

18) In January 1997, Respondents' bookkeeper submitted "Payroll Journals" and "Payroll Verification Reports" for pay periods ending 3/31/96 and 4/15/96, a "Payroll Check Register" and a "Payroll Verification Report" for the period ending 4/20/96, and a "Payroll Journal" for the period ending 4/30/96. Those reports did not indicate what jobs the listed employees had performed or the contracts on which they had worked.

19) On December 19, 1997, MSC Inc. submitted amended CPRs for April 1996. Those reports indicate that some employees had worked on BLM Contract No. P6-0516 (with most working as slash pilers), and some had worked on state or private contracts.

20) The amended CPRs state, and the Forum accepts, that the following individuals performed forestation/reforestation activities during April 1996 on BLM Contract No. P6-0516:

Jonathan Alvarez

Javier Hernandez

Jason Farmer

Clayton Plummer

Steven Knighten

Daniel Moen

Cary Nash

Edward Bracken

Jose Lozano

David Vasquez

Juan Renteria

John Spino

21) The following individuals listed in paragraph 20, *supra*, did not sign an employment agreement with MSC Inc. prior to beginning work on BLM Contract No. P6-0516:

Jonathan Alvarez

Edward Bracken

Daniel Moen

Cary Nash

22) Of the individuals listed in paragraph 20, *supra*, the following signed employment agreements prior to beginning work on BLM Contract No. P6-0516, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

Jason Farmer

Javier Hernandez

Steve Knighten

Jose Lozano

Clay Plummer

Juan Renteria

John Spino

David Vasquez

23) During April 1996, MSC Inc. also performed a private contract that

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Forum infers that Vasquez's contract was similarly deficient.

included forestation or reforestation activities. A & B paid the workers on that contract. In addition, MSC Inc. performed a contract for mechanical roadside brushing, which is not a forestation or reforestation activity.

24) Some individuals worked on both BLM Contract No. P6-0516 and the private contracts in April 1996. The amended CPRs indicate, and the Forum accepts, that the following individuals worked *only* on one or both of the private contracts in April 1996:

Bernie Bliss

Hugo Erly-Arce

Oren Fackrell

Jose Hernandez

Josh Keesee

Dan Lethlean, Sr.

Richard McCoy

Shawn Nash

Jon Powell

Teddy Steele

Michael Takhbar

25) The following individuals listed in paragraph 24, *supra*, did not sign an employment agreement with MSC Inc. prior to beginning work on the private contracts:

Bernie Bliss

Oren Fackrell

Dan Lethlean, Sr.

Richard McCoy

Steele

Michael Takhbar[8]

26) Of the individuals listed in paragraph 24, *supra*, the following signed employment agreements prior to beginning work on the private contracts, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

Hugo Erly-Arce

Josh Keesee

Shawn Nash

Jon Powell

27) From Sulffridge's testimony that reforestation work was MSC Inc.'s main business and his admission that at least some employees did reforestation work on a private contract in April 1996, the Forum infers that the individuals listed in paragraphs 25 and 26, *supra*, performed labor in the forestation or reforestation of lands on an MSC Inc. private contract in April 1996.

28) On July 1, 1996, "forest fire suppression by contract crew" was added to the definition of "forestation or reforestation of lands" in *former* OAR 839-15-004(8). *See former* OAR 839-15-004(22).

29) Sometime in late 1996, BOLI learned that MSC Inc. had engaged in firefighting activities that summer. By letter dated November

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[8]See footnote appended to paragraph 15, *supra*, for a explanation of why the Forum has inferred that any given contract in the record is the first contract signed by that employee.

27, 1996, BOLI compliance specialist Victor A. Muniz informed Sulffridge and MSC Inc. that BOLI had not received CPRs for work performed as a farm/forest labor contractor. Muniz asked Sulffridge and MSC Inc. to provide BOLI with CPRs for July, August, and September 1996 by December 12, 1996. Sulffridge gave a copy of this letter to his bookkeepers.

30) In the last two weeks of September 1996 and the first two weeks of October 1996, MSC Inc. performed at least one contract that involved reforestation work. During the same time period, MSC Inc. performed at least one contract that did not involve reforestation activities. It is not possible to discern from the record which workers performed labor on the reforestation contract; nor is it possible to discern which workers labored on that contract in October, and not only in September. Sulffridge, however, testified credibly that any or all of the employees listed on the mid-September through mid-October payroll may have been performing reforestation activities. The Forum infers from that testimony that at least one individual performed labor in the forestation or reforestation of lands on an unidentified MSC Inc. contract in October 1996.

31) MSC Inc. did not submit a CPR for October 1996 until May 1997. That document does not identify accurately the types of work performed by employees or the contracts on which they worked.

32) In January and February 1997, MSC Inc. performed the "Chaney Creek" contract for a company called Lone Rock. The project involved a "swamper burn," which is a reforestation activity.

33) MSC Inc. did not submit CPRs for the Chaney Creek contract until June 1997. Those CPRs do not reflect the types of work performed by employees. In addition, the CPRs list one employee -- Angela Sulffridge -- who did not work on the contract. Except for that error, the Forum accepts the CPRs' representation that the following individuals worked on the contract:

Jonathan Alvarez

Justin Brown

Joe Diaz Hernandez

Jose Jil Morales

Wade Morgan

Mike Sulffridge

Jason Tyler

Richard Wigle

34) Of the workers listed in paragraph 33, *supra*, the following did not enter into any agreement with MSC Inc. prior to starting work on the Chaney Creek contract:

Jonathan Alvarez

Justin Brown

Mike Sulffridge

35) Of the individuals listed in paragraph 33, *supra*, the following signed employment agreements prior to beginning work on the Chaney Creek contract, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

Joe Hernandez

Jose Morales

Wade Morgan

Jason Tyler

Richard Wigle

36) In February 1997, MSC Inc. also performed BLM Contract No. P7-0514,[9] which involved construction of a fire trail. In December 1997, MSC Inc. submitted CPRs for that contract. The CPRs state, and the Forum accepts, that the following employees had worked as "General Forest Laborer[s]" on the BLM contract:

Jonathan Alvarez

William Eifert

Atilano Espinoza

Javier Hernandez

Josh Keesee

Steve Knighten

Dan Lethlean, Sr.

Dan Lethlean, Jr.

Wade Morgan

Jason Tyler

Todd Wisbey

37) Jonathan Alvarez did not enter into any agreement with MSC Inc. prior to starting work on BLM Contract No. P7-0514.

38) Of the individuals listed in paragraph 36, *supra*, the following signed employment agreements prior to beginning work on BLM Contract No. P7-0514, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

William Eifert

Atilano Espinoza

Javier Hernandez

Josh Keesee

Steve Knighten

Dan Lethlean, Jr.

Dan Lethlean, Sr.

Wade Morgan

Jason Tyler

Todd Wisbey

39) On February 20, 1997, A & B was involuntarily dissolved. At the June 1998 hearing in this matter, Sulffridge was not aware of the company's dissolution.

40) In March 1997, MSC Inc. performed a contract near Rogue River for the USFS. That contract involved slash burning. In February through April 1997, MSC Inc. also performed contracts called Selma and Butte Falls. Those two contracts did not involve reforestation activities.

41) MSC Inc. initially filed CPRs for the Rogue River, Selma, and Butte Falls contracts in June 1997. Those CPRs were not accurate. In December 1997, MSC Inc. submitted amended CPRs for the three contracts. Those reports state, and the Forum accepts, that the following MSC Inc. employees worked as general forest laborers on the Rogue River USFS contract:

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[9]Part of the BLM contract number is not legible on the photocopied exhibits, but the last four digits of the contract number are 0514. The Forum infers that the contract referred to in the exhibits is BLM Contract No. P7-0514, listed in the Notice of Intent. (Exhibits X-25, A-22, A-23)

Jonathan Alvarez

William Eifert

Josh Keesee

Steven Knighten

Mike Montooth

Jason Tyler

Bill Wallace

Todd Wisbey

42) Bill Wallace did not enter into any agreement with MSC Inc. prior to starting work on the Rogue River contract.

43) Of the individuals listed in paragraph 41, *supra*, the following signed employment agreements prior to beginning work on the Rogue River contract, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

Jonathan Alvarez

William Eifert

Josh Keesee

Steve Knighten

Mike Montooth

Jason Tyler

Todd Wisbey

44) In addition to the contracts discussed above, the Agency charged the MSC Inc. respondents with acting as farm/forest labor contractors with regard to USFS Contract No. 96033 and a 1996 contract with Boise Cascade. No evidence in the record establishes that any Respondent entered into, or performed, either of those contracts.

45) At some point after Sulffridge became aware of the magnitude of the problem with the MSC Inc. CPRs, he hired a new employee -- Karen Hightower -- to handle payroll in-house. Hightower prepared the amended CPRs on behalf of Respondents.

46) Sulffridge testified that the hourly wage MSC Inc. paid any given employee varied depending on the type of labor the employee performed. Several employees confirmed that they were paid at different hourly rates, depending on the job and whether they worked on a private or government contract. At least one employee also testified that his hourly wage increased as he gained experience. The Forum infers that it is unlikely that any worker identified in this Order was paid at only one rate during the entire time he worked for Respondents.

47) Sulffridge testified, and the Forum finds, that MSC Inc. did not enter new written agreements with workers when their pay rates changed. MSC Inc. rarely entered new written agreements with employees when they started working on new contracts. Sulffridge informed workers verbally of changing pay rates and job locations, but there is no evidence in the record that workers ever were told the identities of the owners of the lands on which they labored.

48) The testimony of Respondent Mike Sulffridge generally was credible with regard to verifiable historical events. Sulffridge readily admitted that he had funneled money through A & B to pay workers so he

could take advantage of A & B's low workers' compensation rates. He also acknowledged that many of MSC Inc.'s contracts involved forestation/reforestation activities and that reforestation was MSC Inc.'s main business. Finally, he admitted that MSC Inc. signed new agreements with workers reflecting changed working conditions only rarely, when it was convenient. Sulffridge's testimony was straightforward, not evasive, and not defensive. The Forum has relied on that testimony in making some of its factual findings.

49) The Forum has not, however, given great weight to Sulffridge's testimony where it was self-serving and conflicted with documentary evidence. For example, the amended CPRs for the 1995 USFS contract indicate that the individuals listed in paragraph 12 performed general forest labor. Sulffridge testified that, despite the "General Forest Laborer" label, not all of the individuals performed reforestation activities. The Forum finds the documentary evidence to be more reliable than Sulffridge's recollection of the specific type of work performed by any given employee. Similarly, where Sulffridge's recollection of which employees worked on a given contract conflicted with credible documentary evidence, the Forum generally gave more weight to the documents (such as amended CPRs).

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondents Sulffridge and MSC Inc. were licensed farm/forest labor contractors, as defined by ORS 658.405(1), doing business in the State of Oregon.

2) A & B employed workers to perform labor for another in the forestation or reforestation of lands on USFS Contract No. 53-04-N7-5-26 (October 1995), BLM Contract No. P6-0516 (April 1996), and a contract with a private party (April 1996). A & B employed the workers for an agreed remuneration or rate of pay -- the amount of money MSC Inc. transferred to A & B to pay the workers. On the October 1995 USFS contract, A & B employed some, but not all, of the workers (the remainder were employed by MSC Inc.). On the two April 1996 contracts, A & B employed all of the workers.

3) A & B was not licensed as a farm/forest labor contractor.

4) With regard to USFS Contract No. 53-04-N7-5-26, BLM Contract No. P6-0516, and the April 1996 private-party contract, MSC Inc. also acted as a farm/forest labor contractor, as it supplied the workers employed by A & B to perform labor for another in the forestation or reforestation of lands. To the extent that A & B did not employ some of the workers on USFS Contract 53-04-N7-5-26, MSC Inc. was their employer and acted as a farm/forest labor contractor.

5) MSC Inc. also employed workers to perform labor for another in the forestation or reforestation of lands on the Chaney Creek contract, BLM Contract No. P7-0514, and the USFS Rogue River contract.

6) The Agency proved the following acts charged against Sulffridge and A & B in Case No. 11-98:

a) Acting as a farm/forest labor contractor without a license, by employing workers to perform forestation or reforestation work for another on USFS Contract No. 53-04N7-5-26. (One violation).

b) Acting as a farm/forest labor contractor without a license, by employing workers to perform forestation or reforestation work for another on BLM Contract No. P6-0516 and the April 1996 private contract. (One violation).

c) For those employees that A & B paid directly on USFS Contract No. 53-04N7-5-26, failing to provide a certified true copy of all payroll records at such times as prescribed by the Commissioner. (One violation).

d) For BLM Contract No. P6-0516 and the April 1996 private contract (on which A & B paid all the employees), failing to provide a certified true copy of all payroll records at such times as prescribed by the Commissioner. (One violation).

e) For the April 1996 private reforestation contract, failing to enter a written agreement with the following workers as required by ORS 658.440(1)(g):

Bernie Bliss

Oren Fackrell

Shawn Nash

Jon Powell

(Four violations).

7) The Agency proved the following acts charged against Sulffridge and MSC Inc. in Case No. 12-98:

a) Failing to provide certified true copies of all payroll records at such times as prescribed by the Commissioner with regard to the following contracts: the unidentified October 1996 reforestation contract; BLM Contract No. P7-0514; Chaney Creek; and USFS Rogue River. (Four violations).

b) Failing to enter any written agreement with Bill Wallace on the listed workers on the USFS Rogue River contract. (One violation).

c) Failing to provide a written agreement that contained all required elements with the listed workers on one or more of the following contracts: BLM Contract No. P7-0514; the Chaney Creek contract; and the USFS Rogue River contract:

Jonathan Alvarez

William Eifert

Atilano Espinoza

Javier Hernandez

Joe Hernandez

Josh Keesee

Steve Knighten

Dan Lethlean, Sr.

Dan Lethlean, Jr

Mike Montooth

Jose Morales

Wade Morgan

Jason Tyler

Richard Wigle

(Fourteen (14) violations).

8) All Respondents knew or should have known that they were legally required to execute written agreements with their employees that included all of the statutorily required elements. Their failure to execute the required agreements was willful.

9) All Respondents knew or should have known of the legal re-

quirements for filing certified payroll records. Their failure to timely file such records was willful.

10) Respondents A & B and Sulffridge knew or should have known that A & B was required to be licensed as a farm/forest labor contractor, and willfully allowed A & B to operate as a farm/forest labor contractor without the proper license or indorsement.

CONCLUSIONS OF LAW

1) ORS 658.405(1) provides, in relevant part:

> "'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 forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities or the production or harvesting of farm products * * *."

A & B acted as a farm/forest labor contractor by employing workers to perform work on USFS Contract No. 53-04N7-5-26, BLM Contract No. P6-0516, and the April 1996 private contract.

2) ORS 658.410(1) provides, in relevant part:

> "Except as provided by ORS 658.425, 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. 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)."

ORS 658.417 provides, in relevant 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."

In October 1995, A & B violated ORS 658.410(1) and ORS 658.417(1) by acting as a farm labor contractor with regard to the forestation or reforestation of lands without a valid farm labor contractor's license or a farm/forest labor contractor indorsement. Sulffridge, as majority shareholder of A & B, shares liability for that violation.

4) In April 1996, A & B committed a separate violation of ORS 658.410(1) and ORS 658.417(1) by acting as a farm labor contractor on BLM contract No. P6-0516 and a private contract without a valid farm labor contractor's license or a farm/forest labor contractor indorsement. Sulffridge, as majority shareholder of A & B, shares liability for that violation.

5) ORS 658.417 provides, in relevant part:

> "In addition to the regulation otherwise imposed upon farm labor contractors * * *, 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."

Prior to January 9, 1996, *former* OAR 839-15-300 provided, in relevant part:

> "(1) Forest Labor Contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or the contractor's agent pays employees directly.
>
> "(2) 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."

Sulffridge and A & B violated ORS 658.417(3) and *former* OAR 839-15-300 by failing to provide certified true copies of payroll records for the forestation or reforestation work performed on USFS Contract No. 53-04-N7-5-26 within 35 days of the date on which that work first began.

6) Since January 9, 1996, OAR 839-015-0300(1)[10] has provided, in relevant part:

> "Forest labor contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or the contractor's agent pays employees directly as follows:
>
> "(a) 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;
>
> "(b) 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 have been issued as of the time of the report;
>
> "(c) 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, 140 days from the time the contractor begins work on the contract."

Sulffridge and A & B violated ORS 658.417(3) and OAR 839-015-0300

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[10] At some point, the rule was renumbered from OAR 839-15-310 to OAR 839-015-0310, but section (1) of the rule has not changed substantively.

by failing to provide certified true copies of payroll records for the forestation or reforestation work performed on BLM Contract No. P6-0516 and the April 1996 private contract within 35 days of the dates on which that work first began.

7) Sulffridge and MSC Inc. committed four violations of ORS 658.417(3) and OAR 839-015-0300 by failing to provide certified true copies of payroll records for the forestation or reforestation work performed on the unidentified October 1996 reforestation contract, BLM Contract No. P7-0514, the Chaney Creek contract, and the USFS Rogue River contract within 35 days of the dates on which work first began on those contracts.

8) ORS 658.440(1) provides, in relevant 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 the 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 child 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 chapters 654 and 656, ORS 658.405 to 658.503 and 658.830, the Service Contract Act (41 U.S.C. 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 paragraph (f)(A) to (I) 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."

OAR 839-015-0360 provides:

"(1) Farm and forest labor contractors are required to file

information relating to work agreements between the farm and forest labor contractors and their workers with the bureau.

"(2) The commissioner has developed Form WH-153 which, in conjunction with Form WH-151, Statement of Workers Rights and Remedies, can be used to comply with this rule. Farm and forest labor contractors may use any form for filing the information so long as it contains all the elements of Form WH-153 and Form WH-151.

"(3) Farm and forest labor contractors must file the form or forms used to comply with this rule with the bureau at the same time that the contractors apply for a license renewal.

"(4) Farm and forest labor contractors are required to furnish their workers with a written statement disclosing the terms and conditions of employment, including all the elements contained in Form WH-151 and if they employ workers, to execute a written agreement with their workers prior to the starting of work. The written agreement must provide for all the elements contained in Form WH-153. A copy of the agreement and the disclosure statement must be furnished to the workers in English and in any other language used to communicate with the workers. The disclosing statement must be provided to the workers at the time they are hired, recruited or solicited or at the time they are supplied to another by that contractor, whichever occurs first. Amended disclosure statements must be provided at any time any of the elements listed in the original statement change. A copy of the agreement must be furnished to workers prior to the workers starting work. Nothing in the written agreement relieves the contractor or any person for whom the contractor is acting of compliance with any representation made by the contractor in recruiting the workers."[11]

Sulffridge and A & B committed four violations of ORS 658.440(1)(g) and OAR 839-015-0360(4) by failing to provide four employees with the required written employment agreements before they started work on the April 1996 private reforestation contract .

9) Sulffridge and MSC Inc. committed one violation of ORS 658.440(1)(g) and OAR 839-015-0360(4) by failing to provide one employee (Bill Wallace) with a written employment agreement covering his work on the USFS Rogue River contract.

10) Sulffridge and MSC Inc. committed fourteen (14) violations of ORS 658.440(1)(g) and OAR 839-015-0360(4) by failing to provide fourteen employees with written employment agreements that included all required elements before they began work on one or more of the following contracts: BLM Contract No. P7-0514; the Chaney Creek contract; and the USFS Rogue River contract.

11) Under the facts and circumstances of this record, and according to the law applicable in this matter,

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[11]Prior to January 9, 1996, the rule was different only in that more terms were capitalized; substantively, the rule has remained the same since 1990.

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 839-015-508(1)(h). With regard to the magnitude of the penalties, OAR 839-015-0510 provides:

> "(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 violations 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.
>
> "(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other person in violation of any statute or rule.
>
> "(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 839-015-0512 further provides, in relevant 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) For purposes of this rule, `repeated violations' means violations of a provision of law or rule which have been violated on more than one contract within 2 years of the date of the most recent violation.
>
> "(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 violation;
>
> "(b) $1,000 for the first repeated violation;
>
> "(c) $2,000 for the second and each subsequent repeated violation."

The assessment of the civil penalty specified in the Order below is an appropriate exercise of the commissioner's authority.

OPINION

Violations Committed by A & B and Sulffridge

The Forum has found that A & B was the employer of individuals who worked on MSC Inc. contracts in October 1995 and April 1996 because A

& B compensated those individuals for their labor. Respondents contend that, despite its employment of laborers, A & B does not fall within the definition of "farm labor contractor" because it made no profit from leasing employees to MSC Inc. This argument has no merit. ORS 658.405(1) states only that a farm labor contractor is a person who employs forestation/reforestation workers to perform labor for another "for an agreed remuneration or rate of pay." It does not require that the arrangement be profitable, or otherwise economically beneficial, to the contractor. Here, A & B received an agreed remuneration for providing workers to MSC Inc. -- the exact amount of money that it paid the employees. Consequently, A & B was a farm labor contractor as defined by ORS 658.405(1). A & B committed two violations of ORS 658.410(1) and 658.417 by acting as a farm/forest labor contractor without a license or indorsement on the October 1995 and April 1996 contracts. Sulffridge, as majority shareholder of A & B, is equally responsible for those violations, and is jointly and severally liable for the penalties associated with them. *See In the Matter of Manuel Galan*, 15 BOLI 106, 131-32 (1996), *aff'd without opinion sub nom. Staff Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, *rev den* 326 Or 57 (1997).

A & B paid employees directly on USFS Contract No. 53-04-N7-5-26 (October 1995) as well as on BLM Contract No. P6-0516 and a private contract, both performed in April 1996. A & B was, therefore, required to submit CPRs within 35 days of the dates on which work on those contracts began. A & B did not submit any CPRs for the October 1995 contract until February 1997, and did not submit *any* payroll records for the April 1996 contracts until January 1997. A & B and Sulffridge are equally responsible for those two violations of ORS 658.417(3) and are jointly and severally liable for the penalties associated with them.

A & B also failed to enter written agreements with four workers on the April 1996 private reforestation contract, as required by ORS 658.440(1)(g). Two of those workers (Bernie Bliss and Oren Fackrell) signed *no* written agreement. The two other workers (Shawn Nash and Jon Powell) signed written agreements with MSC Inc., not with A & B, which was their employer. Sulffridge is equally responsible for these four violations of ORS 658.440(1)(g), and is jointly and severally liable for the associated penalties.[12]

Violations Committed by MSC Inc. and Sulffridge

MSC Inc. paid the workers on the unidentified October 1996 reforesta-

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[12]Even if the agreements with Nash and Powell "counted" towards A & B's compliance with ORS 658.440(1)(g), the Forum would find that A & B committed a total of four violations of that statute. Nash's and Powell's agreements did not state the different wages they would receive for performing different types of work. Nor did the agreements state the names and addresses of the owners of all operations where the workers would be working. By omitting these required elements from the agreements with Nash and Powell, A & B failed to "execute a written agreement with the * * * workers *as required by ORS 658.440(1)(g)*." Exhibit X-24 at 4 (emphasis added); *see* ORS 658.440(1)(f), (g); OAR 839-015-0360.

tion contract, BLM Contract No. P7-0514, Chaney Creek, and USFS Rogue River. Consequently, MSC Inc. was required to provide BOLI with CPRs for those contracts within 35 days of the dates on which work on the contracts was first performed. ORS 658.417(3); OAR 839-015-0300. MSC Inc. did not comply with that requirement. With regard to the October 1996 contract, MSC Inc. did not provide CPRs until May 1997. The Chaney Creek contract was performed in January and February 1997, but MSC Inc. did not provide CPRs for the contract until June of that year. BLM Contract No. P7-0514 was performed in February 1997, but MSC Inc. provided no CPRs until December 1997. Finally, the Rogue River contract was performed in March 1997, but MSC Inc. did not submit any CPRs until June. In sum, MSC Inc. committed four violations of ORS 658.417(3); as majority shareholder of MSC Inc., Sulffridge is equally responsible for those violations and is jointly and severally liable for the penalties associated with them.

MSC Inc. also repeatedly violated the statute requiring it to enter written work agreements with employees. MSC Inc. failed to enter any written agreement with one employee, and its agreements with fourteen other employees did not include all the required elements. First, the agreements did not state the different rates at which workers would be paid for performing different types of work. Second, the agreements did not state the names and addresses of the owners of all operations where the workers would be working.

Respondents contend that the written agreements substantially complied with ORS 658.440(1)(g) because the workers were verbally informed of worksite locations, and so the omission of that information from the written agreements was not significant. Respondents' argument overlooks the significance of the statutory requirement, which is to inform workers of the *identities* of the landowners for whose benefit they will labor. *See In the Matter of Washburn Reforestation*, 17 BOLI 212, 223-24. Reforestation workers may choose not to perform work for certain landowners, and the statute is designed to provide workers with a method by which they may enforce their right not to do so. A & B did not substantially comply with the statutory requirements merely by informing employees verbally of various worksite locations.

Moreover, Respondents' argument does not account for the fact that the written agreements did not state the different rates at which workers would be paid for different types of work. The fact that A & B gave workers that information verbally does not lessen the magnitude of the violation:

> "Subsection (g) [of ORS 658.440(1)] does more than ensure that workers are provided with information -- it requires the farm/forest labor contractor to enter legally enforceable agreements with them. By executing written agreements with their workers, farm/forest labor contractors also provide themselves with a means of defending against false wage claims. *Cf. In the Matter of Clara Perez*, 11 BOLI 181 (1993) (`One purpose of the WH-153 form is to eliminate any confusion or misunderstandings about the agreed pay rate')."

Washburn Reforestation, 17 BOLI at 222.[13] In short, MSC Inc. committed a total of fifteen violations of ORS 658.440(1)(g). Sulffridge is equally responsible for those violations, and is jointly and severally liable for the penalties associated with them.

Civil Penalty

In determining the appropriate amount of a civil penalty, this Forum may consider the seriousness and magnitude of the violation. In this case, the scope of the violations is staggering. Respondents operated for years without providing their employees with adequate written agreements. After repeated warnings from the Agency about the need to submit timely CPRs, Respondents failed to do so. Respondents obviously did not take all necessary measures to prevent violations; that, too, aggravates the seriousness of the offense. In addition, the Forum has found that Respondents knew or should have known of the violations, in part because of the warnings they received and in part because Sulffridge had been licensed as a farm/forest labor contractor for many years. *See* OAR 839-015-0510(1)(d). There is one possible mitigating factor -- the Agency did not prove that any worker suffered a wage loss as a result of the violations. Given the magnitude of the violations, however, the Forum still concludes that the maximum penalty allowed by law would be appropriate for each and every violation charged. The Forum hereby orders Respondents to pay the following penalties, which are identical to the penalties the Agency sought for the violations that it proved:

<u>Penalties for which A & B and Sulffridge are jointly and severally liable</u>

a) For two violations of ORS 658.410(1) and 658.417(1), operating as a farm/forest labor contractor without a proper license or indorsement: $2,000.00 per violation for a total of $4,000.00.

b) For two violations of ORS 658.417(3), failure to provide timely certified payroll records: $2,000.00 per violation for a total of $4,000.00.

c) For four violations of ORS 658.440(g), failure to enter written agreements with workers as required by statute: $1,000.00 per violation for a total of $4,000.00.

<u>Penalties for which MSC Inc. and Sulffridge are jointly and severally liable</u>

a) For four violations of ORS 658.417(3), failure to provide timely certified payroll records: $2,000.00 per violation for a total of $8,000.00.

b) For one violation of ORS 658.440(g), failure to enter any written agreement with a worker: $1000.00.

c) For fourteen violations of ORS 658.440(g), failure to enter written agreements with workers containing all the required elements: $250.00 per violation for a total of $3,500.00

Exceptions

In each of their exceptions, Respondents challenge the magnitude

[13] Even without this additional deficiency, however, the Forum would find violations of ORS 658.440(1)(g) just for the failure to include the identity of landowners in the written agreements, and would impose the same penalty.

of the proposed penalties, asserting that they should be reduced because Respondents' workers did not lose wages and because Respondent Sulffridge has not had repeated violations during the last two years. The preceding section of this Order addresses both the mitigating and aggravating factors in this case, and adequately explains why a nominal penalty would not be appropriate.

In their first exception, Respondents also argue that because A & B never contracted a farm/forest labor job, and because Sulffridge was licensed for MSC Inc., A & B should not be penalized for acting as a farm labor contractor without a license. This argument misses the point -- because A & B employed forestation/reforestation workers to perform labor for MSC Inc., it was required to be licensed as a farm labor contractor. It simply is irrelevant that MSC Inc. was licensed. Because A & B and MSC Inc. were two different legal entities, each of which performed some activities that qualified it as a farm labor contractor, each was required to be licensed. The exception is denied. Respondents' fourth exception presents a similar argument and is denied for the same reasons.

In their second exception, Respondents argue that the proposed order penalizes both A & B and MSC Inc. for failing to provide CPRs on "Forest Service Rogue River contract #53-04N7-5-26." That is not correct. A & B is being penalized for failing to provide a timely CPR for USFS Contract No. 53-04-N7-5-26, which involved work in the Rogue River National Forest in October 1995. *See* Factual Findings 10-13, Ultimate Factual Finding 6(c). MSC Inc., on the other hand, is being penalized for failing to provide a timely CPR for a USFS contract involving work near the Rogue River that was performed in March 1997. *See* Factual Findings 40-43, Ultimate Factual Finding 7(a). The exception is denied.

Respondents' third exception essentially challenges the Commissioner's authority to impose penalties where workers are provided with written contracts, but those contracts do not contain all of the elements required by ORS 658.440 and are entered into by a legal entity (here, MSC Inc.) different from the entity that actually employed the workers (A & B). The exception is denied for the reasons stated in the third paragraph of the Opinion section of this Order.

In their sixth exception, Respondents claim that their written agreements with workers properly identified the "Owner of the Operation" as Sulffridge, because he owned MSC Inc. and A & B. This argument fails to recognize that ORS 658.440(1) requires that workers be told who owns the land on which they perform labor, not merely who owns the company that employs or supplies them. The exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453 and as payment of the civil penalty for their violations of ORS 658.410(1), ORS 658.417(1), ORS 658.417(3), and ORS 658.440(1)(g), the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Mike Sulffridge and A & B Cutters Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162,

a certified check payable to the Bureau of Labor and Industries in the amount of TWELVE THOUSAND DOLLARS ($12,000.00), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Mike Sulffridge and A & B Cutters Inc. comply with the Final Order.

Furthermore, as authorized by ORS 658.453 and as payment of the civil penalty for their violations of ORS 658.417(3) and ORS 658.440(1)(g), the Commissioner of the Bureau of Labor and Industries orders Respondents **Mike Sulffridge and Mike Sulffridge Contracting Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in the amount of TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500.00), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Mike Sulffridge and Mike Sulffridge Contracting Inc. comply with the Final Order.

In the Matter of
SEARS, ROEBUCK AND COMPANY

Case Number 41-97
Final Order of Commissioner
Jack Roberts
Issued February 19, 1999.

SYNOPSIS

The forum found that Complainant was harassed and discriminated against in the terms and conditions of his employment and with respect to tenure with Respondent based on his invoking and utilizing the workers' compensation procedures in connection with a compensable injury. The forum found that Complainant was barred from employment with Respondent based on Respondent's perception that Complainant was disabled and that the harassment and unlawful failure to continue Complainant's employment resulted in emotional distress and wage loss. The forum found further that Respondent unlawfully required Complainant to pay for a medical evaluation as a condition of continued employment. ORS 659.330, 659.410, 659.425, 659.060(3).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on May 13 and 14, 1997, in hearings conference room 1004 of the State Office Building, 800 NE

Oregon Street, Portland, Oregon. The Civil Rights Division (CRD) of the Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Sears, Roebuck and Company (Respondent), a corporation, was represented by M. Margaret Banas, Attorney at Law, San Francisco, California, and David J. Buono, Attorney at Law, Portland. Lisa Jerkins, Human Resources Manager for Respondent, was present throughout the hearing. Layne C. Woods (Complainant) was present throughout the hearing and not represented by counsel.

The Agency called as witnesses, in addition to Complainant, Respondent's employees Frank Fontana, Mohammad Ghnaim, Jack D. Sweek, and Steve Trafton (by telephone), and Respondent's former employees Michael Knight, Duane R. Martin, and Christopher Wendt.

Respondent called as witnesses Respondent's employees Gary Bettendorf, Ronald Brown (by telephone), Rainy Fischer, Mohammad Ghnaim, and Lisa Jerkins.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-17, Agency Exhibits A-1 (R-12) through A-3, A-6 (R-1), A-8, A-11, A-12, A-15, A-16 (R-18), A-17 through A-23, A-25 through A-33, and A-36, Respondent's Exhibits R-2 through R-7 (A-10), R-8 (A-29), R-9, R-13 through R-16, R-19 through R-21, and Joint Exhibit J-1, which was a combination of A-4 and R-11.

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

FINDINGS OF FACT - PROCEDURAL

1) On December 12, 1995, Complainant filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondent. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint

2) Thereafter, the Agency prepared for service on Respondent Specific Charges alleging that Respondent employed Complainant in 1995 and discriminated against him by subjecting him to a course of conduct by his supervisors designed to harass, embarrass, humiliate and intimidate him which conduct was offensive and unwelcome, creating a hostile, intimidating, and offensive work environment because he invoked and utilized the workers' compensation statutes, all in violation of ORS 659.410; the Agency alleged that Respondent treated him differently because he invoked and utilized the workers' compensation statutes, all in violation of ORS 659.410; the Agency alleged that Complainant was placed on medical leave and urged to seek vocational rehabilitation, effectively terminating his employment, because he invoked and utilized the workers' compensation statutes and that his tenure was thus ended in violation of ORS 659.410; the Agency alleged that Complainant was barred from employment because of respondent's erroneous perception and

treatment of Complainant as having a substantially limiting physical impairment in violation of ORS 659.425(1)(c); and the Agency alleged that due to a 2 day absence from work in March 1995 he was required to pay for a medical examination as a condition of returning to work, a violation of ORS 659.330.

3) On February 11, 1997, with the Specific Charges, the Agency served on Respondent's registered agent the following: a) Notice of Hearing setting forth the time and place of hearing; b) a Notice of Contested Case Rights and Procedures (Notice of Rights) containing the information required by ORS 183.413; c) a complete copy of OAR 839-050-0000, *et seq*., regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings. Both the Notice of Rights and the contested case rules at OAR 839-050-0130(1) provide that an answer must be filed within 20 days of receipt of the Specific Charges.

4) On March 3, 1997, a document denominated "Answer of Respondent" was filed by M. Margaret Banas, a California attorney. On March 24, 1997, the Agency filed a motion for an order of default based on Respondent's failure to timely file an answer through Oregon counsel as required by statute and rule. On March 28, 1997, Respondent through David J. Buono, Attorney at Law, Portland, filed by fax a motion for association of Banas as attorney for Respondent. On March 31, 1997, through Buono Respondent filed its opposition to the Agency's motion, arguing that Respondent had complied with 839-050-130(1) by filing a written answer and that the OAR 839-050-0110(1) requirement that a corporation be represented by counsel applied only to the hearing and not to preliminary matters.

5) On April 11, 1997, the ALJ issued an order which acknowledged the appearance of Buono as counsel for Respondent and the association of out of state counsel Banas effective March 28, 1997. The order found in accordance with precedent that the forum had consistently found default where a respondent's answer was defective or untimely, that the requirement for a corporation to be represented by Oregon counsel applied at all stages of the hearings process, and that Respondent's answer was defective. The Agency's motion for default was granted and Respondent was accorded ten days to obtain relief from default for good cause shown.

6) On April 18, 1997, Respondent through counsel filed a request for relief from default. On April 25, citing earlier precedent of relief granted where the forum withdrew a notice of default when an answer had been tendered prior to the Agency's default motion (*In the Matter of Fred Meyer, Inc.,* 12 BOLI 47 (1993)), the ALJ exercised his discretion, withdrawing the default order and accepting Respondent's answer.

7) On May 2, 1997, the ALJ issued an order requiring that each participant file a case summary in accordance with OAR 839-050-0200 and 839-050-0310.

8) On May 2, 1997, Respondent filed a motion for summary judgment on portions of the Agency's Specific

Charges based on purported issue preclusion in the Administrative Determination resulting from the investigation of Complainant's administrative complaint of unlawful employment practices. Respondent alleged that the investigative findings did not find different treatment violating ORS 659.410, did not find a termination violating ORS 659.410, and did not find a violation of ORS 659.425, and that the Agency was precluded from alleging those violations in the Specific Charges. On May 6, the Agency filed a response to the summary judgment motion arguing that the Administrative Determination was not a final order and that the Specific Charges were reasonably related to the initial allegations of the complaint

9) On May 7, 1997, the ALJ ruled, in part, as follows:

> "Issue preclusion, at times known as collateral estoppel, is based on the desire for judicial economy and is intended to obviate the relitigation of issues already litigated. The issues which Respondent herein seeks to preclude have not in any sense been previously litigated. They have been the subject of administrative inquiry and report, but not the subject of any final adjudication. Contrast *In the Matter of Efrain Corona,* 11 BOLI 44 (1992), *aff'd without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1344 (1993). In that case, the Commissioner found that Respondent had violated the Farm Labor Contractor Act by failing to make workers' compensation premium payments when due, and used the previous order of the state Department of Insurance and Finance (DIF) as the basis of that finding, stating:
>
> > "'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. * * * 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 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 * * *.' *Id*, at 57.
>
> "Clearly, Corona recognizes that an issue is precluded only when it has been previously litigated.
>
> "Complainant's initial complaint and amended complaint allege 'an on the job injury (neck/back)' and 'I had duties removed that I was

physically able to perform,' as well as 'perceived disability (vision impairment)' and that 'this comment was a reference to my visual impairment.' I find that the allegation in regard to the after injury lifting requirement that 'Respondent's erroneous perception and treatment of Complainant as having a substantially limiting physical impairment' states a violation of ORS 659.425(1)(c) which could relate back to the removal of duties alleged in the complaints.

"The legislature did not intend that the investigative findings of the Agency have a preclusive effect. The statutory scheme outlined in ORS 659.095 provides that a complainant have a private right of action under ORS 659.121, *whether or not* the administrative determination described in ORS 659.095(2) finds an unlawful employment practice. If the Agency finds substantial evidence supporting the complaint, a complainant may have a hearing on the merits in this forum. ORS 659.050, 659.060. If the Agency dismisses a complaint as unsupported, a complainant retains the right to a judicial determination. ORS 659.095. The rules of the Agency cited by Respondent are not to the contrary.

"Respondent's motion for summary judgment is **denied.**" (emphasis in original)

That ruling is hereby confirmed.

10) On May 8, each participant timely filed a case summary. On May 9, Respondent notified the ALJ of a telephone witness and on May 12 the Agency filed a supplement to its case summary.

11) At the commencement of the hearing, Respondent's counsel acknowledged that Respondent had received a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413 and had no questions about it.

12) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing

13) Subsequent to the hearing, on May 16, 1997, Respondents by fax filed exceptions to the ALJ's order denying summary judgment. Those exceptions reiterate Respondent's arguments that the Agency may not proceed to hearing on those portions of the administrative complaint not supported by its Administrative Determination, and that in particular, the disability portion of the Specific Charges was not "like or reasonably related" to the disability allegations of the administrative complaint. A discussion of these arguments is contained in the opinion portion below.

14) On December 4, 1998, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) During times material herein, Respondent was a foreign corporation operating retail stores in Oregon which utilized the personal service of six or more employees reserving to it-

self the right to control the means by which such service was performed.

2) Complainant was employed by Respondent from June 1993 through late April 1995 as an automobile service support representative (SSR) at Respondent's Clackamas Town Center Automotive Center (Clackamas Auto Center) in Portland.

3) Complainant's immediate supervisors were Clackamas Auto Center manager Gary Bettendorf and Assistant Manager Ron Brown. Doug Bryant, Auto Center Technician Coordinator, could also assign the priority of Complainant's duties in the absence of Bettendorf and Brown and Complainant reported to Bryant in their absence.

4) Gary Bettendorf was the hardware manager at Respondent's Clackamas Town Center store at the time of the hearing. He had been auto center manager there from July 1993 through April 1995 and supervised Complainant, with whom he had ongoing interactions several times a day during that time.

5) Ronald Brown worked at Respondent's Santa Monica, California store at the time of the hearing. He had been assistant auto center manager at Respondent's Clackamas Town Center store from September 1993 through April 1996 and was one of Complainant's supervisors. He had contact with Complainant several times a day during that time.

6) Complainant's duties were in automotive parts, specifically tires and tire-related items. When first hired, he rearranged the new tire storage in the tire room and around the sales area according to tire brand, tire size, quality, and sales demand. He obtained and installed new racks for this purpose. He was responsible for tracking the inventory of each brand and size on hand and updating the computer record of tires on hand. He received tire shipments as they arrived, helping truck drivers unload, then sorted and put away in storage areas the tires received, either stacked on the floor or shelved in the stockroom. He maintained the organization and cleanliness of the tire stockroom and display areas, maintained and restocked tire displays on the sales room floor, and pulled from stock tires and other parts as requested and delivered them to the backshop for installation. The weight of individual passenger car tires averaged up to 40 or 45 pounds. A few truck or specialty tires weighed as much as 60 or 70 pounds. He processed outside or local purchases of tires and other parts not in stock or from other Sears stores; this sometimes included going after parts at outside locations ("parts runs"), as requested by Bettendorf, Brown or Bryant. Although primarily in charge of tires ("Division 95"), he also assisted in batteries and other non-tire items ("Division 28"). Although classified as part-time, he worked about 40 hours per week

7) In connection with tire inventory, Complainant counted each brand and size of tire on hand then entered the proper count into the computer. When tires were sold, the sale was recorded by the computer if the sales entry was properly noted. Each shipment of tires arriving was tallied and the result entered on the computer. Certain manufacturers,

such as Michelin, required that Respondent inventory their stock on hand on a regular basis. Complainant also kept track of "junk tires," i.e., trade-in tires, which he shipped out at least twice a month. There were as many as 60 lines of tires in addition to the trade-in tires. The time expended by Complainant in counting any line of tires in stock varied markedly with the total tires carried in that line as well as their location. A line might take from ten minutes to 45 minutes or more to count, and twice as long, or more, to enter into the computer. As a result of all of this, Complainant spent as much as 70% of his time doing paper work, maintaining records of receipt and distribution of tire stock. He spent this time at his desk in the parts room where his computer terminal was located, at the various locations of the tire stock, or at the loading dock unloading and tallying the incoming stock. In addition, he averaged at least one to two hours per day on parts runs. Before mid-September 1994, as assigned, he had done a computerized drawing of the store parking area (for which he was paid), of his tire storage plan, and had generated a letter to customers regarding recall of a line of tires.

8) At times material herein, Jack Sweek was employed as an automobile service support representative at Respondent's Clackamas Auto Center. In 1994 and 1995, his duties were similar to those of Complainant except that his responsibility was non-tire related merchandise. He was responsible for tracking the inventory of batteries, shocks, struts, and other division 28 merchandise on hand and updating the computer record. He received and helped unload merchandise shipments as they arrived, sorted it and put it away. He maintained the organization and cleanliness of the salesroom and parts storage and display areas, maintained, restocked, and set up parts displays on the sales room floor, and pulled parts from stock as requested and delivered them to the backshop for installation. He processed returned goods inventories and outside or local purchases of parts not in stock or from other Sears stores; this sometimes included parts runs. Although primarily in charge of batteries and other non-tire items, Sweek also assisted Complainant in tires. He was also part-time but worked close to 40 hours per week.

9) In May 1994 Respondent hired Brian Gornick to do automobile service support work at the Clackamas Auto Center. Gornick helped both Complainant and Sweek in unloading, stocking and pulling merchandise, but the majority of his work was with Complainant in tires. Gornick then did most of the unloading and putting tires away while Complainant tallied the tires received and entered the information into the computer. Gornick did not do paper work and did not go after parts.

10) Initially, tire shipments were received several times a week in quantities of from 50 to 300 tires in each load. By late summer of 1994, two shipments of 300 tires each were received each week. By that time, most of the physical unloading of the new tires was done by Gornick and placing them in storage was done by Gornick and by evening and weekend employees.

11) Duane R. Martin worked in Respondent's Clackamas Auto Center from March 1994 to June 1996 as an installer of tires, shocks, and batteries. He is Complainant's half brother. He and other installers were asked to help unload tires. He saw Knight, Wendt, Phillips and Sweek help with tires.

12) Steven R. Trafton began working for Respondent in 1987 and in 1994 and 1995 worked as a service support representative in Respondent's Clackamas Auto Center. He worked 4 hours a night two nights a week and occasionally worked on Saturday. His duties were to put away stock and do cleanup. He helped in the shop, moved cars, moved tires and parts, stocked batteries (Sweek's division 28) and stocked tires (Complainant's division 95). He did paper work in connection with parts and tire inventory and did some computer input. Bettendorf and Brown were his supervisors, but they were not always there at night. Complainant often left a written list of work to be done, usually putting tires away. Paul Moonan (phonetic) also worked one to two days a week at times material; his duties were similar to those of Trafton.

13) Frank Fontana began working for Respondent in 1973 and in 1994 and 1995 worked as a sales representative in Respondent's Clackamas Auto Center. While working as an auto mechanic for Respondent in 1990 or 1991, he sustained a disabling off the job injury and needed a medical release to return to work.

14) When Complainant began working for Respondent, he and other auto center employees made parts runs, using the employee's own vehicle. Respondent required that the employee have an Oregon driver's license and liability insurance. On September 16, 1994, while on a parts run in his own car, Complainant was injured in an auto accident.

15) Neither Bettendorf nor Brown were available when Complainant returned to the shop and reported the accident. He reported it to Bryant, who urged him to make a claim against the other driver rather than filing for workers compensation. Bryant said that a workers' compensation claim would cause the auto center crew to lose their accident free incentive program bonus. Complainant also reported the accident to Respondent's loss prevention department where he was asked to file any claim for injury against the other driver. It was not until Complainant sought medical attention due to pain the day after the accident that he was told by the hospital staff that his injury was covered by worker's compensation.

16) Complainant had September 17 and 18, 1994, as his regular days off. He tried to work on September 19 but left early due to pain. The following day, Dr. Randle Smith diagnosed an acute neck and back strain and took Complainant off work.

17) On or about September 21, when Complainant turned in workers' compensation accident reports and told Bettendorf he had been taken off work, Bettendorf mentioned that it would affect "our accident free incentive bonus." Bettendorf was speaking of Respondent's program of rewarding the workers in a department or shop with a bonus if the work unit was accident free for a three month period

of time. The bonus was usually spent on a party for the unit.

18) As Complainant was leaving after informing Bettendorf of his injury absence, he told Bryant that he was going off on compensation. Bryant said "thanks for blowing our bonus." Complainant told both Bettendorf and Bryant that the injury was not his fault. He knew that the accident was not his fault but the remarks about the bonus made him feel ashamed that he got injured, as if he had intentionally deprived the other employees of a reward.

19) Complainant remained on time loss through November 6, 1994. During that time, Assistant Manager Brown repeatedly asked Martin "Where is your lazy brother; is he ever going to return to work?" On or about October 27, Bryant asked Martin "Where is your lazy brother, how long is he going to milk the system?" Martin reported these remarks to Complainant.

20) Complainant returned to limited duty work on November 7, 1994, with an overall lifting restriction of 25 pounds. He was limited by his doctor to four hours work per day. This was referred to by Complainant and co-workers as "light duty."[1]

21) On November 7, Brown greeted Complainant with "Hey, lazy, so you finally decided to come back to work." When Complainant informed him that the work release was for light duty, Brown remarked to the effect "what good are you here if you can't do the job."

22) During the time he worked subject to the light duty release, Complainant did not unload tires or put them away. He opened the truck, tallied the tires received and entered the information into the computer. Other employees assisted the driver in unloading. The tires were put away by other SSR's on the regular shift or by evening and weekend employees.

23) During the time he worked subject to the light duty release, Complainant did paper work involving inventory, local purchases and interstore transfers. Bettendorf assigned these duties in accordance with his understanding of Complainant's light duty restrictions. Bettendorf received the information regarding Complainant's need for light duty either from Respondent's loss prevention section or from Complainant himself.

24) On or about December 13, 1994, Bryant told Complainant that a delivery truck of tires had arrived. Complainant told Bryant that his medical restrictions would not allow him to unload the tires. Bryant said to Complainant "you faker, I am going to talk to Ron Brown." Complainant told the truck driver that someone would help him unload. When Ron Brown came out and told Complainant to unload the tires, Complainant explained to him that he was unable to do so because of medical restrictions. Brown appeared angry as he yelled out for others to unload tires because "old lazy Layne is slacking off again." Brown then said to Complainant "Why don't you just go home so we can get someone in here that wants to work." All of this was said in front of co-

[1]No copy of the written interim "light duty" medical release appears in this record. The limitations are taken from the testimony.

employees and the truck driver and Complainant was "totally embarrassed."

25) Christopher Wendt worked at Respondent's Clackamas auto center from July 1994 to April 1995, first as a tire installer, then as a battery installer. He overheard comments between Brown and Bryant, while Complainant was off on time loss, concerning Complainant "milking the system" and playing at being hurt. After Complainant returned to light duty in November 1994, Brown called Complainant "lazy Layne" because he didn't do any lifting in unloading trucks and moving tires in the tire room. These remarks were usually made about rather than to Complainant, but some were made in his presence. While Complainant was on light duty, Wendt was asked to help unload trucks. He was not asked to unload before Complainant was injured. He did not overhear Bettendorf make any negative comment about Complainant. Brown's remarks about Complainant sounded joking but sarcastic and suggested that Complainant was faking.

26) Michael Knight worked at Respondent's Clackamas auto center from November 1994 to April 1995 as a tire installer. Complainant returned to work from an injury after Knight started. Knight overheard comments by Brown and Bryant concerning Complainant being lazy, a slacker who was "milking the system." These remarks were usually made about rather than to Complainant, but some were made in his presence and were overheard by other employees and by delivery drivers. Knight was asked to help unload trucks. He did not overhear Bettendorf make any negative comment about Complainant.

27) On December 13, Complainant reported to Bettendorf that Doug Bryant and Ron Brown were making remarks about his restrictions due to the injury and light duty. Bettendorf said he would take care of it. The remarks slowed but did not stop entirely.

28) Bettendorf spoke to Bryant after Complainant had complained to him about Bryant's remarks regarding Complainant's physical condition. He told Bryant to be sensitive to Complainant's situation. Bettendorf did not recall any similar complaint by Complainant regarding Ron Brown, so he did not recall any discussion with Brown about Brown's alleged remarks. Bettendorf did not remember whether Complainant later complained again about Bryant.

29) Complainant was determined to be medically stationary on February 17, 1995. Dr. Steven S. Anderson, M.D., his attending physician, wrote a brief note on a prescription pad dated "2/17":

> "Return to regular hours[.] May lift up to 50 # occasionally[,] 25 # frequently[.] Avoid frequent above shoulder lifting."

Respondent was so advised by letter from Kemper National Services, Inc., Respondent's insurer, on February 20, 1995, together with a form containing the following:

> "Providence Worker Rehabilitation Services
>
> 5420 N.E. Glisan
>
> Portland, Oregon 97213
>
> (503) 238-4033

"PHYSICAL CAPACITY SUMMARY

"WORKER: LAYNE C. WOODS

"PHYSICIAN: Steven Anderson, M.D.

"INSURER/CLAIM No.: Kemper/787CU047093

"DIAGNOSIS: Thoracic Strain

	At one time	Total hours in 8-hour day
Sit	2 hours	8 hours
Stand Stationary	2 hours	8 hours
Stand With Movement	2 hours	8 hours
Walk	2 hours	8 hours

Lift	Maximum	Occasional	Frequent
Floor to Waist	45 lbs.	45 lbs.	20 lbs.
Waist to Shoulder	35 lbs.	35 lbs.	20 lbs.
Shoulder to Reach	25 lbs.	25 lbs.	15 lbs.
CARRY 25 feet	45 lbs.	45 lbs.	25 lbs.

Climb stair			X
Climb ladder		X	

Endurance	Part-Time
X	Full Time

COMMENTS: Capable of full-time work within the above-listed capacities

Positional	Never	Minimal (1-10%)	Occasional (11-33%)	Frequent (34-66%)	Continuous (67%+)
Bend			X		
Kneel				X	
Squat				X	
Crawl			X		
Reach Fwd				X	
Reach above shoulder			X-----	------ X	
Handling					X

"Therapist's Signature: Larry Andes, P.T., #0613 Date February 3, 1995"

30) In a narrative of his closing examination conducted on February 17, Dr. Anderson noted "In no apparent distress. Posture normal," and recited his impression as

> "Status post cervical thoracic strain, medically stationary with very mildly impaired thoracic left rotation (26º compared to normal of 30º) and no other range of motion impairment in the cervical or thoracic spine. No atrophy, no weakness, no sensory loss."

Dr. Anderson commented further:

> "RESIDUAL FUNCTIONAL CAPACITY: He performed in the light medium range at the time of discharge from Providence Worker Rehabilitation Services. I discussed these with Larry Andes, the treating therapist, who felt that these might be a somewhat conservative estimate of his true capacities. I will therefore estimate that he may lift up to 50 lbs. occasionally, up to 25 lbs. frequently, and that he should avoid frequent over-the-shoulder lifting. He may work regular hours with no other limitations other than those described above."

31) In late 1994, Respondent purchased a van for use by store departments for parts runs and similar errands. Each department designated an employee as van driver and that employee received special training and certification as van driver. Only the designated driver made parts runs in the van. Sweek received the training and was designated as van driver for the Clackamas Auto Center. If Sweek was unavailable, Auto Center parts runs were made by other employees, using their own vehicles as before.

32) Following his return to regular duty, Complainant was sent on a parts run on a Saturday by Bryant. Brown and Bettendorf were not present and Complainant used the company van. He was told by Bettendorf on the following work day that he was not to use the van. Brown remarked that Complainant wasn't to drive because he'd be off for a year if he had another wreck.

33) Because of Complainant's being in charge of division 95, Bettendorf gave Complainant permission to put the title "supervisor" on his name tag on his company mailbox area used for internal mail. Bryant appeared to resent this and in July, 1994 admitted that he defaced or removed the "supervisor" title. On January 26, 1995, following Complainant's injury and return to light duty, Bryant again admitted tampering with Complainant's company mailbox. He told Complainant that Complainant was not a supervisor. Complainant again asked Bryant to leave his company mailbox alone.

34) On February 21, 1995, Complainant again noted that the mailbox had been tampered with and Bryant admitted responsibility when confronted. Complainant told Bryant he would report his harassment to Bettendorf. On February 24, Bryant accused Complainant of faking. Bryant stated that a relative of his who was a doctor had said that Complainant's pain should be gone and that he must be faking. Bryant told Complainant to quit milking the system and start doing his job. Complainant denied faking or milking the system. On or about March 1, he again re-

ported to Bettendorf that he was still being harassed by Bryant and Brown. Bettendorf said he would take care of it.

35) In a "Notice of Closure" mailed to Complainant on March 3, 1995, Respondent's insurer found permanent partial disability from Complainant's September 16, 1994 injury as "Unscheduled disability of 14% equal to 44.8 degrees for injury to the neck, body part code 200. The value of this award is $5,262.66." The insurer had previously paid $2,266.62 in time loss and $4,039.23 in medical compensation.

36) Complainant believed that he could no longer do the lifting portions of his SSR position. He told both Bettendorf and Brown that he was permanently partially disabled. He asked them if they could have others do the lifting portion while he did the other aspects. They said no, that coworkers had taken extra strain since November (i.e., while Complainant had been on light duty).

37) Bettendorf learned of Complainant's permanent partial disability from Complainant. Bettendorf did not recall whether he saw the return to work release; he did know that it was received by both loss prevention and human resources. Bettendorf believed that Complainant could not do the assigned duties of his regular position. Bettendorf went to store manager Frank Bonser for advice.

38) On or about March 29, 1995, Complainant was ill; he called in to Respondent to report he was sick. He called in sick again on March 30. On Friday, March 31, Complainant returned to work. On Saturday, April 1, he again became ill and called to report he would not be in. Later on April 1, Bettendorf telephoned Complainant and told him he would need a doctor's excuse to come back to work. When Complainant asked why, Bettendorf told him that if he was ill three days in a row, he had to bring a doctor's excuse so he could return to work. When Complainant pointed out he had not missed three days in a row, Bettendorf said it was any three scheduled days in a work week. Complainant never saw such a policy in writing. He went to his doctor and obtained the needed excuse. He received a bill for $40.00 from his doctor's office which he paid.

39) Bettendorf's practice was to require a doctor's note from an employee if the employee was absent due to illness "more than 3 days," or if the employee was "chronically sick, continued to call in sick." He had no recall of specific circumstance regarding asking Complainant for such a note; he did recall generally that he had requested such a note of other employees when they missed over three days.

40) On April 8, 1995, Complainant was 66 minutes late in arriving at work. He telephoned before his reporting time to report he would be late, and in the absence of Brown or Bettendorf, spoke with co-employee Lisa Conner, who initially forgot to tell Brown or Bettendorf. Brown wrote up the incident on a "Memorandum of Deficiency Interview" form ("Deficiency Interview"), stating that Complainant had not talked to a manager. Complainant felt the write-up was unfair because he had called and had followed the only procedure of which he was aware.

41) On April 18, 1995, Complainant was 40 minutes late in arriving at work. He telephoned before his reporting time, spoke with Bryant and asked for Brown. He was told that Brown was in a meeting, so Complainant reported to Bryant that he would be late. Brown wrote a Deficiency Interview on the incident; Bryant overheard the discussion and confirmed to Brown that Complainant had called. Complainant felt the write-up was unfair. He refused at first to sign the acknowledgment of the memo, and asked for a copy. On April 19, Brown told him he had to sign the Deficiency Interview in order to get a copy, but that it would appear in Complainant's personnel file regardless. Complainant signed the memo. When he was called to a meeting the next day, he believed he had made Brown angry by refusing to sign and that he would be terminated.

42) Between November 18, 1993 and August 17, 1994, at least three auto center sales or service consultant employees received Deficiency Interview write-ups for tardiness. Some were late by over two hours. Between September 1, 1994 and April 6, 1995 no Deficiency Interview write-ups for tardiness appear on this record. On April 6 and 15, sales employees Healy and Batcheller received Deficiency Interview write-ups for tardiness.

43) Bettendorf had discussed attendance with Complainant in 1994 on several occasions and may have joked with him about it. He never wrote Complainant up. He was made aware of Complainant's April absences by Ron Brown sometime after they occurred.

44) Complainant had no Deficiency Interview write-ups in his record from July 1993 until April 8, 1995. He was often late to work before his injury but always made up any time loss. Bettendorf treated it lightly, if at all, and joked about "late Layne." In December 1994, Bettendorf mentioned to Complainant that he was getting "carried away" with being late.

45) Complainant believed that before his injury he had a good relationship with Bettendorf which seemed to deteriorate when Complainant had to refuse to unload trucks while on light duty and neither Gornick or his replacement were available.

46) Lisa Jerkins began working for Respondent in 1981 in sales. She gained experience in sales supervision, merchandising, and as sales manager. From time to time, she had worked in payroll and done other clerical functions in personnel. On April 1, 1995, she became human resources manager at Respondent's Clackamas Town Center location. Previously, most personnel matters were handled by Respondent's Chicago or Tucker, Georgia, offices. Between March 1, 1995 and April 1, 1995, while she was transitioning from sales manager to human resources manager, Jerkins was made aware of Complainant's situation by store manager Frank Bonser, by Bettendorf, and by loss prevention manager Robert Snider. All were asking human resources for assistance on how to proceed because they saw Complainant as permanently disabled and unable to perform "essential functions" of his position as an automotive SSR.

47) At the time she became human resources manager, Jerkins had no experience or training in compliance with state or federal injured worker or disability law and regulations. She was unaware of the significance of Complainant being termed "medically stationary" or of the letter generated by Kemper Insurance stating in part:

> "We have been advised that Dr. S. Anderson M.D., attending physician has released Layne Woods to return to regular work. Attached is a copy of the worker's limitations. In accordance with ORS 656.340 and OAR 436- 120-020(4), American Manufacturers Mutual requests you determine whether or not suitable employment is available and if so that he be reinstated or re-employed. This is a demand for re-instatement or re-employment under the laws administered by the Oregon Bureau of Labor, ORS 659.420."

Jerkins had no experience or training in eligibility standards or requirements for vocational assistance of injured workers. She believed that the finding of permanent partial disability of 14% disqualified Complainant from his position, which Bettendorf and Brown said involved stocking work and loading and unloading merchandise. In actions regarding Complainant, she consulted store manager Frank Bonser and relied on the advice and instructions of District Human Resources Manager Mike Schwartz. Jerkins discussed available positions at the Clackamas store with Bettendorf, Brown, and Bonser. They did not identify any accommodation of Complainant's limitations in his then current position. She gathered information about Complainant from Bonser, Bettendorf, Brown and Snider and forwarded to Schwartz such information as he requested. Neither Jerkins nor any of the other managers involved sought any further clarification of the return to work note, the Notice of Closure, the physical capacity summary, or the physician's closing examination report. Brown, Bettendorf, and Jerkins did not explore accommodation of Complainant's condition in his SSR position; they did talk about available positions in the store.

48) Respondent's position description for "Automotive Service Support Representative" (SSR) listed several "essential functions" of the position. Complainant never provided cashiering support, responded to customer phone inquiries, or tested or installed non-transportation batteries, despite the listing of these duties as essential. Also included as "essential functions" was "Can perform any of the duties as outlined in the stock replenishment job description." Respondent's position description for "Automotive Replenishment Associate" listed many of the replenishment and stocking duties also performed by the SSR. Both job description listed receiving, shipping, stocking and replenishing as "essential functions", but did not outline any minimum physical capacity necessary to perform such functions. Neither indicated that continuous or heavy lifting was involved in or necessary to perform such functions. Complainant had not seen either job description while employed by Respondent.

49) Schwartz advised Jerkins that Complainant could not continue in his then current position and, since

there were no positions available in the store in the same or a comparable capacity, Complainant was to be placed on "illness leave" so that he could go through vocational rehabilitation.

50) On April 20, 1995, Complainant was called to a meeting in Bonser's office. Bettendorf, Jerkins, Brown and Complainant attended. Bonser left as they arrived. The purpose of the meeting was to inform Complainant of his employment status.

51) Jerkins recorded her recollection of the meeting in a memorandum which she drafted in January 1996 after learning that Complainant had filed a discrimination complaint. The memorandum stated:

> "Re: Layne Woods
>
> "In April of 1995 I had conversations with Kemper Insurance, our Worker's Comp carrier, to determine the status of Layne Woods. According to the physician's findings Layne had been determined to be permanently partially disabled and not able to lift. With the physical activities of his current job, he would not be able to return to the same position without causing further injury to himself. At that time there was (*sic*) no other comparable positions available in our Automotive Department that did not have those physical requirements. We made arrangements through Kemper for a Vocational Rehabilitation counselor to contact Layne and have him participate in vocational rehabilitation since we had nothing available for him. Layne was then placed on an illness Leave of Absence, which is his current employment status.
>
> "Gary Bettendorf, Ron Brown and myself (*sic*) sat down with Layne to discuss his situation. We explained to him that for his safety, based on the permanent partial disability this would not allow him to return to his current position because of possible exposure to further injury. At the time we did not have any other comparable positions available and the next step in the process was for him to be contacted be (*sic*) a vocational rehabilitation counselor and go from there. We repeatedly asked Layne if he had any questions regarding the process and made it perfectly clear he was not being terminated. I told Layne I was available anytime, as did Gary and Ron, to call if he had any questions or if we could be of any help. We told Layne he would be put on an Illness Leave of Absences (*sic*) during this process, maintaining his employment with Sears. We repeatedly asked Layne if he had any questions regarding the situation, and to my knowledge answered them to his satisfaction, again stating that if he had questions later we were available at anytime to try and answer them for him.
>
> "Lisa Jerkins Human Resources Manager"

52) At the April 20 meeting, Jerkins informed Complainant that Complainant had to be to be retrained because he was unable to perform all of his job functions, that he could not do the lifting functions of his job. He believed that Bettendorf's explana-

tion, at the meeting, of what would happen included the elimination of his position. His understanding at the time was that he was being laid off for vocational rehabilitation and that he would get retraining. Complainant believed he was told he could pursue his drafting training. He believed there were other jobs, such as cashier, available, but none were offered. He did not discuss the lifting aspect of the job. He was told to turn in his uniforms and go home. He did so, but remained uncertain and confused.

53) Beyond Jerkins' after-the-fact memo and oral testimony by Respondent's management employees to the effect that were no available jobs Complainant could do, nothing on this record either confirms or negates Respondent's efforts to identify other positions within its work force for which Complainant was qualified or which could accommodate the lifting limitations. Similarly, nothing on this record either confirms or negates any assessment of accommodation of those limitations in his SSR position.

54) Complainant continued to be confused about his status following his departure from Respondent's employ. He consulted an attorney who instructed him to call Respondent and verify his status. About two weeks after April 20, Complainant telephoned Jerkins who told him he was on a medical leave. He also reported that he had not yet been contacted about vocational rehabilitation. She said she would have loss prevention contact Kemper again.

55) Shortly after May 4, 1995, Complainant received a letter from Respondent's "Associate Service Center" in Tucker, Georgia, informing him of his rights under the federal Family and Medical Leave Act of 1993 (FMLA). Complainant took the May FMLA notice to Jerkins, who attempted to explain it. Because he had never requested leave of any kind, it only served to confuse him further[1]

56) Complainant was subsequently contacted by Lori Hansen, a vocational rehabilitation counselor. Hansen told Complainant that it would be difficult to place him in vocational rehabilitation because the employer was only obligated to bring the worker back to 80% of the worker's pre-injury wages. Complainant was making $6.06 per hour when he last worked in April, 1995.[2] Hansen told him that 80% of his regular wage was close to minimum wage and that there were many minimum wage jobs available. About two weeks after meeting with Hansen, Complainant received a letter stating he was ineligible for vocational rehabilitation services.

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[1]Throughout the proceeding and during his search for other employment after leaving Respondent, Complainant consistently referred to his status in testimony and documents as being on "medical leave." Just as consistently, Respondent's agents and counsel have referred to his status in testimony and documents as being on "illness leave."

[2]Complainant's actual earnings from mid-June, 1994, when his base rate was raised to $6.06, to September 19, 1994, when he was injured, were $6.70 per hour for an average of 40 hours per week, due to Respondent's incentive bonus plan, which factored departmental sales together with hours worked. The forum's calculations use the basic rate of $6.06.

57) In April 1995, Oregon statute provided that an injured worker was eligible for vocational rehabilitation services at the employer's expense if unable to return to the worker's previous employment or any other available employment because of a substantial handicap to employment characterized by the worker's lack of physical capacity, knowledge, skill or abilities to be employed in suitable employment, which in turn was partly defined as

> "Employment that produces a wage within 20 percent of that currently being paid for employment which was the worker's regular employment."

Anything over 80% of Complainant's prior wage would be "within 20%." In April 1995, Oregon statute provided that the minimum wage rate in Oregon was $4.75 per hour. [3]

58) Jerkins did not know at the time that Complainant had been denied vocational rehabilitation training. She had referred the matter to Respondent's loss prevention office and believed it was the responsibility of that office. She did not follow up with loss prevention or with Complainant.

59) Had Complainant remained employed with Respondent after April 25, 1995 and worked the number of hours per week he worked before his injury, he would have earned a minimum of $18,034.56 by September 25, 1996.

60) On or about June 2, 1995, Complainant filed for unemployment compensation. He outlined his injury history and stated

> "I was released for regular duties with restrictions. So I was unable to fulfill all of my job duties. So I was involuntarily layed (sic) off for Vocational Rehabilitation"

On June 14, 1995 Respondent's response to notice of filing of Complainant's claim for unemployment benefits was:

> "Claimant on a leave of absence due to disability/illness."

61) Beginning in May, 1995, using newspaper help wanted ads and Oregon State Employment Service referrals, Complainant, by his count, through telephone contact, resume or formal application inquired about between 50 and 100 jobs in the Portland area. During his search for alternative employment, Complainant reported to prospective employers his status with Respondent, with the result that prospective employers wanted clarification before proceeding further. The prospective employer would advise him to clear up his status with Respondent and return. Complainant did not know how to change his status with Respondent, short of quitting, which he did not want to do since he believed he had done nothing wrong and did not want to give up any right to employment or benefit he might still have.

62) In late March 1996, Complainant received a notice from Respondent's Georgia office that his leave of absence would expire on April 26, 1996. He telephoned Jerkins, who told him she would get that

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[3] ORS 658.340 (1993); ORS 653.025 (1993); Effective June 7, 1995, ORS 658.340 was extensively revised and provided that the wages referred to were weekly wages.

date extended, which she did. Complainant was capable of working and had called Jerkins to find out whether, given Respondent's decision to terminate his leave, it would re-employ him.

63) In early September 1996 Complainant received a notice from Respondent's Georgia office that his illness leave of absence would expire on September 26, 1996. A short time later, he received a form headed "Application for Complete Withdrawal -- Employment Terminated" regarding Respondent's Savings and Profit Sharing Fund. It showed a date of employment termination for Complainant of September 26, 1996.

64) When Complainant first reported that he had gotten medical attention through worker's compensation and Bettendorf mentioned that would affect the accident free incentive bonus, Complainant felt anger because the accident was not his fault and he felt as if he had "aced" his co-workers out of something and thus felt ashamed that he'd been injured. He felt badly for the same reasons when Bryant learned he had gone on compensation and accused him of "blowing" the incentive bonus. When Complainant returned to light duty with restrictions, he was hurt by Brown's remark about "you can't do the job." He wanted to take it as a joke, but had already heard of the remarks that had been made in his absence. He was embarrassed in front of others by being referred to as "Lazy Layne" and was insulted and angered by accusations of "milking the system" and being a "faker." The meeting of April 20 totally puzzled Complainant. He hadn't asked for any sort of leave and had the impression that the "layoff" was somehow unfair. He did not understand how he could be retrained if he was not eligible for vocational assistance. He didn't know how to amend his status, that is, how to get off the "illness leave." When he was unable to find other work or obtain reassignment with Respondent, he felt totally frustrated, hurt, betrayed, and depressed and experienced extreme self-doubt. His income consisted of unemployment compensation, which ran out after 26 weeks. He described his earnings situation as "a financial disaster," and had to rely on his mother for support.

65) Most of Complainant's testimony was substantially credible. The ALJ carefully observed his demeanor and evaluated the credibility of his testimony based upon its inherent probability, its internal consistency, whether it was corroborated, whether it was contradicted by other evidence, and whether or not human experience demonstrated it was logically incredible.[4] Complainant's testimony at hearing was at times inconsistent. He had a tendency to respond to questions without first being certain of their content. He was approximate rather than precise on the dates of occurrences, but his reaction to what happened was credible. He appeared to be a singularly unsophisticated individual with limited understanding of his post-injury employment status with Respondent, of the extent of any physical limitations

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[4] *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).

resulting from his injury, and of his available options. He repeatedly stated that he was unaware of how to change his "medical leave" or "illness leave" status, and clearly believed he had somehow been disadvantaged. He testified on direct that he expressed this belief in the April 20 meeting by saying he thought he was being "reamed." Later, on rebuttal, he testified that he stated on April 20 that he thought he was being "shafted." While the two terms apparently have the same meaning to Complainant, their interchange led the ALJ to suspect they were after the fact characterizations of the overall result of the meeting and not contemporaneous evaluations announced to the other participants at the time. The credibility of his job search was undermined when he unaccountably continued to report his status with Respondent as "medical leave" even after the September 1996 total severance of employment.

66) The testimony of Gary Bettendorf was not totally credible. He did not recall how he learned of the lifting limitation and limited hours when Complainant returned on light duty. He did not recall seeing any written limitation, but testified that he assigned duties to Complainant in keeping with Complainant's restrictions. He did not recall seeing any written lifting limitation when Complainant was released to full time work or who made the decision to place Complainant on leave. He stated that he probably asked for a doctor's evaluation, but did not recall if one was received, although he talked to Complainant about limitations. He stated he was told that Complainant was partially disabled but not by whom, unless it was by Complainant or loss prevention. He had no recall of requiring a doctor's excuse for Complainant's late March-early April illness but testified that it was policy to require it after three consecutive days absence and that he had required it of others. He acknowledged that he spoke once with Bryant about Complainant's concerns, but had no recall of a second instance claimed by Complainant or of any complaint of harassment by Brown. He did not recall the terms "lazy Layne" or "milking the system" in reference to Complainant. The forum has accepted Bettendorf's testimony as credible only where it was uncontroverted or was corroborated by credible testimony or inference.

67) The testimony of Lisa Jerkins was substantially credible. Her testimony was consistent with her acknowledged lack of expertise and specific recall. She admitted her limited knowledge of injured worker and disability law and regulations and that she was guided by the recommendations of others in regard to Complainant's employment status. She acknowledged that her memorandum regarding the April 20, 1995 meeting with Complainant was not written contemporaneous to the event but over eight months later, and that it did not necessarily report everything that was said. She testified that there was no specific follow-up on Complainant's status and that since she did not know for two years that Complainant was not eligible for vocational rehabilitation, she had no reason to determine why. She acknowledged that there was no separate medical assessment of Complainant's actual

job duties as an SSR. There was no reason to find her testimony anything but credible.

68) The testimony of Duane Martin was credible. Part of his testimony regarding Brown's frequent inquiries about Complainant's return from time loss was confirmed by Brown himself. Martin's testimony regarding the remarks of Bryant was uncontroverted. This forum will not assume that his testimony was rendered untrustworthy from the mere fact of his blood relationship to Complainant, particularly where Respondent chose not to test his statements through cross-examination. The ALJ was not sufficiently impressed by other evidence or his demeanor so as to cause a finding that his testimony was anything but credible.

69) The testimony of Ronald Brown was not totally credible. Brown admitted that he inquired often of Martin about Complainant's condition during his absence on time loss, although denying he ever referred to Complainant as lazy or suggested that Complainant's absence due to injury was not legitimate. He specifically denied asking others to unload because "Lazy Layne won't," or that he called Complainant "candy ass." He acknowledged citing Complainant for two instances of tardiness in April which he attributed to a general tightening up on attendance. He acknowledged that others cited for tardiness around that time were sales staff or installers whose tardiness directly affected delivery of customer service. He attempted to justify the use of a Josh Reinertson, an installer who was habitually tardy in September-October 1995, as a comparitor to Complainant in April by testifying that Reinertson had previously been a replenishment associate while Complainant was employed. He stated that Complainant repeatedly told him that Complainant could no longer do all of the SSR job, but this record does not otherwise reflect that Complainant stated anything beyond a lifting limitation. The forum has accepted Brown's testimony as credible only where it was uncontroverted or was corroborated by credible testimony or inference.

70) Michael Knight and Christopher Wendt were both former employees of Respondent presented as Agency witnesses. Both were discharged over inaccurate or false employment applications. Knight had failed to answer a question on his application about whether he had been convicted of a crime involving dishonesty within seven years of the application. Wendt had answered the same question on his application in the negative. Each had in fact been convicted of such a crime within the designated time frame. Each was equivocal when confronted on cross-examination with the reason for discharge and Wendt initially testified falsely. They were roommates, and Knight was a friend of Complainant and Martin. The ALJ has considered the convictions and that a witness found to be false in part of his testimony is to be distrusted in others. The testimony of these witnesses was given no weight where it conflicted with credible evidence, but was accorded some weight where it tended to corroborate other credible testimony.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent was a foreign corporation

operating retail stores in Oregon, utilizing the personal service of six or more employees and reserving to itself the right to control the means by which such service was performed.

2) Complainant was employed by Respondent between June 1993 and April 1995. His principal duties in Respondent's automotive center were receipt, storage, display, and inventory of tires and tire related items. He maintained tire storage and display areas, tracked the timeliness of service orders, and procured parts from sources outside the store.

3) Complainant's immediate supervisors were auto center manager Gary Bettendorf and assistant manager Ron Brown. He was also subject to the direction of technician coordinator Doug Bryant.

4) In September 1994, while driving his own vehicle to obtain parts, Complainant sustained a compensable injury for which he initiated a workers' compensation claim.

5) Because a workers' compensation claim would negatively affect each employee's accident free bonus, Complainant's supervisors attempted to discourage him from filing a claim.

6) While he was drawing time loss due to his injury, Complainant was the subject of negative comment by at least two of his supervisors regarding the genuineness of his absence, of his temporary disability, and of his injured worker status.

7) Complainant returned to work in November with a limited duty medical release. The same individuals continued frequently to question the genuineness of his temporary disability and injured worker status.

8) Complainant found the comments about his time loss, his disability and his injured worker status to be unwelcome and offensive and that they created a hostile and offensive work environment.

9) A reasonable person in Complainant's situation would have found such remarks unwelcome and offensive creating a hostile and offensive work environment.

10) Complainant was declared medically stationary in February 1995 with a permanent partial disability rating of 14%, and was released to full time work with a lifting limitation.

11) Because of the permanent partial disability rating and lifting limitation, Complainant's supervisors assumed he could not perform the duties of his pre-injury position. Respondent did not accommodate the limitation and did not offer him an alternate position.

12) Complainant had no disciplinary or absentee record until April 1995 when he received two deficiency memoranda for tardiness from Brown. He was also required by Bettendorf to supply a doctor's excuse at his own expense as a condition of his return to work after a brief illness.

13) On April 20, 1995, Complainant was advised in a meeting with Bettendorf, Brown, and Respondent's human relations manager that he was being placed on an illness leave because Respondent had no positions available in which he would not risk further injury due to the lifting restrictions and his permanent partial disability. Respondent stated that Complainant would be referred for

vocational rehabilitation. Several weeks later, Respondent's insurer informed Complainant that he was not eligible for vocational rehabilitation.

14) Complainant's leave continued after vocational rehabilitation was no longer possible. Respondent took no action to clarify or modify his status.

15) Complainant applied for unemployment compensation and diligently sought replacement employment. Respondent stated to the employment department that Complainant was "on a leave of absence due to disability/illness." He continued to seek replacement employment until September 1996 when Respondent terminated his leave status.

16) Complainant suffered severe emotional distress from the suggestion that he had deliberately deprived the work unit of the accident free bonus, from the negative comment regarding the genuineness of his time loss claim, and from the continued questioning of the genuineness of his disability and limited duty. He was embarrassed in front of others and was insulted and angered by the accusations regarding his worker's compensation status and made to feel ashamed that he'd been injured. He suffered emotional distress from Respondent's failure to discuss accommodation of his restrictions or to discuss other positions.

17) Complainant was severely upset emotionally by the manner in which his tenure with Respondent was interrupted and terminated; he felt he was betrayed. He felt totally frustrated, hurt, depressed, and experienced extreme self-doubt. His distress continued as he searched for employment saddled with the status of "illness leave," a status he could not get modified or corrected.

18) Complainant lost wages of $18,034.56 between April 25, 1995 and September 25, 1996.

CONCLUSIONS OF LAW

1) At times material herein, ORS 659.010 provided in part:

> "As used in ORS 659.010 to 659.110, 659.400 to 659.460 and 659.545, unless the context requires otherwise:
>
> " * * * * *
>
> "(6) 'Employer' means any person * * * who in this state * * * engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.
>
> " * * * * *
>
> "(12) 'Person' includes one or more * * * corporations * * *."
>
> " * * * * *
>
> "(14) 'Unlawful employment practice" includes only those unlawful employment practices specified in ORS * * * 659.330, * * * 659.410, * * * 659.425 * * * "

Respondent was an employer subject to ORS 659.010 to 659.110, 659.400 to 659.460 and 659.505 to 659.545 at all times material herein.

2) ORS 659.040 (1) provides:

> "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 * * * no later than one year after the alleged unlawful employment practice."

Under ORS 659.010 to 659.110 and 659.400 to 659.460, the Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein.

3) The actions, inactions, statements and motivations of Gary Bettendorf, Ronald Brown, Douglas Bryant and Lisa Jerkins are properly imputed to Respondent herein.

4) At times material herein, ORS 659.410 provided, in part:

> "(1) 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 chapter 656 or of ORS 659.400 to 659.460 or has given testimony under the provisions of such sections."

Respondent subjected Complainant to a course of conduct by his supervisors designed to harass, embarrass, humiliate and intimidate him which conduct was offensive and unwelcome, and created a hostile, intimidating, and offensive work environment because he invoked and utilized the workers' compensation statutes, all in violation of ORS 659.410.

5) Except for the harassment described in Conclusion of Law 4) above, Complainant was not treated differently from workers who had not invoked and utilized the workers' compensation statutes and Respondent did not violate ORS 659.410 in that respect.

6) Respondent effectively terminated Complainant's employment when, because he invoked and utilized the workers' compensation statutes, Complainant was placed on illness leave to obtain vocational rehabilitation and was provided no alternative when he was not eligible for vocational rehabilitation and his tenure was thus ended in violation of ORS 659.410.

7) At times material herein,[5] ORS 659.400 provided :

> "As used in ORS 659.400 to 659.460, unless the context requires otherwise:
>
> "(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment or is regarded as having such an impairment.
>
> "(2) As used in subsection (1) of this section:
>
> "(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

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[5]The statutory protection for disabled persons in employment was substantially rewritten by the 1997 Oregon legislature. *See* chapter 854, Or Laws 1997, which amended ORS 659.400 and 659.425 and added ORS 659.436 to 659.449. Statutes are quoted as they appeared at the time of the alleged offenses.

"(b) 'Has a record of such an impairment' means has a history of, or has been misclassified as having such an impairment.

"(c) 'Is regarded as having an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment.

"(3) 'Employer' means any person who employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard."

and ORS 659.425 provided, in part:

"(1) For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for an employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

"* * * * *

"(c) An individual is regarded as having a physical or mental impairment."

Respondent regarded Complainant as having a substantially limiting physical impairment and barred Complainant from employment because of Respondent's erroneous perception in violation of ORS 659.425(1)(c).

8) At times material herein, ORS 659.330 provided:

"(1) It is an unlawful employment practice for an employer to require an employee, as a condition of continuation of employment, to pay the cost of any medical examination or the cost of furnishing any health certificate.

"(2) Notwithstanding subsection (1) of this section, it is not an unlawful employment practice for an employer to require the payment of medical examination or health certificate costs:

"(a) From health and welfare fringe benefit moneys contributed entirely by the employer; or

"(b) By the employee if the medical examination or health certificate is required pursuant to a collective bargaining agreement, state or federal statute or city or county ordinance.

"(3) 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 659.470 to 659.545."

Respondent violated ORS 659.330(1) when it required that Complainant pay the cost of a medical examination and furnish a health certificate as a condition of continued employment.

OPINION

The Agency's Specific Charges alleged that Respondent violated of ORS 659.410 by subjecting Complainant to harassment, by treating him differently in terms and conditions of employment, and by terminating his tenure as an employee, all because he invoked and utilized the workers' compensation statutes. The Specific Charges alleged further that Respondent barred from employment in violation of ORS 659.425(1)(c) because Respondent erroneously regarded Complainant as having a substantially limiting physical impairment, and finally, that Respondent violated ORS 659.330 by requiring Complainant to pay for a medical examination and health certificate as a condition of returning to work.

1. Harassment based on invoking and utilizing workers' compensation statutes (ORS 659.410).

The Agency's Specific Charges alleged that Respondent violated of ORS 659.410 by subjecting Complainant to harassment, offensive and unwelcome conduct which harassed, embarrassed, humiliated and intimidated him creating a hostile, intimidating, and offensive work environment because he invoked and utilized the workers' compensation statutes. This forum has previously found that "there can be little doubt that the prohibition of discrimination by ORS 659.410(1) includes a prohibition of harassment based on applying for benefits or invoking or utilizing the state's workers' compensation procedures." *In the Matter of Central Oregon Building Supply, Inc.,* 17 BOLI 1, 9 (1998)

To establish a prima facie case of harassment (i.e., hostile environment harassment by supervisory employees of a worker who has applied for benefits or invoked or utilized the workers' compensation procedures), the Agency must present evidence to show that: (1) respondent is an employer of six or more persons; (2) respondent employed complainant; (3) complainant was a worker who applied for benefits or invoked or utilized the workers' compensation procedures; (4) respondent's supervisory employee engaged in unwelcome verbal or physical conduct directed at complainant because of his protected class; (5) the conduct had the purpose or effect of creating an objectively intimidating, hostile, or offensive working environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct. *Central Oregon Building Supply*, *supra;* (1998); OAR 839-005-0010; *In the Matter of Kenneth Williams*, 14 BOLI 16, 24 (1995)

Respondent employed six or more persons including Complainant who applied for benefits and invoked and utilized the worker's compensation procedures. In the absence of his manager, Bettendorf, and the assistant manager, Brown, Complainant reported his auto accident on the job to Bryant, who often assigned him

work. Bryant[6] attempted to discourage him from filing a workers' compensation claim. Bryant and Bettendorf reminded him that the filed claim would negatively affect each employee's accident free bonus. Once the claim was filed, Bryant told him he had "blown" the chance for the bonus. While he was drawing time loss due to his injury, he was the subject of negative comment by Brown and Bryant regarding the genuineness of his absence and temporary disability. These remarks were relayed to him by his brother, a fellow employee, at or near the times they occurred. He returned to work with a light duty medical release in November which limited his work time to four hours per day. When he returned on limited duty, Brown greeted him with a demeaning comment, questioning his usefulness. Bryant and Brown continued questioning the genuineness of Complainant's temporary disability. Complainant found the comments unwelcome and abusive and that their conduct created a hostile and offensive work environment.

A month or so after Complainant's return on light duty, Bryant told him to unload a tire truck. When Complainant said he couldn't, Bryant intimated he was faking and called Brown. Triggered by Bryant's report of Complainant's refusal to unload, which Complainant based on his light duty restrictions, Brown commented unfavorably about Complainant when informed by Complainant that the work was outside his medical restrictions. Other employees overheard Bryant's and Brown's comments about Complainant.

Complainant told Bettendorf of the comments. Credible evidence showed that Bettendorf immediately took care of Complainant's first complaint about Bryant, telling Bryant to be more sensitive to Complainant's condition. There was no evidence of timely or appropriate corrective action related to Brown's conduct toward Complainant or related to Complainant's subsequent complaint of Bryant's repeated comments.

Complainant testified credibly that the negative comments upset him and made him ashamed that he had been injured, even though it was not his fault. He was hurt, insulted embarrassed and angered by being referred to as "Lazy Layne" and by the suggestions that he couldn't do the job, that he was faking, and that he was "milking the system."

At hearing, Respondent's witnesses denied that any harassment occurred. Bettendorf admitted to only one instance of counseling Bryant and had no recollection about any accusation against Brown. Brown denied any negative comment, although admitting he often inquired of Martin about Complainant's return from time loss. Bryant was not a witness. The preponderance of available evidence favored the Agency's position that Complainant was harassed for invoking and utilizing the workers' compensation statutes.

In an effort to question the seriousness of Complainant's emotional distress, Respondent presented credible evidence that Complainant attended company functions after

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[6]The forum includes Bettendorf, Brown, and Bryant as Complainant's supervisors. See Finding of Fact -- the Merits 3.

April 1995 and was apparently friendly toward Respondent's personnel. Complainant apparently enjoyed his job and wanted to return to it, and was led to believe by Respondent that he was still an employee. The forum finds nothing inconsistent in his activities.

2. Different Treatment based on invoking and utilizing workers' compensation statutes (ORS 659.410).

Except for the disparaging comments included in the harassment described above, Complainant was not treated differently from workers who had not invoked utilized the workers' compensation statutes. There was credible evidence that only Sweek made parts runs in the company vehicle, that others were subject to the rule of providing medical verification of illness after a three day absence and that the three day provision was known to others in the work force, and that others were subject to disciplinary procedures regarding tardiness. Brown threatened other employees with attendance problems with increasingly severe sanctions in the event of further violation. The Agency did not establish by a preponderance that Complainant was demonstrably treated differently in those particular terms and conditions of employment

3. Termination of tenure as an employee based on invoking and utilizing workers' compensation statutes (ORS 659.410).

The Agency alleged that Complainant was placed on medical leave and urged to seek vocational rehabilitation, effectively terminating his employment, because he invoked and utilized the workers' compensation statutes and that his tenure was thus ended in violation of ORS 659.410.

A preponderance of evidence indicates that Respondent placed Complainant on an illness leave for the purported purpose of retraining him through vocational rehabilitation. Respondent took this step because Complainant had received a permanent partial disability rating of 14% and had a lifting limitation as a result of a compensable injury sustained in Respondent's employ for which he had invoked and utilized the Oregon Workers' Compensation law. The leave would end when Complainant was retrained or when he somehow obtained a medical evaluation of recovery, i.e., a release without restrictions. But it was determined that Complainant was not eligible for vocational rehabilitation. Unaccountably, Respondent did not follow up, even though it consistently advised Complainant that he was still a Sears employee. Complainant sought other work within the supposed limitations, but his "illness leave" status made him unemployable as a practical matter. He was in the position of being employed but unable to work for the employer, and, because he was employed, being unable to work elsewhere. A "Catch 22." Thus the "illness leave" status was in reality a termination of his tenure with Respondent.

A permanent partial disability rating is by no means an indication of a worker's ability to work. It does not necessarily establish a worker's in-

ability to perform a job.[7] It is an evaluation of the loss of earning capacity attributable to a particular injury, or as in Complainant's case, an "Unscheduled disability of 14% equal to 44.8 degrees for injury to the neck, body part code 200." Such a rating in no way delineates what the individual can or cannot do.

Accordingly, placing Complainant on "illness leave" for retraining and leaving him there when retraining was no longer an option and no other realistic options existed, because he had received a workers' compensation permanent partial disability rating, had the effect of ending Complainant's tenure as Respondent's employee because he had invoked and utilized the workers' compensation statutes. This violated ORS 659.410(1).

4. Barring from employment an individual regarded as having a physical impairment (ORS 659.425(1)(c)).

The Agency alleged that Complainant was barred from employment because of respondent's erroneous perception and treatment of Complainant as having a substantially limiting physical impairment in violation of ORS 659.425(1)(c).

According to the medical evidence in the record, Complainant had physical impairment that limited his ability to perform some functions of his job some of the time. However, Respondent erroneously treated Complainant as if he was disabled not only from his position as a automobile service support representative but from any other position that involved loading, unloading, or stocking. The basis for this belief was the capacity assessment and medical release accompanying Kemper's letter of February 20, 1995, and the report of Dr. Anderson's closing examination of February 17. But those documents did not provide the type of individual assessment required of employers in determining whether an employee can perform the duties of a position. There was no indication anywhere in the documentation or testimony that the physician was aware of the actual work done by Complainant, outside of the general area of "lifting." There was insufficient evidence upon which to determine where along the charted spectrums of "Maximum-Occasional-Frequent" (as to lifting) and "minimal-occasional-frequent-contin-uous" (regarding positions) Complainant's duties actually fell. There was evidence that the average tire weighed about 40-45 pounds. 45 pounds was the most Complainant was to lift and carry "occasionally," and 20 pounds was the most he was to lift and carry "frequently," according to the physical capacity summary dated February 3. After consulting with the physical therapist, Dr. Anderson's February 17 opinion placed these limits at 50 pounds and 25 pounds, respectively. There was evidence that immediately prior to his injury, he was only required to move tires occasionally.

If truckloads of tires arrived twice a week, unloading them occupied a maximum of 40% of Complainant's time, even if each took all day. The record reflects that it could take ten minutes to an hour to unload each truckload, but generally Complainant

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[7] *Chavez v. Boise Cascade Corporation,* 92 Or App 508, 759 P2d 297 (1988); *aff'd, Chavez v. Boise Cascade Corporation,* 307 Or 632, 772 P2d 409 (1989)

spent from one half to three quarters of an hour on each load, and an equal time to put the tires away. Thus the time that Complainant would be engaged in lifting to the capacity of [45--50] pounds would be well under the occasional ("up to 33%") limit.

Jerkins was of the opinion that Complainant's stated permanent partial disability operated to disqualify him from his former position and from all other stocking positions as well. She testified to her understanding that the workers' compensation disability rating was an indication of a limitation on Complainant's ability to work. That is incorrect. Complainant received compensation for "unscheduled disability of 14 % equal to 44.8 degrees for injury to the neck, * * * ." The mere finding of degrees of disability is not a reliable indicator of a recovering injured worker's actual capacity. "[A] finding that a [worker] is permanently partially disabled does *not* mean, necessarily, that he is totally unable to work." *Chavez v. Boise Cascade Corporation,* 92 Or App 508, 759 P2d 297 (1988) (emphasis in original); *aff'd, Chavez v. Boise Cascade Corporation,* 307 Or 632, 772 P2d 409 (1989).[8] Complainant's assigned degree of disability was not a physical impairment which substantially limited employment, but he was treated by Respondent as if it were such an impairment.

Jerkins and Brown testified to the effect that Complainant was placed on illness leave as a means to keep him from injuring himself further. That reason was memorialized in Jerkins January 1996 memo. But whether a worker is at risk of injury or reinjury, i.e., "present risk of probable incapacitation," is a medical question rather than a personnel decision. To deny the opportunity to work when a risk of incapacitation is less than probable would contravene the policy of Oregon law. *In the Matter of WS, Inc.,* 13 BOLI 64, 83-84 (1994) It is a decision for experts. *In the Matter of Pacific Motor Trucking,* 3 BOLI 100, 111-113 (1982) *aff'd, Pacific Motor Trucking v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446 (1983); *rev den* 295 Or 773, 670 P2d 1036 (1983).

By regarding Complainant as having a physical impairment based on a permanent partial disability rating or upon an unsupported fear of injury or reinjury, and denying him employment opportunity, Respondent violated ORS 659.425(1)(c).

5. Requiring an employee to pay the cost of a medical examination and furnish a health certificate as a condition of continued employment (ORS 659.330).

The Agency alleged that due to a 2 day absence from work in March 1995 Complainant was required to pay for a medical examination as a condition of returning to work, a violation of ORS 659.330.

The Agency alleged that due to a 2 day absence from work in March 1995 Complainant was required to pay for a medical examination as a condition of returning to work, a violation of ORS 659.330.

The statute makes it an unlawful employment practice to require an employee to pay the cost of any

[8]The term "disability" has a different meaning in the workers' compensation context than it does under the Americans with Disabilities Act.

medical examination or the cost of furnishing a health certificate as a condition of continuation of employment. The uncontroverted evidence was that Bettendorf told Complainant that he must bring in a doctor's excuse in order to return to work after Complainant had been off with the flu. Complainant paid for the resulting examination and return to work slip. There was no evidence presented that this cost was payable from any fringe benefit contributed entirely by Respondent, nor was there any evidence that the examination and/or certificate was required by collective bargaining or by federal, state, or local ordinance. These are affirmative defenses. Accordingly, the forum finds that Respondent violated ORS 659.330.

Respondent's motion for summary judgment

Subsequent to the hearing, on May 16, 1997, Respondents by fax filed exceptions to the ALJ's order denying summary judgment. Those exceptions reiterate Respondent's arguments that the Agency may not proceed to hearing on those portions of the administrative complaint not supported by its Administrative Determination, and that in particular, the disability portion of the Specific Charges was not "like or reasonably related" to the disability allegations of the administrative complaint. The forum has reviewed the portion of the pre-hearing order set out at Findings of Fact -- Procedural 9 and finds no reason to alter its prior opinion. Respondent's exception to the ruling is overruled.

Damages

Awards for mental suffering damages depend on the facts presented by each complainant. A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Jerome Dusenberry*, 9 BOLI 173 (1991).

Here, credible evidence showed that, as a result of the discrimination Complainant experienced, he suffered embarrassment, insult, anger, shame as described in the Findings of Fact. The harassment started when Complainant filed his workers' compensation insurance claim in September 1994 and continued on a frequent basis until he was placed on "illness leave" the following April. The emotional effect of the manner of his separation from active employment began with illness leave and persisted up to the hearing. He felt betrayed, totally frustrated, depressed, and experienced extreme self-doubt. His emotional state was negatively impacted by his economic situation. Respondent is directly liable for any damage flowing from Complainant's emotional distress.

Because the forum has found that Complainant's termination of employment with Respondent was unlawful, Respondent is liable for Complainant's loss of wages from April 25, 1995 to September 25, 1996, when Complainant's meaningful job search ceased.

The amounts awarded to Complainant in the order below are compensation for his wage loss, for the unlawful medical expense, and for the mental suffering and are a proper exercise of the Commissioner's authority to eliminate the effects of the unlawful practices found.

Respondent's exceptions

In its first exception, Respondent argues that the Agency lacked authority to bring and pursue Specific Charges that included allegations which the Agency's investigator had found no substantial evidence to support. The Forum rejects that argument for the reasons stated in the ninth procedural finding of fact, supra. It is worth noting that Respondent argues only that the plain language of ORS 659.050(1) precludes the Agency from pursuing charges related to allegations that the investigator found no substantial evidence to support. Respondent does not argue that the Agency's action deprived it of due process; nor does it argue that it was in any way prejudiced by the scope of the Specific Charges.

Respondent's reading of ORS 659.050(1) is too narrow. That statute merely provides that if the investigator finds substantial evidence to support *any* allegation set forth in the complaint, the Agency may investigate and pursue any of those allegations, including ones which the investigator did not initially determine were supported. Because the Agency's investigation continues past the substantial evidence determination, the Specific Charges may include charges supported by evidence that the investigator did not discover.[9] The only limitation is that the Specific Charges be "reasonably related" to the allegations in the initial complaint.[10] Respondent's first exception is denied.

Paragraph D of the Specific Charges alleges that Respondent "barr[ed] Complainant from employment based on Respondent's erroneous perception and treatment of Complainant as having a substantially limiting physical impairment" caused by a neck injury. In its second exception, Respondent argues that this allegation is not "reasonably related" to any of the allegations in Complainant's complaints. That is not correct. The initial complaint accused Respondent of harassing Complainant both because he had filed a workers' compensation claim related to his on-the-job neck/back injury and because of his vision impairment. Complainant further alleged that Respondent laid him off (placed him on medical leave) because of *both* the back/neck injury and the visual impairment. Thus, the allegations in the complaint and those in Paragraph D of the Specific Charges both concern discrimination based on Complainant's on-the-job neck injury. The allegations are "reasonably related" and Respondent's second exception is denied.

Respondent claims in its third exception that the Agency did not prove a violation of ORS 659.330(1). Ac-

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[9] *Cf. School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135, 1139 (1975) (in rejecting contention, under earlier statutory scheme whereby Attorney General filed formal charges after an investigation by the Commissioner, that the formal charges should be limited to matters in the complainant's original complaint: "It is not reasonable to assume that the legislature intended to prevent the Attorney General from including in his formal charge other discriminatory practices found to exist [during the Commissioner's investigation] which affect the complainant.").

[10] *Id.*

cording to Respondent, the evidence demonstrates only that it required Complainant to *provide* a medical certificate before returning to work, not that it required Complainant to *pay* for it. Respondent's argument fails because the Forum has inferred from evidence in the record that Respondent did require Complainant to pay for the certificate, as discussed in section 5 of the opinion, *supra*. The exception is denied.

In its fourth exception, Respondent argues that ORS Chapter 659 does not authorize the Commissioner to award economic or non-economic damages for a violation of ORS 659.330(1). That is not correct. The same remedies are available for violation of ORS 659.330(1) as are available in other cases of unlawful employment practices:

> "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 659.470 to 659.545."

ORS 659.330(3). It is well-established that 659.010(2) and 659.060(3) authorize the Commissioner to award economic and non-economic damages designed "to eliminate the effects of any unlawful practice found * * *." ORS 659.010(2); *see Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189, 192-93 (1985); *Montgomery Ward and Co. v. Bureau of Labor*, 42 Or App 159, 600 P2d 452, 454 (1979), *rev den* 288 Or 81; *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 124, 139-40 (1997). The Commissioner's award of $40.00 eliminates the effect of Respondent's unlawful requirement that Complainant pay for a medical certificate before returning to work, and is authorized under Chapter 659. The exception is denied.

The Forum proposed an award of $30,000.00 for mental suffering associated with all the unlawful employment practices committed by Respondent. In its fifth exception, Respondent claims that no evidence in the record establishes that Complainant suffered mental distress as the result of having been required to pay $40.00 for a medical certificate in violation of ORS 659.330(1). Respondent is correct, and the order has been amended accordingly. In its ninth exception, Respondent argues more generally that the record does not contain evidence of suffering severe enough to justify an award of $30,000.00.

In light of Respondent's exceptions, the Forum has reconsidered the evidence related to mental suffering and finds that a total award of $30,000.00 still is appropriate. Complainant suffered harassment from September 1994 to April 1995 that caused him embarrassment, shame, anger, insult, and hurt feelings.[11] The Forum finds that $10,000.00 will adequately compensate Complainant for

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[11]The findings regarding Complainant's mental suffering are supported not only by Complainant's own testimony, but also by the testimony of Martin.

that emotional distress. Complainant suffered more severe mental distress as a result of being placed on "illness leave" and being unable to gain employment. Complainant was very frustrated, hurt, and depressed. He felt betrayed and experienced extreme self-doubt. These effects of Respondents' unlawful employment practices persisted during the entire period Complainant remained on leave. The Forum finds that $20,000.00 will appropriately compensate Complainant for that mental distress. Respondent's ninth exception is denied.

The Forum determined that Respondent unlawfully had discriminated against Complainant based on its erroneous perception that he was substantially limited in the major life activity of employment. In its sixth exception, Respondent argues that the Forum applied an incorrect legal standard in reaching that conclusion. According to Respondent, to establish that Respondent believed Complainant was substantially limited in the major life activity of employment, the Agency had to prove that he was treated as "`significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills and abilities.' 29 CFR § 1630.2(j)(3)(i)." Respondent argues that the ALJ did not apply this standard, but focused only on whether Respondent erroneously perceived that Complainant was not able to perform the specific job he previously had held.

The quoted portion of Respondent's statement of law is essentially correct. Under Oregon law in effect at material times, to be substantially limited in the life activity of employment, a person had to be "unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." *In the Matter of Parker-Hannifin Corporation*, 15 BOLI 245, 265 (1997). The "class of jobs" had to be related to the person's chosen line of work. "For an individual without a clear career direction or who is changing career paths, the connection could be to a class of jobs encompassing the type of labor sought or obtained (*i.e.*, manual labor requiring heavy lifting)." *Id.* at 265 n*.

Respondent's error lies in its characterization of the facts and the application of the law to those facts. Respondent did not place Complainant on medical leave because it believed he was unable to perform just the one job he had held prior to his injury. Rather, the evidence establishes that Respondent placed Complainant on "illness leave" because it erroneously believed his neck injury substantially limited his performance of *any* work that involved a particular type of labor -- stocking and/or lifting.[12] Because Respondent treated Complainant as being substantially limited in that class of jobs, Complainant was protected by *former* ORS 659.400(2)(c)(A), and Respondent violated *former* ORS 659.425(1)(c) by barring Complainant from employment on that basis. Respondent's sixth exception is denied.

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[12]Section 4 of the opinion has been slightly modified to clarify this point.

In its seventh exception, Respondent argues that no evidence in the record supports the finding that Respondent terminated Complainant because he invoked and utilized the workers' compensation system. That is not correct. Paragraph 3 of the opinion explains some of the reasons the Forum inferred that Respondent placed Complainant on "illness leave" because of his utilization of the workers' compensation system. In addition, the Forum notes that, had Complainant not utilized the workers' compensation system, he would not have received the partial permanent disability award. Respondent's misunderstanding of the significance of that award contributed to its decision to place Complainant on illness leave. That, too, supports the inference that Complainant's utilization of the workers' compensation system led to his termination. So does the uncontested finding that Respondent harassed Complainant because he pursued a workers' compensation claim.

The Forum proposed an award of $18,074.56 for Complainant's lost wages. In its eighth exception, Respondent argues that Complainant failed to mitigate these damages because he did not clarify his medical leave status after prospective employers told him that they could not hire him so long as he remained on leave. In essence, Respondent attempts to hold Complainant responsible for its own misunderstanding of the workers' compensation, disability, and leave laws. It was Respondent's human resources manager who placed Complainant on an ill-defined leave status that rendered him unemployable. It is not reasonable to punish Complainant for failing to clarify his employment status when Respondent did not understand it, either. Moreover, Complainant did once attempt to clarify his status. After he had been on leave for one year, he received notice that his leave was going to be terminated. Complainant was capable of working and contacted Respondent's human resources department to learn whether Respondent might re-employ him.[13] Instead, Respondent extended Complainant's leave, with the effect that he remained unemployable until September 1996. Given the confusion caused by Respondent's lack of understanding of workers' compensation and disability law, Complainant did all that reasonably could be expected of him in terms of trying to become employed. The exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2), in order to eliminate the effects of the unlawful practices found, and as payment of the damages awarded for violations of ORS 659.410(1), ORS 659.425(1), and ORS 659.330, Respondent SEARS, ROEBUCK and COMPANY is hereby ordered to:

1) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for LAYNE C. WOODS, in the amount of:

a) EIGHTEEN THOUSAND SEVENTY-FOUR DOLLARS AND FIFTY-SIX CENTS ($18,074.56), less lawful

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[13] Finding of Fact No. 62 has been amended to include this information.

deductions, representing $18,034.56 in wages lost by Complainant between April 25, 1995 to September 25, 1996 while his tenure as an employee was unlawfully terminated in violation of ORS 659.410(1) and while he was unlawfully barred from employment in violation of ORS 659.425(1)(c), and $40.00 Complainant was unlawfully required to pay for a medical exam and certificate on or about April 3,1995, in violation of ORS 659.330(1), plus

b) TEN THOUSAND DOLLARS ($10,000.00), representing compensatory damages for the mental and emotional distress suffered by LAYNE C. WOODS as a result of Respondent's violations of ORS 659.410(1) (terms and conditions), plus

c) TWENTY THOUSAND DOLLARS ($20,000.00), representing compensatory damages for the mental and emotional distress suffered by LAYNE C. WOODS as a result of Respondent's violations of ORS 659.410(1) (termination) and ORS 659.425(1)(c), plus

d) Interest at the legal rate from September 25, 1996, on the sum of $18,034.56 until paid, plus

e) Interest at the legal rate from April 3, 1995, on the sum of $40.00 until paid, plus

f) Interest at the legal rate on the sum of $30,000.00 from the date of the Final Order herein until Respondent complies therewith, and

2) Cease and desist from discriminating against any employee in terms and conditions and tenure of employment based upon the employee's having filed for benefits or invoked or utilized the Oregon workers' compensation law, or upon the employee's disability, and cease and desist from requiring a medical examination or health certificate at the employee's expense as a condition of continued employment.

In the Matter of

BARRETT BUSINESS SERVICES, INC.

Case Number 25-98[1]

Final Order of the Commissioner

Jack Roberts

Issued February 22, 1999.

SYNOPSIS

Claimant, who did not have a physical impairment, applied for work with Respondent as a timber faller. Respondent hired Complainant, then violated ORS 659.425 by refusing to refer him to a job as timber faller based on Respondent's erroneous perception that he had a physical impairment to his back that prevented him from doing strenuous labor using his back. Respondent also required Complainant to pay for a medical examination and/or the cost of providing a health certificate as a condition of continued employment in violation of ORS 659.330. The forum awarded Complainant $8,450.50 in back pay and $20,000

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[1] Ed. Note: This final order initially was issued under an incorrect case number. On July 28, 1999, an amended final order was issued that included the correct case number and a statement regarding correction of the case number. Except for that statement, the amended final order is identical to this website version.

in mental suffering. ORS 659.330; ORS 659.425.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (hereinafter "ALJ') by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon (hereinafter "BOLI"). The hearing was held on May 27 and May 28 at BOLI's office at 700 E. Main Street, Suite 105, Medford, Oregon, and on June 17, 1998, in room 1004 of the Portland State Office Building, 800 NE Oregon, Portland.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Kelley E. Robbins (hereinafter "Complainant") was present throughout the Medford hearing and was not represented by counsel. Respondent Barrett Business Services, Inc. (hereinafter "Respondent") was represented by Scott H. Terrall, Attorney at Law. James Hardt was present as Respondent's representative during the Medford portion of the hearing.

The Agency called as witnesses, in addition to Complainant, John Abgeris, logging contractor, and Dale Deboy, employee, Occupational Health Dept., Rogue Valley Medical Center. Respondent called as witnesses current employees Lisa Van Wey and James Hardt; Wayne Gamby, occupational health technician; and former employee Heidi Beck.

Administrative exhibits X-1 to X-18 and Agency exhibits A-1 through A-3, A-4, pp.3-22, A-5, A-6, A-7, p.3, A-8, and A-11 through A-13 were offered and received into evidence. Respondent exhibit R-2, p.4, was offered and received into evidence. The record closed on June 17, 1998.

Having fully considered the entire record in this matter, I, Jack 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 June 27, 1996, Complainant filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondent in denial of employment based on his perceived physical disability. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On November 10, 1997, the Agency prepared for service on Respondent Specific Charges alleging that Respondent discriminated against Complainant in refusing to hire him based on perceived physical impairment and record of a physical impairment, and by requiring Complainant to pay for medical records and a medical evaluation as a condition of employment.

3) 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.

4) On December 1, 1997, counsel for Respondent filed an answer in which it denied the allegations mentioned above in the Specific Charges, and stated numerous affirmative defenses. At the same time, counsel moved for a postponement on the basis that he was scheduled to be out of state on vacation at the time set for hearing.

5) On December 1, 1997, Douglas A. McKean, the ALJ initially assigned to hear the case, sent a letter to Respondent's counsel requesting an affidavit or other documentation indicating when the vacation was scheduled.

6) On December 29, 1997, Respondent's counsel indicated that after the Christmas holidays he would be filing an affidavit concerning when his spring vacation was scheduled.

7) On February 6, 1998, the ALJ issued a Discovery Order requiring Respondent and the Agency to submit a case summary pursuant to OAR 839-050-0200 and 839-050-0210 by March 13, 1998, thirteen days before March 26, the date set for hearing.

8) On February 13, 1998, Respondent's counsel submitted an Affidavit in support of his motion for postponement stating that in September 1997 he had made plans for a vacation with his family during the time set for hearing.

9) On February 20, 1998, the ALJ granted Respondent's motion for postponement on the basis that Respondent's counsel had a previously scheduled vacation that conflicted with the hearing date and had provided documentary evidence of that fact. The ALJ issued an amended notice resetting the hearing for May 27, 1998, and modified the Case Summary due date to May 15, 1998.

10) On March 9, 1998, the ALJ granted Respondent's motion of March 4 to depose Complainant. The ALJ noted that Respondent had not made a showing of the materiality of Complainant's testimony, gave no explanation of why a deposition rather than informal or other means of discovery was necessary, and did not request that the witness's' testimony be taken before a notary public or other person authorized by law to administer oaths, as required by OAR 839-050-0200(4), but granted the motion on the bases that the Agency did not object and that a Complainant's testimony is normally material.

11) On May 6, 1997, the forum issued an order changing the ALJ from Douglas A. McKean to Warner W. Gregg and advancing the hearing date to May 26, 1998. On May 12, 1998, Respondent's counsel advised the forum that he could not attend the hearing on May 26.

12) On May 14, 1998, the ALJ reset the hearing date to its previous setting of 9:00 a.m. May 27, and on May 15 the Agency and Respondent timely filed their respective Case Summaries.

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

14) At the commencement of the hearing, pursuant to ORS

183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) During the course of the hearing, Respondent moved to dismiss the Specific Charges based on lack of jurisdiction, asserting that all individuals employed by Respondent to work for James Abgeris dba Hilltop Logging in 1996 were California employees because they performed all their work in the state of California. Respondent's motion was denied. That ruling is confirmed, for reasons stated in the Opinion section herein.

16) During the course of the hearing, the Agency moved to amend the Specific Charges to include as damages expenses incurred by Complainant in obtaining alternative employment in Alaska and transporting his wife and children there, noting that the amount of back pay sought by the Agency would be reduced by the same amount. This motion reflected evidence and issues that had already been presented without objection from Respondent. Respondent objected to the motion on the basis that the motion was untimely, thereby prejudicing Respondent. The ALJ advised he would take the matter under advisement and rule on the Agency's motion in the Proposed Order. The Agency's motion is granted, for reasons stated in the Opinion section herein.

17) After the Agency called Complainant as a rebuttal witness, the hearing was recessed on May 28 because of the unavailability of Bernadette Yap Sam, the Agency's final rebuttal witness, due to a medical emergency. After consulting the participants, the ALJ set June 12 at 1 p.m. as the time for the hearing to reconvene in room 1004 of the Portland State Office Building, 800 NE Oregon, Portland, Oregon, with the Agency having the option to present Ms. Yap Sam's testimony in person or by affidavit, subject to Respondent objection. The participants were instructed to be prepared to present closing arguments after Ms. Yap Sam's testimony.

18) On June 12, 1998, the hearing reconvened at 1 p.m. in room 1004 of the Portland State Office Building, 800 NE Oregon, Portland. The ALJ and Ms. Lohr were present, but Respondent's counsel did not appear. The ALJ sent counsel a letter on June 12 informing him that the Agency had suggested it would present no further evidence and scheduling closing argument for June 17, 1998 at 4 p.m. in the same location. The ALJ further informed counsel that he or an associate must be present unless Respondent wished to waive closing argument.

19) On June 17, 1998, the hearing reconvened at 4 p.m., at which time the Agency and Respondent presented closing arguments.

20) The proposed order was issued on December 23, 1998. An exceptions notice was issued on January 6, 1999, and the participants were given an extension of time until January 18, 1999, to file exceptions. Respondent filed exceptions that were postmarked January 19, 1999. These exceptions were timely because January 18 was a holiday.

FINDINGS OF FACT--THE MERITS

1) At all times material herein, Respondent was a foreign corpora-

tion registered to do business in the State of Oregon and was an employer in this state that utilized the personal services of and employed six or more persons, subject to the provisions of ORS 659.010 to 659.435. Respondent's business consists of providing temporary employees to other employers and leasing employees to other employers.

2) Complainant began working in the logging industry in 1974 and has worked almost exclusively in the industry since then. Since 1981, he has worked as a timber faller. From 1987 to July 15, 1995, Complainant worked as a timber faller in Alaska.

3) Timber falling is an extremely strenuous physical occupation. Among other things, it requires repetitive use of the upper and lower back, walking and working on uneven surfaces, repetitive lifting of a 20-25 pound chain saw to waist height, and frequent twisting, reaching, squatting and bending. The other types of logging jobs, e.g. choker setter, are also extremely strenuous.

4) In 1988, Complainant sprained his lower back while working as a timber faller in Alaska. Complainant received several treatments from a chiropractor in Alaska, who told Complainant he thought there was evidence of degenerative disc disease in Complainant's x-rays, that Complainant might be getting degenerative disc disease with age, and that Complainant probably shouldn't be doing hard work or eventually he would get arthritis in his back. Complainant was then examined by a medical doctor, who prescribed 30 days of rest. Complainant rested for 30 days, returned to work as a timber faller, and has not experienced any subsequent related back problems since that time that caused him to see a physician or lose work.

5) In 1992, Complainant injured his neck and upper back while working as a timber faller in Alaska. Complainant visited another chiropractor in Alaska, who took x-rays, treated him five times over a period of several days, and told him that the cause of his pain was two vertebrae that were twisted slightly. Complainant missed only a few days of work as a result of this injury, returned to work as a timber faller, and has not experienced any subsequent related back problems since that time that caused him to see a physician or lose work.

6) In 1991 or 1992, after his neck and upper back injury, Complainant injured his right knee while working as a timber faller in Alaska when a tree limb struck his knee. Complainant had surgery on his knee, missed about five weeks of work in total, and has not experienced any subsequent related knee problems since that time that caused him to see a physician or lose work.

7) In 1995, Complainant decided to move back to Oregon in order to provide a better education for his high school age children. Complainant had been living on an island in Alaska with limited educational opportunities for his children. Before leaving Alaska, he made numerous phone calls to Oregon in an attempt to locate work.

8) John Abgeris, who owns and operates a logging business called Hilltop Logging, told Complainant he was interested in hiring him as a tim-

ber faller, but that Complainant would have to go through Respondent to come to work for him. Abgeris' practice was to refer all job applicants to Respondent, who then screened applicants. If Respondent decided to hire the applicant, Respondent would then lease the applicant to Abgeris.

9) On July 29, 1995, Complainant made application for employment at Respondent's Medford office. Complainant was interviewed by Lisa Van Wey, personnel placement coordinator for Respondent since January 1995. Complainant completed forms describing his employment and medical history, an I-9, W-4, and other standard forms used by Respondent. Complainant took and passed a urinalysis and underwent Respondent's orientation before being referred out to work as a timber faller for John Abgeris at Hilltop Logging immediately afterwards. During Complainant's employment with Respondent in 1995, Respondent paid unemployment tax and carried workers compensation insurance for Complainant in Oregon.

10) Complainant disclosed the injuries listed in Findings of Fact 4-6 on a form entitled "Medical History Information" that he completed for Respondent as part of his application process.

11) Complainant worked for Hilltop Logging as a timber faller through November 12, 1995, working six days a week, and being paid for six hours of work per day at the rate of $30/hr. Hilltop Logging, in turn, paid Respondent $42.90/hr. for Complainant's services. Complainant commuted an average of 70-120 miles round-trip each day to work for Hilltop. All of the work Complainant did for Hilltop was performed in the state of California.

12) Because of environmental conditions, timber fallers in Oregon (and northern California) work a limited season that extends from spring until mid-November. Complainant stopped working for Hilltop Logging on November 12, 1995, because Hilltop's logging season ended.

13) Complainant experienced no physical problems of any kind while working for Hilltop Logging in 1995. Abgeris had no problems with Complainant's work performance. Respondent was Complainant's employer while he worked at Hilltop Logging.

14) Between November 12, 1995, and April 3, 1996, Complainant collected unemployment benefits and also worked cutting timber in Powers, Oregon for one or two weeks. During this time, Respondent considered him to be an "inactive" employee.

15) In early April 1996, Abgeris called all of his leased employees from 1995, including Complainant, and asked them to visit Respondent and complete the drug screen and physical if they wanted to work at Hilltop again in 1996.

16) On April 3, 1996, Complainant visited Respondent's office in Medford to "update" his paperwork. While at Respondent's office, Complainant initially completed Respondent's standard employment forms, then took and passed a urinalysis that was administered by Van Wey. Respondent considered applicants to be hired at the moment they pass a urinalysis and considered Complainant to be hired at that time.

17) After Complainant passed the urinalysis, he was sent downstairs in Respondent's office to undergo a "Back Strength and Flexibility Evaluation" and an "Upper Extremity Evaluation."

18) In 1996, Wayne Gamby contracted with Respondent to conduct physical evaluations of all applicants for jobs classed as physically strenuous. This covered, among other jobs, every job in the logging industry, truck drivers, and reforestation workers.

19) In 1996, Gamby was administrative director of Occupational Services. He had previously worked in the medical field for 26 years as an orderly, a paramedic, and an occupational health technician. He received professional training for all three of these jobs, including training as an occupational health technician by supervisors on how to look for certain things and how to evaluate findings in certain categories. He went to a conference in Seattle on cumulative trauma disorders and injuries to the back and upper extremities. He was not an audiologist or medical doctor and held no current licenses or certificates related to the medical field or certificates except for one authorizing him to perform Audiometric Hearing Testing. The authority he had to perform physical evaluations for job applicants was under the license of Dr. Theodore Kruse, a medical doctor whom Gamby consulted as necessary. Dr. Kruse also prescribed criteria for Gamby to use in his physical evaluations and "signed off" on the policies and procedures that Gamby used in his business.

20) Gamby conducted the "Back Strength and Flexibility Evaluation" and an "Upper Extremity Evaluation" with Complainant by requiring him to perform various flexibility and strength tests. Based solely on the results of these evaluations, Gamby would not have restricted or limited Complainant's ability to perform physical work in any way.

21) Gamby also went over Complainant's medical history with Complainant. Besides the information contained on the "Medical History Information" form Complainant completed for Respondent in 1995, Complainant also told Gamby the following:

a) The chiropractor who treated him in 1988 told Complainant he thought there was evidence of degenerative disc disease in Complainant's x-rays and that Complainant probably shouldn't be doing hard work or eventually he would get arthritis in his back.

b) The chiropractor who treated him in 1992 told him that the cause of his pain was two vertebrae that were twisted slightly. Complainant couldn't recall if he had been given a release but told Gamby that Ben Thomas, his employer at the time would not let him return to work without a release.[2]

c) He has not experienced any subsequent related back problems since that time that caused him to see a physician or lose work.

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[2]Complainant's 1995 application with Respondent shows that he worked for Ben Thomas from 1990-95.

d) He had experience soreness in his upper extremities after clearing ground for his garden.

e) He occasionally experiences pains going down his legs.

f) He experienced pain in his arms while cutting brush in 1995 that was resolved after two or three days of rest.

22) Based on Complainant's stated medical history, Gamby assumed that Complainant had a sciatic nerve impingement. Based on Complainant's stated medical history, Gamby recommended Complainant should "LIMIT EXERTIONAL\REPETITIVE USE OF BACK 2^{o} TO HISTORY WITHOUT A FULL RELEASE."[3] Gamby's primary concern centered around Complainant's 1988 injury. Gamby documented the findings and conclusions from his evaluation of Complainant.

23) After Gamby completed his evaluation, Complainant and Gamby went back upstairs and met with Van Wey and Heidi Beck, the personnel coordinators in Respondent's Medford office.

24) At the meeting, Gamby stated that Complainant's back was "a ticking time bomb". Van Wey or Beck[4] stated to Complainant that he would never work out of any of Respondent's offices that included any kind of strenuous work with his back.

25) At the conclusion of the meeting, Van Wey or Beck[5] gave Complainant Respondent's "doctor's release packet" along with a detailed job description for the job of timber faller. Complainant was told by Van Wey or Beck[6] that he could not be put to work as a timber faller until he got an "evaluation/release" from a doctor, and that his medical history was the reason for this condition. Van Wey or Beck told Complainant they were concerned about his 1992 injury.[7] Had Complainant been referred to Hilltop Logging in 1996, he would have worked in California again and Respondent would have paid unemployment tax and carried workers compensation insurance for Complainant in Oregon.

26) The "doctor's release packet" given to Complainant consisted of a cover letter, a two page document entitled "Physical Capacities Evaluation," a job description for timber faller for Hilltop Logging, a job analysis, and a job analysis for "position modifiers."

27) The cover letter referred to in FOFM #26 reads as follows:

"Date: 4-3-96 (date handwritten)

"Dear Doctor,

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[3]Gamby explained in his testimony that "2^{0} " in his handwritten note was his shorthand for "secondary"'.

[4]Complainant was confused about the identity of Beck and Van Wey and thought Beck was Van Wey and vice-versa based on a statement made Bernadette Yap-Sam, the Agency's investigator, that misidentified Beck as Van Wey. In addition, it was not clear from the testimony of Beck and Van Wey which one of them said or did what. However, based on Complainant's credible testimony, the forum has concluded that this statement was made by one of the two.

[5]See *supra* previous footnote.

[6]See *supra* previous footnote.

[7]See *supra* previous footnote.

"Kelly Robbins has been offered employment by our firm based on an assessment of his/her physical capabilities as they relate to the intended Job Description. We have enclosed that document as well as a copy of the Medical history and the *Physical Capacities Evaluation* form. We would appreciate a description of the evaluation criteria that you utilize for this assessment. (emphasis added)

"Sincerely,

"Heidi Pozarich (signature handwritten)

"Personnel Coordinator"

28) The Physical Capacities Evaluation form referred to in FOFM #26 is entitled "PHYSICAL CAPACITIES EVALUATION" and requested the following information regarding Complainant:

"1. Frequency and hours per day" [that Complainant was] "able to perform the following activities": "sitting, walking, lifting, bending, squatting, climbing, kneeling, twisting, and standing."[8]

"2. Maximum weight that [Complainant] could lift/carry/push/pull repetitively for ____ hours per day."9

"3. Any "restrictions of function, Range of Motion or position that [Complainant] has in a work setting."10

"4. Any "environmental restrictions (heat, cold, dust fumes, etc.) applicable to [Complainant]."[11]

"5. If you are not currently treating this worker, when did they become medically stationary for the condition that is indicated on the enclosed medical history."[12]

"5. If you are currently treating this worker, what is the condition that you are treating and when do you anticipate that the worker will be medically stationary?"[13]

"6. Can you fully release this worker for the enclosed job description, without restriction or qualification?"[14]

29) No medical history was attached to the Evaluation.

30) The job description referred to in FOFM #26 lists in detail all the physical activities performed by a timber faller for Hilltop Logging, including shift, % of day different physical movements such as "twisting" are performed, maximum weight lifted, tools/equipment, actual jobs performed, e.g. "falling timber", and safety hazards.

31) The job analysis referred to in FOFM #26 specifies the "physical strength level" and "activity level" that corresponds to the job description in FOFM #30. "Physical strength level"

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[8]The numeral "1" is circled and all activities are highlighted on the original document.

[9]The numeral "2" is circled.

[10]The numeral "3" is circled.

[11]The numeral "4" is circled.

[12]The numeral "5" is circled.

[13]The numeral "5" is circled and should have been "6", based on its sequential placement on the Evaluation.

[14]The numeral "6" is circled and should have been "7", based on its sequential placement on the Evaluation.

is rated at "moderate" with "lifting/carrying/pushing/pulling" minimums and maximums listed and "activity level" is rated at "moderate to heavy", with relevant activities and their intensity listed. It also specifies parts of the body for which "repetitive action" and "maximum strength, endurance & flexibility" are required.[15]

32) The job analysis with "position modifiers" referred to in FOFM #26 specifies particular "condition[s] or apparatus" required for the job of timber faller, e.g. "**WILL** be exposed to excessive noise levels (above 85 decibels, routinely.)" (emphasis in original). Eight out of 17 modifiers are indicated by circling and/or highlighting the modifier.

33) At the conclusion of the meeting, Complainant believed he was required to provide Respondent with a written release from the chiropractor who had treated him in 1992 and have the "Physical Capacities Evaluation" completed by a physician before Respondent would refer him to Hilltop Logging.

34) Shortly after April 3, Complainant attempted to obtain a release from Dr. Hediger, the chiropractor who had treated him in 1992.

35) Complainant also began calling physician's offices in an attempt to schedule a physical capacities evaluation. Complainant was unable to make an appointment for an evaluation. Complainant called the Rogue Valley Medical Center ("RVMC") in Medford, a facility that conducts work performance evaluations. In 1996, RVMC charged $582 for a medical evaluation like the one contemplated by the "Physical Capacities Evaluation" form provided to Complainant by Respondent and would not conduct such an evaluation without a physician's referral[16] or a referral through the Occupational Health Department at RVMC. Either Dale Deboy or Debbie McQueen from RVMC's Work Performance Center telephoned Respondent in response to Complainant's inquiry, asked who would pay for the evaluation, and was told by someone in Respondent's office that Respondent would not pay for it.

36) Neither Beck nor Van Wey told Complainant or anyone else at any time that Respondent would pay for the cost of obtaining a medical release or for a physician to complete the "Physical Capacities Evaluation."

37) Gamby consulted Dr. Kruse not long after April 3, 1996 because he thought there might be problems arising from his evaluation. On November 1, 1996, Dr. Kruse noted that he concurred with Gamby's evaluation of Complainant. Kruse never examined Complainant.

38) Complainant got "pretty upset" when he was told in the meeting with Beck, Van Wey, and Gamby that he wouldn't be referred to Hilltop Logging because of his medical history.

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[15]The specific parts of the body are indicated by highlighting on the original.

[16]Dale Deboy, the Agency's witness who testified about this matter, used the term "prescription", not "referral", but the forum infers from the context of his testimony that the term he meant to use was "referral".

Afterwards, he went home and was "very upset."

39) Complainant had just purchased a manufactured home in February 1996 and was supporting five children who lived at home with Complainant and his wife in April 1996. He was aware that the work "season" for timber fallers in Oregon had just started and was extremely concerned about finding work.

40) Complainant began a search for other timber faller jobs in the southern Oregon/northern California area after April 3, 1996. From April 3 to April 15, Complainant contacted a minimum of four local sources -- John Abgeris, Estremeda Logging, JMW Logging, and a saw shop -- in an unsuccessful attempt to find work.

41) Complainant, as a last resort, then decided to seek work in Alaska. Complainant did this as a last choice to avoid the severe financial consequences he and his family would have experienced if they had remained in Oregon and Complainant had been unable to find work. When he decided to leave, his wife already had a firm job offer as a cook in a logging camp in Whitestone, Alaska. Complainant left for Alaska on or about April 20 with his wife and two of his five children, aged four and 11, all driving in his crew cab pickup. He left three other children at home in Grants Pass. One was a freshman in high school; the second was a sophomore; and the third was his 18-year-old stepdaughter who was seven or eight months pregnant.

42) Leaving for Alaska was a traumatic experience for Complainant. He had originally left Alaska because of his children and was now having to leave three of them at home, one of whom was in the late stages of pregnancy, in order to meet his financial obligations. He felt devastated at having to make this decision. He would not have gone to Alaska if he had found work in Oregon or California.

43) Prior to leaving for Alaska, Complainant did not provide Respondent with a release or the Physical Capacities Evaluation completed by a physician.

44) To get to Alaska, Complainant drove 1500 miles to Prince Rupert, with expenses of approximately $500. Complainant then took the ferry to Juneau, at a cost of $602 for the basic fare and about $100 for food. He arrived at Whitestone on or about April 27. His wife then began working as camp cook and Complainant immediately began working as a timber faller in the same camp. Complainant and his wife paid $180 for rent for the first month at the Whitestone camp. After about one week, Complainant determined that the camp was an unfit place for his children based on aggressive and out of control behavior of other camp children towards his children. He obtained work in a logging camp near Ketchikan where he had hoped to work when and his wife first came to Alaska. On May 7, Complainant flew alone to Ketchikan, with documented air fare costing him $128, and two connecting charter flights of undetermined cost. Because of the logging camp's policy on trial service, Complainant's wife and children could not join him for three weeks. Complainant paid $12/day room and board for three weeks in Ketchikan. On May 28, his wife and children took the ferry to Ketchikan to join Complainant, with

ferry fare costing him $126. Complainant and his wife then rented a trailer for one month, at a cost of $280. Complainant's wife worked very little in Ketchikan. While in Ketchikan, there were no public phones, and Complainant had to hitch rides on a boat to get to a phone he could use to call his children in Oregon. On June 21, Complainant and his family left Ketchikan for home. They left because they could no longer stand being separated from the rest of the family. On the way home with his family, Complainant spent $94.50 for one night's motel lodging. Complainant spent $346 for ferry fare from Hollis to Ketchikan and from Ketchikan to Prince Rupert. Complainant drove from Prince Rupert back to Grants Pass, another 1500 mile drive.

45) Complainant's total earnings in Alaska were $7400 gross. Complainant's wife earned a total of $3265 while working as a camp cook in Alaska. $2965 of this was earned in Whitestone.

46) Complainant arrived back in Grants Pass in late June and immediately began looking for work. On July 1, 1996, Complainant went to work as a timber faller in Quincy, California. He worked one week in Quincy, then went to work for BMR, who called him in response to his earlier application. Complainant earned $653.90 working in Quincy. Complainant started work for BMR on July 8, 1996, earning $200/day.

47) In 1996, timber fallers employed by John Abgeris worked Monday through Saturday, six hours a day, and were paid $30/hr., for a total of $180/day. The timber fallers were responsible to pay for their own travel, equipment and fuel expense. This expense amounted to about twenty percent of their wages.

48) Complainant's testimony was generally credible. He testified forthrightly about his medical history, perhaps the most significant issue in the case from his point of view. He did not deny making statements about pain in different parts of his body to Wayne Gamby during Gamby's evaluation and was straightforward with Gamby when it would have been in his best interests to omit items of his medical history or shade the truth. He did not try to minimize his prior injuries in his testimony before the forum, but attempted to explain the specific circumstances of each injury and the treatment he received. He did not try to exaggerate the extent of his job search between April 3 and late April 1996 when he made his decision to go to Alaska. Although the figures he provided in his testimony concerning his wage loss and the cost of going to Alaska and back to obtain work differed between earlier statements and the testimony he provided at hearing, the forum believes that any inconsistent testimony in this regard was a result of his confusion in trying to compare different sets of figures or not having the specific figures available to him. He testified convincingly about the emotions he experienced as a result of Respondent's failure to refer him to Hilltop Logging and was visibly upset at the hearing when he testified about the April 3 post-evaluation meeting and not being referred to Hilltop. He did not try to embellish his mental suffering. He was candid in admitting that he sometimes gets confused when angry, that he might not hear

things right when angry, and that he might say something that might not quite be accurate when angry.

49) Dale Deboy's recollection was somewhat vague. The forum credited his testimony regarding Rogue Valley Medical Center's policies, procedures, and costs. Because of his vague recollection, his testimony regarding contacts with Complainant and Respondent was credited where it was corroborated by other credible evidence.

50) John Abgeris' testimony was credible in its entirety.

51) Heidi Beck was not a credible witness. Important parts of her testimony were inconsistent and, in some cases, simply unbelievable. For example, she claimed that Respondent did not use the terminology "physical capacities evaluation," but signed a one paragraph form cover letter created by Respondent referring specifically to a "Physical Capacities Evaluation" form and enclosed the form, which is clearly titled "Physical Capacities Evaluation," with the letter. She testified that Respondent never required anyone to have a formal physical capacities evaluation other than Gamby's assessment, but gave Complainant the above-mentioned "Physical Capacities Evaluation" form and form cover letter with instructions to get a "release/evaluation". She testified it would have been sufficient if Complainant had brought back a release from a physician stating Complainant could do unrestricted work, yet the letter and forms she gave Complainant clearly call for an evaluation and specific responses to specific questions regarding Complainant's ability to utilize different parts of his body in performing physical labor. She referred to Gamby's evaluation both as an "evaluation" and a "medical assessment". She testified that her handwritten notes were made contemporaneous with her phone conversations, yet a conversation with Complainant that clearly took place on April 8, 1996, is dated "4/9/96", with no explanation from Beck as to the reason for the difference. Regarding Respondent's requirement that Complainant obtain a release/evaluation, she testified or wrote variously regarding Complainant's referral to Hilltop that: (1) Complainant was asked to get a release from a physician he had seen that released him for full duty work; (2) Complainant was not told that he had to get a medical exam or physical capacities evaluation (hereinafter "PCE"); (3) She was not requiring an evaluation, but a release; (4) Complainant needed to get an "evaluation/release" from a doctor to be referred; and (5) Complainant was not required "to get a release but that he was welcome to have someone else evaluate him." Consequently, the forum has credited Beck's testimony only where it was corroborated by other credible evidence.

52) Lisa Van Wey's testimony was colored by her present employment with Respondent. It was rendered suspect by her admission that she discussed Heidi Beck's testimony with Beck after Beck had testified and before Van Wey testified. Like Beck, her testimony was inconsistent. Unlike Beck, who claimed that "PCE" was a term foreign to her, Van Wey thought a PCE was what

Gamby did for Respondent. She testified that Exhibit A6, pp.3-5, were Respondent's "release packet", yet claimed she didn't associate PCE with the packet and never noticed page 4 was titled "Physical Capacities Evaluation". She testified that Respondent requires applicants who have seen a doctor *"in the last year"* (emphasis added) for anything but the "common cold" to get a doctor's release stating if they have any limits, but that Complainant was required to get a release because he said he hadn't been released by a chiropractor or chiropractors who saw Complainant either four or eight years earlier. Like Beck, Van Wey's testimony was credited only where it was corroborated by other credible evidence.

53) James Hardt's testimony on critical issues was disingenuous and seemed to be crafted specifically for the hearing. For example, he testified that Respondent sometimes requires applicants to undergo physical exams by physicians and Respondent pays for it. This contradicted Beck's and Van Wey's testimony that Respondent never required applicants to have a physical exam other than Gamby's PCE, and no evidence was offered to support this assertion. Hardt testified that Respondent may FAX requests for a release to a treating physician's office, but there was no evidence that this was ever done in Complainant's case. Notably, neither Van Wey nor Beck mentioned this gratuitous policy in their testimony. He testified that if an applicant can't get a release, Respondent might find a doctor, have the applicant examined, and pay for it. Again, it is noteworthy that neither Van Wey nor Beck testified to this policy, and no evidence was offered to support this assertion. Finally, Hardt testified that, "with rare exceptions," if there is a problem with employees, he "knows about it almost immediately," and he would make it a top priority to do what he could to put that person to work. Although Hardt was absent from work on April 3, 1996, his subordinates Van Wey and Beck, as well as Gamby, clearly perceived Complainant's situation as a problem. Yet there was no testimony that Hardt was aware that Complainant had even come in to apply, much less that there was a problem with Complainant getting a release. Given Hardt's testimony concerning his awareness of problems in the office, it is simply not believable that he was not aware of Complainant's problem. If he was aware, he clearly did not apply the proactive procedures described earlier in this paragraph. Accordingly, the forum has discredited Hardt's testimony regarding Respondent's gratuitous procedures towards applicants whom Respondent believes need post-hire medical evaluations or releases.

54) The Agency did not challenge Wayne Gamby's testimony regarding the physical evaluation he performed on Complainant and the results of that evaluation, and the forum finds that testimony credible because the evaluation was based on objective physical criteria. However, the forum finds his opinion regarding Complainant's limitations, based solely on Complainant's self-described medical history, not credible based on Gamby's lack of a medical license or any relevant certification. Although Gamby testified

that Dr. Kruse verified his opinion, more significant to Gamby's credibility was the conspicuous absence of Dr. Kruse from the witness stand to verify his stamp of approval and the basis on which he granted that stamp of approval.

ULTIMATE FINDINGS OF FACT

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

2) At all times material, Respondent's business was leasing employees to other businesses and providing temporary employees to other businesses.

3) Complainant applied for employment with Respondent on April 3, 1996 as a timber faller after being referred to Respondent by Hilltop Logging, an employer who desired to use Complainant's services as a timber faller.

4) Complainant passed a drug screen and was considered hired by Respondent before Respondent's agent conducted a Physical Capacities Evaluation on Complainant.

5) After Complainant underwent the Physical Capacities Evaluation, Respondent informed Complainant that he was restricted from strenuous activity requiring the use of his back, and that he would not be referred to Hilltop Logging unless he obtained a medical release/evaluation.

6) Based on the Physical Capacities Evaluation, Respondent perceived that Complainant had a physical impairment to his back that prevented him from performing any strenuous physical labor requiring the use of his back, including all jobs in the logging industry, the occupation Complainant had worked in his entire adult life.

7) At all times material, Complainant had no physical impairment to his back.

8) Complainant would have been referred to Hilltop Logging as a timber faller except for Respondent's erroneous perception that Complainant had a physical impairment to his back that prevented him from performing any strenuous physical labor requiring the use of his back, including all jobs in the logging industry, the occupation Complainant had worked in his entire adult life.

9) Although Respondent required Complainant to obtain a medical release/evaluation as a condition of continuation of his employment, Respondent would not pay the cost of the release/evaluation.

10) Complainant lost wages of $8,876.60 between April 4 and July 7, 1996.

11) Complainant was very upset about Respondent's failure to refer him to Hilltop Logging. He diligently sought work thereafter and moved to Alaska to obtain employment in order to ensure the financial well being of his family. The move devastated him because of the separation of his family.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.330 to 659.460.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over 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, and 659.435.

3) The actions of employees Lisa Van Wey and Heidi Beck and agent Wayne Gamby, described herein, and their perceptions and attitudes underlying those actions, are properly imputed to Respondent.

4) At times material herein, ORS 659.425 provided, in pertinent part:

"(1) For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

" * * * * *

"(b) An individual has a record of a mental or physical impairment; or

"(c) An individual is regarded as having a physical or mental impairment."

At times material herein, ORS 659.400 provided, in pertinent part:

"As used in ORS 659.400 to 659.460, unless the context requires otherwise:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(2) As used in subsection (1) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

"(b) 'Has a record of such an impairment' means has a history of, or has been misclassified as having such an impairment.

"(c) 'Is regarded as having an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment.

"(3) 'Employer' means any person who employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard."

At times material herein, OAR 839-06-205 provided, in pertinent part:

" * * *

"(2) 'Disability' means a physical or mental (including emotional

or psychological) impairment which substantially limits one or more major life activities. Disability does not include the current use of illegal drugs.

"(3) 'Duly licensed health professional', in addition to physicians and osteopathic physicians, includes psychologists, occupational therapists, clinical social workers, dentists, audiologists, speech pathologists, podiatrists, optometrists, chiropractors, naturopaths, physiotherapists, and radiologic technicians insofar as any opinion or evaluation within the scope of the relevant license applies or refers to the individual's physical or mental impairment.

"(4) 'Major life activity' includes but is not limited to: walking, speaking, breathing, performing manual tasks, hearing, learning, caring for oneself and working in general, considering the person's experience and education, as opposed to performing a particular job.

"(5) 'Medical' means authored by or originating with a medical or osteopathic physician or duly licensed health professional.

"(6) 'Misclassified', as used in ORS 659.400(2)(b), means an erroneous or unsupported medical diagnosis, report, certificate, or evaluation, including an erroneous or unsupported evaluation by a duly licensed health professional.

"(7) 'Perceived disability' is:

"(a) A physical or mental condition which does not limit a major life activity but which is thought to be disabling (example: flu thought to be AIDS); or

"(b) The perception of a disability where no condition exists (example: a person who speaks slowly is thought to be mentally impaired); or

"(c) A condition disabling only because of the attitude of others (example: disfigurement because of burns).

"(8) 'Physical or mental impairment' means an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages a person's health or physical or mental activity."

Complainant was not a disabled person at times material herein. Respondent perceived Complainant as having a physical impairment to his back that substantially limited Complainant in the major life activity of employment. Respondent violated ORS 659.425 by refusing to refer Complainant to the position of timber faller based on this perception.

5) At times material herein, OAR 839-06-235 provided, in pertinent part:

"(1) An employer may inquire whether an individual has the ability to perform the duties of the position sought or occupied.

"(2) An employer may require a post offer medical evaluation of a person's physical or mental ability to perform the work involved in a position:

"(a) The person seeking or occupying a position must cooperate in any medical inquiry or evaluation, including production of medical records and history relat-

ing to the person's ability to perform the work involved; and

"(b) If the employer requires a medical evaluation as a condition of hire or job placement and the evaluation verifies a physical or mental impairment affecting the ability to perform the work involved, or verifies a present risk of probable incapacitation, the employer may not refuse to hire or place a person based on the person's impairment unless no reasonable accommodation is possible.

"(c) The employer shall pay the cost of a medical evaluation or the production of medical records it has requested as provided in ORS 659.330.

" * * *

"(4) An employer may not use the provisions of this section as a subterfuge to avoid the employer's duty under ORS 659.425."

At times material herein, ORS 659.330 provided, in pertinent part:

"(1) It is an unlawful employment practice for any employer to require an employee, as a condition of continuation of employment, to pay the cost of any medical examination or the cost of furnishing any health certificate.

" * * *

"(3) 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 * * * remedies * * * as provided in ORS 659.010 to 659.110 * * *."

Respondent violated ORS 659.330 by requiring Complainant to pay the cost of a medical examination or furnishing a health certification as a condition of continuation of employment.

OPINION

1. ORS 659.425(1)(b)

ORS 659.425(1)(b) prohibits discrimination because an "individual has a record of a physical or mental impairment." When ORS 659.425(1)(b) is read in light of the definitions in ORS 659.400(1) and (2), "has a record of such an impairment" means that an individual has a history of, or has been misclassified as having an impairment which substantially limits one or more major life activities. *In the Matter of Parker Hannifin Corporation*, 15 BOLI 245, at 262, *citing* ORS 659.400 (2)(b); *Devaux v. State of Oregon*, 68 Or App 322, 326, 681 P2d 156, 158 (1984).

The initial issue is whether the medical history available to Respondent at the time Complainant was told he could not be referred as a timber faller qualifies as a "record". The medical history under scrutiny here was provided by Complainant to Respondent in 1995 and 1996. In 1995, Complainant provided a written medical history to Respondent stating, in relevant part: (1) He suffered a lower back sprain in 1987,[17] was treated by a chiropractor and a physician and

[17]Testimony by Complainant indicated this injury was actually in 1988.

had "30 days rest" as treatment; (2) He threw vertebrae out in his neck and upper back in 1991 or 1992, went to the chiropractor five times; and (3) He had scar tissue removed from his right knee in 1991[18] or 1992. Complainant indicated he had no current physical restrictions of limitations as a result of these injuries. In 1996, Complainant told Gamby that the 1988 chiropractor told him he thought there was evidence of degenerative disc disease and Complainant shouldn't be doing hard work, that the 1992 chiropractor told him he had two vertebrae that were slightly twisted, that he had experienced soreness in his upper extremities after clearing ground for his garden, that he occasionally experiences pains going down his legs, and that he experienced pain in his arms while cutting brush in 1995 that was resolved after two or three days of rest.

Complainant's medical history does not disclose any condition that substantially limited any major life activity. The only major life activity even referenced is employment. In order to be substantially limited in employment, one must be unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. *Former OAR 839-06-205(4); Parker-Hannifin Corporation, supra,* at 265. The medical history shows that Complainant missed some work because of his injuries, but there is nothing indicating anything more than a temporary impairment. *Former OAR 839-06-240(1)*. The forum concludes that Complainant's medical history acted upon by Respondent does not constitute a "record" of any impairment that substantially limits any major life activity or misclassification of such impairment, and as a result, Complainant did not enjoy the protection of *former* ORS 659.425(1)(b).

2. ORS 659.425(1)(c)

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 v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743 (1989)*; Parker-Hannifin Corporation, supra. Former* ORS 659.400(2)(c) provided:

"'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."

An individual must have an "impairment" to come under the protection of *former* ORS 659.400(2)(c)(A) and (B). "Impairment" is defined as "an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages a person's health or physical or mental activity." *Former OAR 839-06-205(8)*. There was no

[18]Complainant's medical record showed this injury was actually in 1992.

evidence presented in this case, other than Gamby's evaluation of Complainant's medical history, that established that Complainant had any condition that weakened, diminished, restricted, or otherwise damaged his health or physical or mental activity. Complainant had spent his entire adult life working as a logger, and the previous 15 years working as a timber faller. Since Respondent's refusal to refer him to Hilltop Logging, he has worked continuously as a timber faller without injuring himself or losing work due to problems with his back, or having to consult a doctor about his back. The injuries Gamby was concerned about occurred four and eight years prior to 1996, and there is no evidence whatsoever, other than Gamby's opinion, that Complainant was in any way impaired from working as a timber faller or doing any job in the logging industry. In addition, Gamby's objective evaluation of Complainant concluded that Complainant was physically capable of working as a timber faller. Consequently, the forum must conclude that Complainant did not have an "impairment," and that he was not protected by the provisions of *former* ORS

659.400(2)(c)(A) and (B).

The remaining subsection, *former* ORS 659.400(2)(c)(C), was explicitly designed to protect individuals in Complainant's circumstances -- individuals who do not have an impairment but are treated adversely by an employer or potential employer as though they had an impairment which substantially limits one or more major life activities. *OSCI v. Bureau of Labor and Industries*, *supra* at 746. The question was whether Respondent treated Complainant adversely and whether that adverse treatment was based on Respondent's perception that Complainant was substantially limited in one or more major life activities.

Respondent's refusal to refer Complainant clearly fulfills the adverse treatment requirement of the statute. Whether or not Respondent took this action based on a perception that Complainant had an impairment that substantially limited one or more major life activities requires a further analysis of the facts and applicable law.

The major life activity under scrutiny is employment. In order to be substantially limited in employment, one must be unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. *Former OAR 839-06-205(4); Parker-Hannifin Corporation, supra,* at 265.

Complainant applied for a job as a timber faller. His chosen field of employment since high school had been the logging industry, and he had worked almost exclusively as a timber faller since 1981. Pursuant to Respondent's standard hiring procedure, which involved having Gamby evaluate everyone who applied for <u>any</u> job in the logging industry, Gamby evaluated Complainant for the job of timber faller. Gamby did that and recommended that Complainant should "limit exertional/repetitive use of back". All jobs in the logging industry that Complainant was qualified to perform require strenuous, repeated use of the back, and the effect of this recommendation was to foreclose Complainant from working in any job in the logging industry, so far as Re-

spondent was concerned. In doing this, Respondent clearly perceived Complainant as "unable to perform" a class of jobs as contemplated by former OAR 839-06-205(4) and violated ORS 659.425(1)(c).

3. Was Complainant "barred" or "refused hire?"

The Agency alternatively alleges that Complainant was either "barred" or "refused hire" by Respondent. ORS 659.425 prohibits both actions. The question is what label to put on Respondent's action. Respondent claims that Complainant was never "barred" or "refused hire", based on their contentions that Complainant was "hired" after passing the drug screen and that Respondent would have referred him to any job for which he was qualified after that.

A review of the facts is in order. Complainant sought Respondent as an employer solely because it was the only way he could be referred to Hilltop Logging, a company that wanted Complainant to work for them as a timber faller for a second consecutive year. If Complainant had applied at Hilltop Logging directly and been turned down because of a negative PCE, he would not have been considered "hired". Respondent may have "hired" Complainant, but Complainant did not stay "hired" after Respondent refused to refer him to the very job he sought. Respondent's position is without merit. Likewise, Respondent's argument that Complainant was not "barred" because Respondent would have referred him to a lesser paying, non-logging job, is purely one of semantics, lacks substance, and is not supported by credible facts. ORS 659.405, which sets out the public policy of the state of Oregon with regard to disabled persons and employment, is instructive as to the correct approach to this issue. It reads, in relevant part:

"(1) It is declared to be the public policy of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state, to engage in remunerative employment * * *.

"(2) The right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction * * * are hereby recognized and declared to be the rights of all the people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights and ORS 659.400 to 659.460 shall be construed to effectuate such policy."

The policy behind Oregon's disability statutes make it clear that disabled persons are not to be denied rights guaranteed by the legislature based on legal artifice. There is no doubt that Complainant was not referred to Hilltop based on a perceived physical impairment. The "adverse action" necessary for establishing a prima facie case of discrimination occurred when Complainant was denied referral. Even if Complainant stayed "hired", any subsequent actions of Respondent related to other potential referrals only go to mitigation, and not to whether or not unlawful discrimination occurred.

4. ORS 659.330.

The preponderance of credible evidence showed that Respondent required Complainant to provide a "release/evaluation" as a condition of job placement in the logging industry, that Complainant sought to obtain such a "release/evaluation" through the Rogue Valley Medical Center in order to comply with Respondent's directive, and that Respondent refused to pay the $500+ prospective cost of Rogue Valley's evaluation. The type of "release/evaluation" contemplated by Respondent, as evinced by the paperwork provided to Complainant, clearly required a "medical examination".[19] Based on the testimony of Respondent's witnesses, Complainant was in fact "hired" when this condition was placed on him, so there can be no doubt that it was "a condition of continuation of employment." The fact that Complainant did not actually undergo the examination and pay for it out of his own pocket is irrelevant. He was required to undergo a medical examination as a condition of continuation of employment and was required to pay for the examination if he chose to undergo the examination.[20] Under these circumstances, Respondent's actions constituted a violation of ORS 659.330.

5. The Agency's motion to amend the Specific Charges to include the expenses of Complainant's move to Alaska as an element of damages.

During the course of the hearing, the Agency sought to amend the specific charges to include Complainant's moving expenses to and from Alaska as an element of damages. Respondent opposed it on the grounds that damages of this sort were not authorized by law and because Respondent was prejudiced by not having prior knowledge of the Agency's intent.

OAR 839-050-0140 governs amendments in BOLI's contested case hearings. In relevant part, it reads as follows:

" * * *

"(2)(a) After commencement of the hearing, issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is expressed or implied consent of the participants. Consent will be implied where there is no objection to the introduction of such issues and evidence or where the participants address the issues. The administrative law judge may address and rule upon such issues in the proposed order. Any participant raising new issues must move the

[19]The "Physical Capacities Evaluation" form given to Complainant requires answers to questions about Complainant's physical condition that can only be answered by someone who has examined Complainant, and there is a line at the bottom of the form for a "Physicians Signature".

[20]Even if Complainant was only required to obtain a release, which could be considered a "health certificate" under ORS 659.330, there is no credible evidence that Respondent intended to pay any of the cost of obtaining one from Complainant's former treating physicians or chiropractors in Alaska, and the same analysis would apply. Either way, Respondent violated ORS 659.330.

administrative law judge to amend its pleading to conform to the evidence and to reflect issues presented.

" * * *

"(2)(c) Charging documents may be amended to request increased damages * * * to conform to the evidence presented at the contested case hearing."

Complainant's out of pocket expenses related to his trip to Alaska were not prayed for in the Specific Charges. Evidence concerning those expenses came into the record without objection, implying consent on the part of Respondent. In past cases before the forum, the Commissioner has consistently granted amendments under these circumstances. *In the Matter of Benn Enterprises, Inc.*, 16 BOLI 69, 71 (1997), *In the Matter of Yellow Freight System, Inc.*, 13 BOLI 201, 203 (1994). The forum follows its own precedent in this case and grants the Agency's amendment.

6. Respondent's motion to dismiss the Specific Charges on the grounds that Hilltop Logging, the employer Respondent have leased Complainant to, did all of its work in California in 1996.

This motion was denied during the hearing. This ruling is affirmed. The evidence is clear that Respondent hired Complainant, an Oregon resident, through their office in Medford, Oregon, and that all of Complainant's workers compensation insurance and unemployment tax was paid in Oregon in 1995 and would have been paid the same in 1996. Under these circumstances, the fact that Complainant would have been sent to work out of state does not convert Respondent into a non-employer for the purposes of ORS 659.400(3).

7. Damages.

Complainant seeks two types of damages, back pay and compensation for mental suffering.

a. Back Pay.

If Complainant had been referred to Hilltop, he would have started work on April 4, 1996, working six days a week, six hours a day, and earning $180 a day. Through July 7, he would have worked 76 days, earning gross wages in the amount of $14,760. On July 8, 1996, he obtained a job that paid $200 a day, cutting off any further back pay award.

In contrast, Complainant's actual gross earnings during this period of time were $8,053.90 ($7,400 in Alaska; $653.90 in Quincy). These wages must be counted as an offset against the back pay to which he is entitled.

Complainant also incurred expenses getting to and from the logging camps he worked at in Alaska. Since he would not have earned the $7400 without incurring these expenses, they must be counted as a set-off against the $7400. The forum has allowed those expenses for which there is documentary evidence or a reasonable estimate of expenses. Expenses allowed include $1,000 for 3,000 miles round-trip from Grants Pass to Prince Rupert in Complainant's crew cab pickup, $602 for the ferry ride from Prince Rupert to Juneau, $128 for Complainant's plane flight to Ketchikan, $94.50 for motel expenses on the way home to Grants Pass, and $346 for the ferry ride from Hollis to

Prince Rupert, for a total of $2170.50. Expenses for food are not included, as Complainant and his family would have had to eat anyway. Complainant's rent and room and board is not included, as the forum considers that they offset the estimated "20%" expense reflected in Finding of Fact - The Merits #49.

Based on this analysis, Complainant's back pay can be computed as follows: $14,760 (gross back pay) *minus* $8,053.90 (gross wages earned in mitigation) *plus* $2170.50 (expenses) *equals* gross pay loss of $8,876.60.

b. Mental Suffering.

Awards for mental suffering damages depend on the facts presented by each Complainant. A Complainant's testimony about the effects of a Respondent's unlawful conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Jerome Dusenberry*, 9 BOLI 173 (1991).

Complainant testified credibly as to the extent of his mental suffering attributable to Respondent's unlawful employment practices. Complainant, who had been a timber faller for the previous 14 years, including the previous year with Respondent, was understandably "very upset" when Respondent told him he could not do that job based on the opinion of Wayne Gamby. He was aware that the work season for timber fallers in Oregon had just begun and was "extremely concerned" about finding work. This concern was heightened by the fact that he had recently purchased a manufactured home in which to house his family, which he had moved from Alaska to Oregon for his children's sake the previous summer. He tried to find work in Oregon and northern California, but soon realized he would have to move back to Alaska to maximize his chances of finding employment. He made that move, taking his wife and two youngest children with him, and found work immediately. However, the separation from his three high school aged children, including one who was seven months pregnant, was "devastating" to him. While in Alaska, he worked continually, finally leaving when he could no longer stand the separation from his family.

Based on all of the above, the forum concludes that $20,000 is an appropriate award of mental suffering damages in this case.

8. Respondent's Exceptions to the Proposed Order

a. ALJ Bias and Witness Credibility

Respondent contends that Barrett's witnesses were credible and believable, that Complainant's story was not believable, and that the ALJ's assessment of credibility was based on the ALJ's bias. Specifically, Respondent notes "what they believe to be a prejudice and bias by the Judge who was hired by the Commissioner and travels with and dines with the BOLI representatives, agents and case presenters while trying the Commissioner's cases." In prior cases, the question of ALJ bias has typically arisen in the context of a motion to disqualify the ALJ or hearings referee.[21] A 1993 BOLI case illus-

[21]Administrative law judges (ALJs) employed by BOLI were referred to as "hearings referees" until mid-1995.

trates the rationale used by this forum in deciding questions of ALJ bias. In that case, Respondent contended that the hearings referee was incapable of giving Respondent a fair hearing and decision because he was an employee of the Agency. The forum observed:

"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)." *In the Matter of Clara Perez*, 11 BOLI 181, 182-83 (1993)

In the same case, the forum held that Respondent has the burden of showing actual prejudice or bias. *Id, at 183.*[22] Here, there is no evidence on the record demonstrating actual prejudice or bias as alleged by Respondent. The ALJ's assessments of witness credibility are supported by substantial evidence in the record. Accordingly, Respondent's exceptions on this point are overruled.

b. Failure to Call Complainant's Wife as a Witness

Respondent argues that the ALJ's bias is further demonstrated by the language in FOFM #48 noting that "It was equally within Respondent's power to call Complainant's wife as a witness to impeach Complainant, and Respondent did not do so." That portion of FOFM #48 has been deleted, but the forum's assessment of Complainant's credibility stands.

c. Testimony of John Abgeris

Respondent contends that the ALJ should have commented on John Abgeris' testimony that he would want to have a medical release before hiring a timber faller who was stating he had prior back problems and had radiating pain down his legs. Abgeris had no medical background that would entitle his opinion on this subject to any weight. Respondent's exception is overruled.

d. The Release

Respondent argues that it was reasonable to request a release and that the ALJ should have commented on the fact that Complainant stated he contacted his chiropractor for a release. The issue of reasonableness has been adequately covered in the proposed order. The issue of whether or not Complainant contacted his chiropractor for a release is irrelevant to the outcome of this case, given that Respondent's act of requiring a "release/evaluation" violated ORS 659.330.

e. Damages and Amendment.

Respondent generally excepts to the damages allowed and the amendment granted. The damages are supported by a preponderance of the evidence. The basis for granting the amendment is based on the administrative rules governing

[22] *See also Boughan v. Board of Engineering Examiners,* 46 Or App 287, 611 P2d 670, *rev den* 289 Or 588 (1980).

procedures in this forum and the forum's precedent. These exceptions are without merit and are overruled.

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 in violation of ORS 659.330 and ORS 659.425 and as payment of the damages awarded, Respondent BARRETT BUSINESS SERVICES, INC. is hereby ordered to:

1) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for KELLY ROBBINS, in the amount of:

a) EIGHT THOUSAND EIGHT HUNDRED SEVENTY-SIX DOLLARS AND SIXTY CENTS ($8,876.60), less lawful deductions, representing wages lost by Complainant between April 4 and July 7, 1996, as a result of Respondent's unlawful practices found herein, plus

b) TWENTY THOUSAND DOLLARS ($20,000), representing compensatory damages for the mental and emotional distress suffered by KELLY ROBBINS as a result of Respondent's unlawful practices found herein, plus,

c) Interest at the legal rate from July 7, 1996, on the sum of $8,876.60 until paid, and

d) Interest at the legal rate on the sum of $20,000 from the date of the Final Order until Respondent complies herewith.

2) Cease and desist from discriminating against any employee based upon the employee's disability and cease and desist from requiring a medical examination or health certificate at the employee's expense as a condition of continued employment.

In the Matter of

WESTERN STATIONS CO., WSCO PETROLEUM CORPORATION., and WESTERN HYWAY OIL CO.

Case Number 04-99

Final Order of the Commissioner

Jack Roberts

Issued February 26, 1999

SYNOPSIS

Where the Agency failed to establish by a preponderance of the evidence that Complainant, a female, had been subjected to harassment because of her sex, or that Respondents discharged Complainant for complaining about alleged sexual harassment, the commissioner dismissed the complaint and specific charges. ORS 659.030(1)(b), (f); OAR 839-007-0550.

The above-entitled contested case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 6 and 7, 1999, in the

conference room of the Oregon State Employment Department, 846 S.E. Pine Street, Roseburg, Oregon. The Civil Rights Division ("CRD") of the Bureau of Labor and Industries ("the Agency") was represented by Linda Lohr, an employee of the Agency. Respondents were represented by Karen O'Kasey of Schwabe, Williamson & Wyatt, P.C., Portland. Glen Zirkle (phonetic) and Greg Tripp (phonetic) were present as Respondents' representatives and did not testify. The Complainant, Kathy J. Hamilton, was present and was not represented by counsel.

The Agency called as witnesses, in addition to Complainant: Opal Darlene Maxey and Jeff McClellan (former employees of Respondents) and Kassandra Kendall (Complainant's daughter). Respondents called as witnesses: Charles Pryor, Patrick White, and Phyllis Nelson (current employees of Respondents).

The ALJ admitted into evidence: Administrative Exhibits X-1 through X-6; Agency Exhibits A-1 to A-4; and Respondents' Exhibit R-1.

Having fully considered the entire record in this matter, I, Jack 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 February 20, 1997, Complainant filed a verified complaint with the Civil Rights Division of the Agency. Complainant alleged that she was sexually harassed and subjected to a hostile work environment when she worked for Respondents. Complainant further alleged that Respondents terminated her employment in retaliation for her complaints about the sexual harassment and/or because of her alleged disability (depression).

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence that Complainant had been subjected to sexual harassment and a hostile work environment, had suffered retaliation for complaining about that harassment, and was terminated on the basis of her opposition to an unlawful employment practice. The Agency found no substantial evidence that Respondents had terminated Complainant because of a disability.

3) In August 1998, the Agency requested a hearing in this matter.

4) On September 17, 1998, the Agency served on Respondents Specific Charges alleging they had subjected Complainant to a hostile, offensive, and intimidating work environment and had retaliated against her for opposing the sexual harassment by terminating her employment, in violation of ORS 659.030(1)(b) and (f). The Agency sought damages of $22,500.00 for mental suffering.

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 Summary 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. The Notice of Hearing stated that Respondents' answer was due 20 days from receipt of the notice and that, if Respondents did not timely file an answer, they could be held in default.

6) Respondents filed their answer on or about September 30, 1998. Respondents generally denied they had engaged in any unlawful employment practices. For their first affirmative defense, Respondents alleged that Complainant did not take advantage of Western Stations' policy prohibiting sexual harassment and requiring employees to report any such harassment. For their second and third affirmative defenses, Respondents alleged that the demand for compensatory damages was barred by the statute of limitations and by the substantive remedies and limitations provided for under ORS Chapter 659.

7) On December 3, 1998, the Forum issued a case summary order requiring Respondents and the Agency to submit a list of persons to be called as witnesses, copies of documents to be offered into evidence, and a statement of any agreed or stipulated facts. The participants submitted timely case summaries.

8) At the start of the hearing, counsel for Respondents stated that her clients had received the Notice of Contested Case Rights and Procedures and that she had no questions about it.

9) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) On February 4, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The Forum received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) Respondents all are Oregon corporations and employers in Oregon that utilize the personal services of one or more employees.

2) In 1995, Respondent Western Stations Co. operated Astro Station #234 in Winston, Oregon ("the service station"). Respondent WSCO Petroleum Corp. is a successor in interest to Western Stations Co.[1] There is no evidence in the record that Complainant ever was employed by Respondent Western Hyway Oil. Throughout the remainder of this order, the term "Respondents" refers only to Western Stations Co. and WSCO Petroleum Corp.

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[1]No evidence in the record indicates when this succession took place. Although the Agency alleged that WSCO Petroleum Corporation "purchased Respondent Western Stations Co. on or about December 31, 1997," Respondents admitted only that WSCO Petroleum had succeeded in interest to Western Stations Co., not when that occurred. Respondents further admitted in their case summary (Exhibit X-6) that WSCO Petroleum employed Complainant at some point in time, suggesting that the succession must have taken place quite a bit earlier than December 31, 1997, since Complainant was fired in January of that year. Given the ultimate outcome of this case, there is no need to resolve this question.

3) At material times, Patrick White was manager of the service station, Jeff McClellan was assistant station manager, and both were employees of Respondent Western Stations Co.[2] Charles ("Chuck") Pryor was Respondents' area supervisor and visited the service station about once every two weeks.

4) In November 1995, McClellan, acting for Respondent Western Stations Co., hired Complainant to work as an attendant at the service station. Complainant is female.

5) At all material times, Respondents had an employee handbook that included a policy forbidding sexual discrimination and harassment. The written policy defined sexual harassment and stated that incidents of harassment should be promptly reported to a supervisor or to "the next higher level of management." Respondents' general practice was to have new employees review and sign the handbook, but there is no evidence in the record that this happened with Complainant.

6) At the beginning of Complainant's employment, Phyllis Nelson, another attendant, was Complainant's shift supervisor. Relatively soon after Complainant was hired, Nelson quit work for a brief period of time. After Nelson returned, her shift overlapped with Complainant's shift for about five hours per day. During that time, Complainant served as Nelson's shift supervisor. White's shift ended when Complainant's shift started; he generally stayed an hour later completing paperwork and, therefore, was at the station for about an hour each day during the time that both Complainant and Nelson were present.

7) In January 1996, Opal Darlene Maxey was hired to work as an attendant at the service station. She frequently worked at the same time that both Complainant and Nelson were working. Maxey lived with McClellan throughout the time she worked at the station; they are now engaged but disagree about whether they were engaged at the time Maxey was hired. Maxey and Complainant are close friends.

8) At the time Complainant worked at the service station, at least half of the people who worked there were women.

9) At material times, a small enclosure called the "dog house" was located in the middle of the gasoline pumps at the service station. A cash register was located in the dog house and attendants would go there to control the gas pumps, ring up sales, make change, and get cigarettes for customers. The dog house was only about three feet square. Two employees could fit into the enclosure with some difficulty, but would touch each other unless they made a conscious effort not to.

10) When White was in the dog house with other employees, he sometimes would touch them on the hips, back, or shoulders to let them know he was there, or to get them to move. White did not do this in a sexual manner or with sexual intent. White did occasionally tell "off-color" jokes at work but directed no sexual comments toward Complainant.

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[2]Depending on when WSCO Petroleum Corporation succeeded in interest to Western Stations Co., White, McClellan, and other employees referenced in this order may also have been employed by WSCO Petroleum.

Complainant never told Maxey that she thought White said or did things that were inappropriate. Maxey was not offended by White's jokes and never told him she thought they were inappropriate. Nelson was not offended by White's jokes.

11) Complainant received telephone calls from her children at least once each day. Other employees received personal telephone calls, but not as often as Complainant did. Nelson frequently "needled" and "harangued" Complainant about the number of telephone calls she received from her children. White told Complainant several times that she should not receive so many calls.

12) Complainant and Nelson did not get along; they bickered and argued constantly. Each employee felt that she worked much harder than the other. As White put it, the two employees had a "work ethic conflict." Nelson frequently made insulting and offensive remarks about Complainant's children. She also resented the time Complainant spent talking on the telephone and complained to White about that. Complainant complained to McClellan about Nelson's general hostility toward her and Nelson's negative comments about Complainant's children. McClellan told White about some of those complaints.

13) When White received Nelson's and Complainant's complaints about each other, he instructed McClellan to handle the situation by telling the employees to calm down and get along.

14) Nelson sometimes asked the service station customers whether they "liked it hard or soft." Although Nelson asked that question to determine whether customers wanted cigarettes in hard packs or soft packs, her words and demeanor carried a sexual connotation. One regular customer at the station had a truck with duel fuel tanks that were located one behind the other. The front tank had a leak, so the station attendants needed to fill the rear tank. Nelson sometimes joked with this customer by asking him whether he "liked it in the rear."

15) Nelson daily made jokes and comments about sex to customers, which sometimes included references to spitting or swallowing semen. Many of these jokes could be heard by other employees at the station because Nelson usually shouted them as she walked through the gas pump area. Nelson also sometimes talked about her sex life. Once, Nelson asked Complainant if she preferred to spit or swallow semen. One other time, she asked Complainant if she liked it "in the mouth." Nelson asked similar questions of other employees, and did not address her two questions to Complainant because of Complainant's sex. Nor were Nelson's workplace jokes or her questions to Complainant motivated by a general hostility toward women in the workplace. Rather, Nelson genuinely believed that her jokes were funny and that her customers and coworkers, including Complainant, were amused by them. Moreover, the nature of Nelson's comments and jokes -- under the circumstances in which they were made

-- did not objectively suggest hostility toward women.[3]

16) In fact, Complainant was somewhat offended by Nelson's jokes, comments, and questions, and suffered a minimal amount of mental distress as a result. Complainant told Maxey several times that she was bothered by Nelson's jokes and comments but did not tell that to Nelson. Complainant herself sometimes used profanities at work and occasionally told jokes with sexual content, but she did not talk about sexual matters nearly as often as Nelson did. Other service station employees, including Maxey, McClellan, and White, also sometimes made jokes with sexual content but much less frequently than Nelson. No credible evidence in the record suggests that Complainant was offended by these jokes.

17) Maxey found some of Nelson's sexualized comments offensive, but "blew it off" and did not say anything to Nelson.

18) Nelson, like White, sometimes bumped into or brushed against other employees while they were working in the dog house. Complainant testified that Nelson also intentionally rubbed her breasts against Complainant in a sexual manner. The Forum does not believe that testimony, which was not credible. Nor does the Forum accept Complainant's unsupported testimony that, when Nelson occasionally touched her crotch area through her clothing, she did it with sexual intent. Nelson's testimony that she was scratching an itch was far more credible. Nelson once invited Complainant and Maxey to spend the night at her house, but did not suggest that they engage in sex.

19) The Agency did not establish, by a preponderance of the evidence, that Complainant ever complained to McClellan specifically about any sexual harassment by Nelson. Complainant did, on one occasion, mention the sexual remarks while complaining generally to McClellan about her *other* problems with Nelson. There is no credible evidence, however, that Complainant told McClellan that she believed *she* was the victim of sexual harassment. Rather, the preponderance of evidence suggests that Complainant considered Nelson's sexual remarks in the presence of customers to be unprofessional and inappropriate, and told that to McClellan during one of her many complaints about Nelson's generally obnoxious behavior. McClellan did not pass that aspect of Complainant's complaint on to White, Pryor, or any other managerial employee. By Complainant's own admission, she never complained directly to White, Pryor, or any other managerial employee about any sexual harassment.

20) To some extent, customers complained about virtually all the employees at the service station. There were few or no customer complaints about Maxey and only a few about another attendant, Nick Delgadi (phonetic). White sometimes would talk to the complained-of employees; the complaints rarely, if ever, were memorialized in writing.

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[3]Certainly the same comments could be highly intimidating and hostile if, for example, they were made one on one, behind closed doors.

21) During late 1996, the number of customer complaints about Complainant increased and, during that time, customers complained about her more frequently than they did about other employees. At least some of these complaints related to Complainant yelling or cursing at customers. Nelson sometimes apologized to customers for Complainant's behavior. Nelson complained two or three times to White about having to do that. White talked to Complainant about the complaints but her negative interactions with customers continued.

22) In January 1997, White fired Complainant because of her poor working relationship with Nelson and because of the frequent customer complaints about her. McClellan believed Complainant was fired because she had asked a regular customer for identification when she purchased cigarettes.

23) On January 31, 1997, White fired Maxey and McClellan because they kept talking to customers about what they perceived to be Respondents' unfair treatment of Complainant.

24) For several reasons, the Forum finds much of Complainant's testimony not to be credible. Certain aspects of her testimony simply were unbelievable. For example, Complainant testified that she never joked around at work and never had uttered a profanity or other "bad word" the entire time she worked at the service station. Even Complainant's best friend, Maxey, acknowledged that Complainant used profanities, sometimes when customers could hear. Similarly, although Complainant acknowledged that her children called her at work every day,[4] she insisted that Nelson had never indicated that she was bothered by the telephone calls. Maxey and McClellan testified more credibly that Nelson frequently told Complainant to get off the telephone and that Nelson constantly "needled" or "harassed" Complainant about the calls. Complainant's testimony also was internally inconsistent. For example, Complainant initially insinuated that Nelson asked every day whether she spit or swallowed semen. On cross-examination, Complainant clarified that Nelson asked her that question only once.

25) In addition, Complainant's story changed significantly over time. In the complaint she initially filed with the Agency, at a time when she was represented by counsel, she did *not* allege that White had sexually harassed her in any way. The Specific Charges, however, include an allegation that White "repeatedly made remarks of a sexual nature to Complainant, including, but not limited to telling her that what she needed was a good `piece of ass.'"[5] The Charges also allege that White "grabbed Complainant by the waist and pushed his crotch against Complainant's rear end." Then, at the hearing, Complainant described only two sexual comments that White allegedly made

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[4]Complainant conceded this fact only on cross-examination. During her direct testimony, she denied that her children repeatedly called the station and implied that they called only when there was an emergency.

[5]The Forum presumes that allegations in the Specific Charges that describe conduct and comments directed specifically toward the Complainant are based on Complainant's assertions to the Agency.

toward her: that White thought her "butt" was the right size; and that the only use White had for another woman was to bend her over in the back room. Complainant did not state that White had made repeated comments to her of a sexual nature or that he had said anything about her needing a good "piece of ass."[6] The Forum did not believe Complainant's shifting allegations regarding White's alleged comments and behavior.

26) For the reasons set forth above, the Forum has found Complainant's testimony regarding the material allegations generally not to be credible and has given it little weight. Complainant did appear to testify more honestly on cross-examination, and the Forum has given some weight to that testimony, particularly where it was corroborated by that of more credible witnesses.

27) The testimony of Kassandra Kendall, Complainant's daughter, was almost completely unbelievable. Her manner of testifying was unconvincing and she appeared unwilling to say anything that might reflect negatively on Complainant. She said she heard Nelson ask Complainant if she liked threesomes, saw her mother burst into tears a couple of times after Nelson asked her sexual questions, and *twice* saw White rub his crotch against Complainant's backside. Complainant testified to neither of the first two events and stated repeatedly that White had rubbed his crotch against her only once. On cross-examination, after having described all these events she allegedly observed, Kendall admitted she had gone to the station only about once every other week, and had spent only about 15 minutes there each time she visited. The Forum has given no weight to Kendall's testimony.

28) Nor did the Forum believe much of the testimony of McClellan on the subject of sexual harassment, which was slanted in favor of Complainant's allegations. For example, McClellan testified that he observed Nelson ask Complainant whether she liked threesomes, something about which Complainant did not testify. He also testified that he observed Nelson ask Complainant *seven or eight times* whether she liked oral sex or wanted to participate in a threesome. On cross-examination, Complainant had acknowledged that Nelson asked her the former question only once and *never* asked her the latter question. Not only was McClellan biased in favor of Complainant, he clearly had bad feelings toward Respondent. After he was fired, he filed a complaint with BOLI, which the Agency found no substantial evidence to support. McClellan's testimony was belligerent, accusatory, and defensive. He seemed more interested in telling a story than in answering specific questions put to him. McClellan's testimony that he reported Complainant's allegations of sexual harassment to White was particularly unconvincing; White's testimony to the contrary was much more credible. On matters not related to the alleged harassment and complaints about it, McClellan's testimony was a bit more credible, and the Forum has relied on it to some extent, particularly when it was corroborated by credible testimony from other witnesses.

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[6]Complainant did repeat her charge that White once rubbed his crotch against her rear end in a sexual manner.

29) Compared to the testimony of some other witnesses, Maxey's testimony was relatively credible despite her friendship with Complainant and despite White having fired her. She acknowledged facts that were not helpful to the Agency's case as well as those that supported the harassment allegation. Maxey did, however, give some testimony that exaggerated the facts in Complainant's favor. For example, she stated that Complainant frequently complained about how Nelson "constantly" asked her whether she liked to spit or swallow semen. Although Complainant, too, initially suggested that Nelson asked her this question on a daily basis, on cross-examination, she admitted that Nelson had asked her the question only once. For this reason, as well as Maxey's bias in favor of Complainant, the Forum has not found her testimony sufficiently credible to establish -- by itself -- any element of the discrimination claim. However, where Maxey's testimony comported with Complainant's, appeared inherently credible, and was uncontradicted by credible testimony from any other witness, the Forum has given it weight.

30) Nelson's testimony was not wholly credible, in that she appeared to exaggerate Complainant's faults. For example, she testified that Complainant's children sometimes called every 10 or 15 minutes; no other witness who worked at the station testified that the children called that frequently. In other respects, Nelson's testimony was credible. She admitted making sexual jokes and comments, talking about oral sex, and scratching her crotch area. She also frankly acknowledged that she does not like Complainant and did not like dealing with telephone calls and visits from Complainant's children. In general, Nelson's testimony was blunt and forthcoming. For these reasons, the Forum finds her testimony to be more credible than that of Complainant, McClellan, and Kendall, and has found the facts in accordance with her testimony if those witnesses provided the only evidence to the contrary. The Forum also finds Nelson's denials of sexual intent toward Complainant and Maxey more persuasive than Complainant's and Maxey's testimony that they had inferred -- for reasons they were unable to identify -- that Nelson wanted to have sex with them.

31) The testimony of Pryor was credible. He readily admitted that, prior to January 1999, Respondents had given their area supervisors no formal training in the area of sexual harassment. He also admitted that sexual harassment had not been a "real subject of conversation" between himself and upper-level management. Because of his limited contacts with the station, however, Pryor had little information directly relevant to Complainant's allegations. Pryor did testify credibly that White had informed him, about two weeks before firing Complainant, that he thought that might be necessary because of the number of complaints he had received from customers. The Forum has accepted that testimony, which corroborates Respondents' asserted reasons for firing Complainant, as fact.

32) White's demeanor was forthright and his testimony was believable. He readily acknowledged that his practice was to allow employees to work out their own differences,

which did not work in this case, as the conflicts between Nelson and Complainant continued. White also admitted that employees at the station, including himself, teased each other and used profanities. The Forum generally has found White's testimony to be credible. Where it differed from the testimony of Complainant or McClellan, the Forum has relied on White's version of events.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondents each had one or more employees within the State of Oregon.

2) Complainant is female and worked for Respondents Western Stations Co. and/or WSCO Petroleum Corp. from November 1995 until January 1997.[7]

3) Throughout Complainant's employment, a female coworker, Nelson, made frequent jokes and comments about sex, most often with the service station's customers. Nelson did not direct those comments and jokes toward Complainant and did not make them because of Complainant's sex. Nor did she utter the comments and jokes for Complainant's benefit, or with the intent that the sexual talk would have any particular effect on Complainant. In making the sexual remarks, Nelson was not motivated by any hostility toward women in the workplace. Nor did the jokes, which Nelson usually shouted toward customers as she walked through the gas pump area, objectively suggest that Nelson or Respondents were hostile toward women.

4) Twice, Nelson asked Complainant questions related to oral sex. Those two questions were not directed at Complainant because of her sex, were not motivated by and did not evince a hostility toward women, and were not sufficiently pervasive to create a hostile, offensive, or intimidating work environment.

5) Complainant was not subjected to any physical contact of a sexual nature by Respondents' employees, whether welcome or unwelcome. Nor was she subjected to any other type of intimidating physical contact.

6) In December 1996, Respondents' agent, Patrick White, terminated Complainant's employment because of her poor working relationship with Nelson and because of customer complaints. White was not aware that Complainant had made any complaints about sexual harassment, and the termination was not based on Complainant's opposition to actual or alleged sexual harassment.

CONCLUSIONS OF LAW

1) At all material times, Respondents Western Stations Co. and WSCO Petroleum Corp. were "employers" for purposes of ORS 659.030. *See* 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 659.022; ORS 659.040 *et seq*.

3) ORS 659.040(1) requires complaints of unlawful employment

[7] *See* footnote appended to Factual Finding No. 2, *supra*.

practices to be filed within one year of the alleged practices. Complainant's complaint was timely filed.

4) ORS 659.030 outlines what acts constitute unlawful employment practices. It states, in pertinent part:

> "(1) For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340 and 659.400 to 659.545, it is an unlawful employment practice:
>
> "* * * * *
>
> "(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."

The Agency's administrative rules further define what constitutes sexual harassment that violates ORS 659.030(1)(b). From 1986 until March 1996, *former* OAR 839-07-550 provided:

> "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."

From March 1996 through December 1998, *former* OAR 839-007-0550 provided, in pertinent part:

> "Sexual harassment is unlawful discrimination on the basis of gender. Unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward a person because of that person's gender, and:
>
> "* * * * *
>
> "(3) Such conduct has the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive working environment (referred to as hostile environment harassment).
>
> "(4) Whether particular conduct directed towards a person constitutes sexual harassment with be determined by the Civil Rights Division. The standard will be viewed from the perspective of the reasonable person in the circumstances of the person alleging harassment.
>
> "(5) In quid pro quo harassment cases, an employer is liable for acts of sexual harassment by its agents or supervisory employees against an employee. In hostile environment harassment

cases, an employer is liable for acts of sexual harassment by its agents or employees against another employee where the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action * * *."

OAR 839-007-0550 now provides, in pertinent part:

"(1) Sexual harassment is unlawful discrimination on the basis of gender. Sexual harassment includes the following types of conduct:

"(a) Unwelcome sexual advances, requests for sexual favors or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's gender; and

"(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

"(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual.

"(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive working environment.

"(2) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating, or offensive working environment is whether a reasonable person in the circumstances of the complainant would so perceive it.

"* * * * *

"(4) Harassment by Supervisor, No Tangible Employment Action: Where sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred by no tangible employment action was taken:

"(a) The employer is liable if the employer knew of the harassment unless the employer took immediate and appropriate corrective action.

"(b) The employer is liable if the employer should have known of the harassment. The Civil Rights Division will find that the employer should have known of the harassment unless the employer can demonstrate:

"(A) That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and

"(B) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

"(5) Harassment by Co-Workers or Agents: An employer is liable for sexual harassment by any of the employer's employees or agents who do not have immediate or successively higher authority over an offended individual where the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action. * * *"

Respondents did not violate ORS 659.030(1)(b) because Nelson's workplace jokes, comments, and questions were not directed at Complainant because of her sex, were not motivated by hostility toward women, and did not evince hostility toward women. Nor were the two questions that Nelson directed to Complainant sufficiently pervasive to create an objectively hostile, intimidating, or offensive work environment. White did not direct unwelcome comments or conduct of a sexual nature at Complainant; the few sexual jokes he told did not create a working environment that was either objectively offensive, hostile, or intimidating or subjectively offensive, hostile, or intimidating to Complainant.

5) ORS 659.030(1)(f) provides that it is an unlawful employment practice for an employer to "discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * *." Respondents did not terminate Complainant's employment because she had opposed unlawful sexual harassment, and did not violate ORS 659.030(1)(f).

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

OPINION

Sexual Harassment

This case involves allegations of sexual harassment of one woman by another. This Forum has long recognized that same-sex sexual harassment may constitute a violation of ORS 659.030(1)(b), whether or not the harassment is motivated by sexual desire. *See In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 253 (1995). The United States Supreme Court more recently has reached the same conclusion regarding claims under Title VII. *Oncale v. Sundowner Offshore Services*, 523 US __, 118 S Ct 998 (1998). The legal analysis is the same as in any other sexual harassment case: to meet its burden of proving that Respondents sexually harassed Complainant, the Agency had to produce evidence establishing the following elements:

1) Respondents were employers subject to ORS 659.010 to 659.110;

2) Respondents employed Complainant;

3) Complainant is female;

4) Respondents, through their agents, engaged in unwelcome verbal or physical conduct directed at Complainant because of her sex;

5) The unwelcome conduct had the purpose or effect of creating an intimidating, hostile or offensive working environment;

6) Respondent knew or should have known of the conduct; and

7) Complainant was harmed by the conduct.

See In the Matter of Executive Transport, Inc., 17 BOLI 81, 92 (1998). "In determining whether conduct has created an `intimidating, hostile or offensive working environment,' [the

adjudicator applies] an objective standard, that is, [it] determine[s] whether a reasonable person would arrive at that conclusion." *Fred Meyer, Inc. v. BOLI*, 152 Or App 302, 307, 954 P2d 804 (1998).

In this case, the first three elements are not contested, at least with regard to Respondents Western Stations Co. and WSCO Petroleum Corp. The Agency also has established the fifth, sixth, and seventh elements of its case: Nelson's jokes and comments about sex were sufficiently pervasive to render the workplace environment offensive to a reasonable person; the pervasiveness was such that Respondents knew or should have known that the offensive environment existed; and Complainant was somewhat offended by the comments and suffered some minimal level of emotional distress because of them.[8]

The remaining question is whether Nelson's sexual jokes and comments were directed at Complainant "because of * * * [her] sex. ORS 659.030(1)(b); *see Executive Transport*, 17 BOLI at 92 (conduct must be "directed at Complainant"). *Cf. Fred Meyer, Inc. v. BOLI*, 152 Or App 302, 309, 954 P2d 804 (1998) (noting, in affirming Agency finding of unlawful sexual harassment, that unwanted sexual comments and behavior were "directly targeted at complainant" and "were not merely part of a general milieu of good-natured banter"). In deciding this question, it is important not to interpret the phrase "directed at" too narrowly. An employer may violate ORS 659.030(1)(b) by allowing unwanted sexual words or conduct to be directed at women *as a class*, even if it cannot be established that a particular female complainant is the target of the harassment. For example, an unlawful work environment could be created through the pervasive posting of signs suggesting hostility, disrespect, or a demeaning attitude toward women even in the absence of evidence that the employees who posted the signs acted with animosity (or sexual desire) toward a specific female employee.[9] Such hostility could take many forms, such as assertions that women cannot or should not perform certain jobs, implications that women should act in a pliable or docile manner around men, or insinuations that women's worth should be judged primarily by their sexual attractiveness. Even supposedly friendly jokes could be so pervasive and degrading to women that an employer's tolerance of them could, by itself, lead to an inference that the employer was hostile to women in the workplace.

[8]Although other employees also made sexual jokes, they did so much less frequently than Nelson. Moreover, there is no credible evidence that these other employees' jokes were either objectively offensive or subjectively offensive to Complainant. As noted above, the Forum does not believe Complainant's allegation that White once said to her that the only use he had for some other woman was to bend her over in the back room. That type of comment certainly could be said to be objectively offensive and to demonstrate hostility toward women.

[9]In bringing a case on behalf of a particular complainant the Agency would, of course, have to prove that the complainant was subjectively offended, intimidated, or made fearful by the workplace environment.

This, however, is not such a case. Nelson's jokes and comments, although objectively and subjectively offensive, were not directed at Complainant *because she is female*.[10] Nor did Nelson make the jokes for Complainant's benefit, hoping they would adversely affect her.[11] And Nelson did not direct her remarks against women as a class; although the comments and jokes were explicitly sexual in nature, they were not inherently demeaning or belittling to women -- at least not more than they were to men. In using vulgar language and referencing sex, Nelson was not motivated by a hostility toward women in the workplace; nor did the comments evince any such hostility.

In other words, although Nelson's behavior was vulgar and offensive, it did not constitute sexual harassment of Complainant. As the United States Supreme Court recently explained:

> "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at `discriminat[ion] . . . because of . . . sex.' We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. `The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.
>
> "* * * * *
>
> "A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility toward the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, **he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted `discrimina[tion] . . . because of . . . sex.**'"

Oncale v. Sundowner Offshore Services, 523 US __, 118 S Ct 998, 1002 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 US 12, 21 (1993)) (bracketed material and ellipses in original; boldface added).[12] Here,

[10]As outlined in the factual findings, the Forum disbelieves Complainant's charges that White and Nelson made unwelcome sexual contacts or advances toward her. If those facts had been proved, this would be a very different case.

[11]The Forum has found no evidence to support any suggestion that Nelson made the comments as part of a campaign to drive Complainant out of the workplace.

[12]This holding is pertinent because federal cases interpreting Title VII of the 1964 Civil Rights Act are instructive in construing ORS 659.030, the statute alleged to have been violated here. *Mains v. II Morrow, Inc.*, 128 Or App 625, 634, 877 P2d 88 (1994). The Oregon appellate courts have cited with apparent approval federal holdings outlining the elements of sexual

Nelson's comments and jokes were not phrased in "sex-specific and derogatory terms * * * as to make it clear that [Nelson was] motivated by general hostility toward the presence of women in the workplace." *Oncale*. In short, Nelson's sexual comments did not constitute discrimination against Complainant "because of * * * [her] sex." ORS 659.030(1)(b).

The fact that Nelson twice directed questions toward Complainant does not change this result. Again, although the questions were sexual in nature, they were not objectively demeaning or hostile *toward women*, and they were not directed at Complainant *because of her sex*. In any event, even if Nelson had directed the comments at Complainant because of her sex, they were not sufficiently pervasive to create an objectively hostile, offensive, or intimidating working environment.[13]

Employers should not view this order as holding that it is permissible for employees to make jokes and comments similar to those made by Nelson. The Forum's determination that Nelson's jokes did not evince hostility toward women is highly dependent on the circumstances in which she made them: outside, in a busy working environment, with *no* evidence that the jokes targeted or were directed at women more than men. It also is significant that Nelson directed only two comments toward Complainant and that Complainant was Nelson's supervisor. If Nelson had made the comments behind closed doors, used a threatening tone, touched Complainant in a sexual or intimidating manner, demonstrated a general hostility toward female coworkers, combined the jokes with unwelcome sexual advances toward Complainant, or held a position of power over Complainant, the result of this case probably would have been different.

Discharge

The Agency's second theory of unlawful employment practices was that Respondents discharged Complainant because of her complaints about sexual harassment, in violation of ORS 659.030(1)(f). As discussed above, the Forum has found that Complainant never complained to White about Nelson's sexual comments and, to the very limited extent she made such a complaint to McClellan, he never passed it along

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harassment claims. *See, e.g., Holien v. Sears, Roebuck and Co.*, 298 Or 76, 89, 689 P2d 1292 (1984); *Fred Meyer*, 152 Or App at 309-10; *Mains*, 128 Or App at 734-35. The Forum is unaware of any Oregon case or BOLI ruling holding that some sexual harassment claims are cognizable under ORS 659.030 even though they would not pass muster under Title VII.

[13]Again, it is possible that sexual conduct in the workplace not directed at a particular employee could constitute sexual harassment if it evinced or was motivated by hostility toward employees of a particular sex. In a close case, the fact that a small number of sexual comments were directed at an employee of that sex *combined with the sexual conduct elsewhere in the workplace* might push the case over the line between a merely offensive environment and an environment that constitutes unlawful discrimination. This is not such a case.

to White. Because White had no knowledge that Complainant ever had complained about Nelson's sexual comments, he could not have fired Complainant in retaliation for having made those complaints. Consequently, Respondent's termination of Complainant's employment did not violate ORS 659.030(1)(f).

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
MOYER THEATRES, INC.

Case Number 36-97
Final Order of the Commissioner
Jack Roberts
Issued March 11, 1999.

SYNOPSIS

Where the Agency failed to establish by a preponderance of credible evidence that Complainant, a female, had been sexually harassed by a male co-worker or a male supervisor as alleged, or that Complainant quit as a result of discriminatory working conditions related to Complainant's protected class status, the commissioner dismissed the complaint and specific charges. ORS 659.030(1)(a)(b); OAR 839-005-0012; OAR 839-007-0550.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 23, 24, and 25, 1997, 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 Linda Lohr, an employee of the Agency. Sarah A. Vaughan (Complainant) was present throughout the hearing and was represented by Janice E. Jackson, Attorney at Law. Respondent Moyer Theaters, Inc. was represented by Terry W. Baker, Attorney at Law. Christine Moyer, Respondent's corporate president, and Larry Moyer, Respondent's chairman of the board emeritus[1], were present throughout the hearing.

The Agency called as witnesses, in addition to Complainant, Respondent's former employees Nicholas Bridges (by telephone), Leah Arstill (by telephone), Jennifer Joslin, and Cathy Burkhartzmeir; Civil Rights Division ("CRD") Senior Investigator Donna Renton; Complainant's attorney Janice Jackson; Complainant's boyfriend Garon Primmer; and Complainant's mother, Janette Vaughan.

Respondent called as witnesses former employees Robert Kysor, Scot

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[1]Mr. Moyer announced that this was his title.

Hicks, Tylan ("Ty") Hamilton, Darlene Rivera[2], and Ron Dentler; Robert Kysor's wife Brenda Kysor; and Respondent's corporate president Christine Moyer.

Administrative exhibits X-1 to X-26 and Agency exhibits A-1 through A-4, and A-7 were offered and received into evidence. Respondent exhibits R-3 through R-8 were offered and received into evidence. The record closed on June 25, 1997.

Having fully considered the entire record in this matter, the Administrative Law Judge hereby makes the following Proposed Findings of Fact (Procedural and on the Merits), Proposed Ultimate Findings of Fact, Proposed Conclusions of Law, Proposed Opinion, and Proposed Order.

FINDINGS OF FACT -- PROCEDURAL

1) On October 10, 1995, Complainant, a female, filed a verified complaint with CRD alleging that she was the victim of the unlawful employment practices of Respondent in terms and conditions and discharge from employment. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations regarding terms and conditions of employment.

2) On January 9, 1997, the Agency prepared for service on Respondent Specific Charges alleging that Respondent discriminated against Complainant in her employment based on her sex in terms and conditions and discharge from employment in violation of ORS 659.030(1)(a) and (b).

3) 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.

4) On January 13, 1997 the Agency moved to amend the Specific Charges to change the amount of back pay sought from $46,400 to $25,000, based on a February 25, 1995 discharge.

5) On January 13, 1997 Douglas McKean, the ALJ assigned to the case, granted the Agency's motion to amend.

6) On January 16, 1997 Terry W. Baker, Attorney at Law, filed a notice of appearance on behalf of Respondent and moved for a postponement on the basis of previously scheduled commitments to attend several out of state Board of Directors meetings, noting in his motion that the Agency had no objection.

7) On January 17, 1997 the ALJ granted Respondent's motion to postpone and tentatively rescheduled the hearing from February 25, 1997 to April 1, 1997. On January 21, 1997, based on agreement of the participants, the ALJ rescheduled the hearing for April 17, 1997.

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[2]Rivera has married since her employment with Respondent. During her employment with Respondent, her last name was Navalta. To avoid confusion, she will be referred to as Diane Navalta throughout this Order.

8) On January 27, 1997 counsel for Respondent filed an answer in which it denied the allegations mentioned above in the Specific Charges and stated several affirmative defenses.

9) On January 31, 1997 the ALJ issued a Discovery Order requiring Respondent and the Agency to submit a case summary pursuant to OAR 839-050-0200 and 839-050-0210 by April 4, 1997.

10) On February 13, 1997 Respondent moved for a Discovery Order allowing Respondent to take the deposition of the Complainant, Sarah Vaughan, and her mother, Janette Vaughan, based on the materiality of their testimony and Respondent's inability to interview either witness.

11) On February 18, 1997 the ALJ issued a Discovery Order allowing Respondent to take the deposition of Sarah and Janette Vaughan, noting that Respondent had made a showing of materiality and the Agency had agreed to make both individuals available for deposition.

12) On March 6, 1997 the ALJ was informed that the Agency had reassigned the case from Linda Lohr, case presenter, to Judith Bracanovich, another case presenter pursuant to a redistribution of cases. The Agency requested that the hearing be postponed until April 21 in order to give the participants additional time to prepare for the hearing after depositions, noting that counsel for Respondent had no objection.

13) On March 6, 1997 the ALJ granted the Agency's motion for postponement and an Amended Notice of Hearing was issued resetting the hearing to April 21, 1997, and making case summaries due on April 11, 1997. Due to a docket conflict, the ALJ was changed from Douglas McKean to Warner W. Gregg.

14) On March 17, 1997, the Agency moved to postpone the hearing until June 10, 1997 based on Ms. Bracanovich's serious medical condition requiring surgery, with a projected 6-8 week recovery time. The Agency's motion noted that Respondent did not object.

15) On March 17, 1997 the ALJ granted the Agency's motion for postponement for the reasons given in the request and issued an amended Notice of Hearing resetting the hearing for June 10, 1997 and making case summaries due on May 29, 1997.

16) On March 20, 1997, the Agency moved to reschedule the hearing for June 23, 1997, based on the mutual agreement of the participants. On March 21, 1997 the ALJ granted the Agency's motion and issued an amended Notice of Hearing resetting the hearing for June 23, 1997 and making case summaries due on June 13, 1997.

17) On June 2, 1997, the Agency notified the forum that the case was being reassigned to case presenter Linda Lohr. On June 12 and 13, 1997, the participants timely filed their respective case summaries.

18) On June 16, 1997, Respondent filed a request to cross examine the "affiant, certificate preparer or other document preparer or custodian of Exhibits A-1 through A-5" enclosed with the Agency's case summary and

on June 17, Respondent sent a letter to the forum designating Scott Hicks as a telephone witness.

19) At the start of the hearing, Respondent's counsel stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

20) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

21) The Proposed Order, which included an Exceptions Notice, was issued on January 20, 1999. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) Complainant is female.

2) At all times material herein, Respondent Moyer Theatres, Inc., was an Oregon corporation engaged in the operation and management of motion picture theaters within the State of Oregon and was an employer in this state that engaged or utilized the personal services of one or more persons.

3) Complainant was initially employed by Respondent on August 3, 1994, at Respondent's Rose Moyer theater. Complainant was hired by Robert Kysor, Complainant's neighbor and manager of the theater. At the time Complainant was hired, Kysor gave Complainant a copy of Respondent's Personnel Policy Manual and Complainant signed and dated a statement acknowledging that she read and understood the policies in the manual.

4) Page 7 of Respondent's personnel policy manual that Complainant received contained Respondent's policy on sexual harassment. It read as follows:

> "Moyer Theatres, Inc. will not allow any form of sexual harassment or any such conduct that has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.
>
> "Such conduct, when experienced or observed, should be reported to the supervisor/manager or personnel department. The personnel department will conduct an investigation and will be required to report the findings to the president's office or his or her appointed representative.
>
> "Any intentional sexual harassment is considered to be a major violation of company policy and will be dealt with as determined at the sole discretion of management.
>
> "It is the intent of Moyer Theatres, Inc. to provide a work environment free from verbal, physical and visual (signs, posters, or documents) forms of sexual harassment. All employees are asked to be sensitive to the individual rights of their co-workers."

5) Complainant was a senior in high school when she went to work for Respondent and lived at home with her mother, Janette Vaughan. Like the majority of other new hires, Complainant began work in the concessions stand. Complainant worked different shifts until school started.

When school started, Complainant was scheduled to work from 6 p.m. until about 10 p.m. on school days, and from noon until closing on Saturdays and Sundays.

6) During Complainant's employment with Respondent, Respondent employed several different assistant managers who were Complainant's immediate supervisors. They included Greg Shafer (sp), Ron Dentler, Darlene Navalta, and Mary Jacobs.

7) During Complainant's employment with Respondent, Dentler was day assistant manager and worked from noon until 6 or 7 p.m. on weekdays and sometimes on weekends.

8) During Complainant's employment with Respondent, Kysor worked from 6 p.m. until closing (midnight-1 a.m.) on weekdays and from noon until 7 p.m. on Sundays.

9) One of Complainant's coworkers was Ty Hamilton, male, another high school student.

10) The Specific Charges alleged that Hamilton daily grabbed Complainant's breasts and crotch and did the same with other female coworkers, that she complained repeatedly to her supervisors about Hamilton, and was told it was a "guy thing" and was accused of lying about sexual harassment.

11) During her employment with Respondent, Complainant did not complain to Darlene Navalta or any other manager employed by Respondent that Hamilton had grabbed her breasts and crotch.

12) Jennifer Joslin, Complainant's cousin who was employed by Respondent during the same time period as Complainant, did not complain to any manager employed by Respondent that Hamilton had grabbed her breasts and crotch.

13) Hamilton did not grab Complainant's breasts or crotch during Complainant's employment with Respondent.

14) The Specific Charges further alleged that Ron Dentler repeatedly commented on Complainant's apparel in a sexually suggestive manner and lifted her skirt to reveal her underwear, that Dentler "constantly" lifted the skirts of Cathy Burkhartzmeir and Leah Arstill, that Dentler repeatedly referred to her as a "slut," in front of co-workers and repeatedly stated that she was sleeping with a male co-worker at Dentler's home, that Dentler frequently commented in front of her co-workers that she had a "nice butt."

15) At some time prior to Complainant's termination, Complainant told her mother that Dentler had lifted her skirt. Her mother told this to Brenda Kysor, her neighbor and Robert Kysor's wife. Brenda Kysor then told this to Robert Kysor, who in turn asked Dentler if he had done this. Dentler told him he had tugged on Complainant's skirt, and that it was a nice skirt. Kysor instructed Dentler not to do it again. Dentler did not touch Complainant's skirt again.

16) Around the end of January 1995, Complainant erroneously perceived that Dentler was telling coworkers that she was a slut and was sleeping with co-workers at Dentler's house. Complainant told her mother about this. Her mother instructed her to quit Respondent's employ, then called Robert Kysor and complained to him that Dentler had lifted Complainant's skirt and was telling co-

workers that Complainant was a slut and was sleeping with co-workers at Dentler's house.

17) In response, Robert Kysor immediately contacted Dentler, who was at home, and had him come back to work, where Kysor described the allegations made by Complainant's mother. Dentler again admitted "tugging" Complainant's skirt, but denied the other allegations. Kysor instructed Dentler to call Complainant and at least apologize for tugging on her skirt. Dentler then called Complainant's home. Complainant answered, and Dentler asked to speak with Complainant's mother. Dentler talked with Complainant's mother, but did not apologize to Complainant for 'tugging" at her skirt.

18) Dentler had grasped Complainant's skirt, but did not lift Complainant's skirt so he could see her underwear during Complainant's employment with Respondent.

19) Dentler did not repeatedly refer to Complainant as a "slut" in front of Complainant's co-workers or repeatedly state to Complainant's co-workers that Complainant was sleeping with someone from the workplace at Dentler's home.

20) Dentler told Complainant she had a "nice dress" and made a comment to Complainant along the lines of "looking mighty fine today, are you," but did not repeatedly comment on Complainant's apparel in a sexually suggestive manner or frequently comment to Complainant in front of her co-workers that she had a "nice butt."

21) Dentler did not, with Complainant's knowledge, repeatedly lift the skirt of Complainant's female co-workers, tell them they had a "nice butt," or comment on their apparel in a sexually suggestive manner. Dentler did make "dirty jokes" on occasion in the workplace, but not when Complainant could hear.

22) Complainant quit Respondent's employ shortly thereafter based on her mother's instructions and her belief that Dentler was spreading defamatory rumors about her sexual activities and Respondent was not taking any action to stop it.

23) After Complainant quit, Kysor also called Scott Hicks, his supervisor and Respondent's operations manager, and told him that an employee had made allegations of sexual harassment at Rose Moyer theater and the employee would be calling him soon.

24) Complainant called Hicks and repeated her allegations against Dentler. Within 24 hours, Hicks visited the Rose Moyer theater and confronted him with Complainant's allegations. Dentler denied lifting Complainant's skirt or spreading any rumors about Complainant, but did admit he had touched Complainant's skirt and told her she had a "nice dress." Hicks spoke with Jacobs, Navalta, and a female snack bar employee, and they all indicated they had not been sexually harassed and were not aware of Dentler sexually harassing Complainant. Hicks called Complainant back and spoke with her mother, telling her what he had found and asking her to have Complainant provide him with more supportive evidence. Hicks also offered Complainant a job at one of Respondent's other theaters or video stores. Hicks then told Dentler that there was a very serious sexual harassment

claim against him, currently unsubstantiated, but if anyone else came through with any evidence that Dentler had engaged in this type of behavior, Dentler would be terminated.

25) After she quit Respondent's employ, Complainant would not have accepted any job offer from Respondent to work at any of Respondent's facilities.

26) After Complainant quit Respondent's employ, she was hired as a temporary employee to work two days at a warehouse. Complainant quit after one day because she felt uncomfortable working around her male co-workers. Complainant did not apply for any other jobs after that. Complainant gave birth to a daughter on January 17, 1996. Complainant went to work again in September 1996 as a certified nursing assistant.

27) At some point between 1989 and the date of the hearing, allegations of sexual harassment at Respondent's Grandview theater were brought to Respondent's attention. After an investigation, the alleged harasser was discharged.

28) Complainant's testimony was not credible on a number of material issues because of internal inconsistencies; inconsistencies with her prior statements, statements by other credible witnesses, and facts capable of objective determination; and assertions that were not supported by the testimony of other Agency witnesses who were in a position to support those assertions. An exhaustive list of examples is unnecessary, but the following are illustrative of the evidence that led the forum to its conclusion about Complainant's lack of credibility. She testified that she was "absolutely certain" that Ron Dentler lifted her skirt in the box office in October 1994, whereas unrebutted personnel records showed that Complainant did not even work in the box office until December 5, 1994. She testified that she quit on February 25, 1995, whereas the same personnel records show her last day of work was January 29, 1995, and the Agency provided no credible evidence to rebut these records. She told Don Alcoke, the first CRD investigator assigned to the case, that "all the women" working at Rose Moyer had gone to Robert Kysor to complain about Ron Dentler's behavior, but no evidence was produced at the hearing to support this assertion. She told Alcoke that Hamilton's sexual harassment of her went on for "about a week", but testified at the hearing that it went on for three weeks. She told Alcoke that Dentler "constantly" lifted the skirts of Cathy Burkhartzmeir and Leah Arstill, but Burkhartzmeir testified that it only occurred once and Arstill, who was fired by Respondent, testified that it never happened to her at all. She testified that Nicholas Bridges told her he was disgusted with Dentler's comments about her, but Bridges, who no longer works for Respondent, denied that he ever talked to Complainant about the way Dentler talked about her. As a result, the forum has credited only those portions of her testimony which were corroborated by other credible evidence.

29) The testimony of Janette Vaughan was not entirely credible because of internal inconsistencies, inconsistencies with statements by other credible witnesses, inconsistencies with Complainant's testimony,

and inconsistencies with undisputed facts. She recalled with certainty that she had talked with an individual at Respondent's corporate headquarters who had identified himself as "Scott Moyer" and had, among other things, offered Complainant a job at one of Respondent's more geographically distant facilities in Tigard or Tualatin. It was clear from the evidence presented at the hearing that she had actually talked with Scott Hicks, Respondent's operations manager, and undisputed that Respondent did not have any facilities in Tigard or Tualatin. She testified that it was the beginning of 1995 when Complainant told her that Dentler had lifted her skirt a day or two earlier, whereas Complainant testified she was "absolutely certain" this event happened in October 1994. She testified that Complainant quit in late February 1995, whereas documentary evidence established Complainant's last day of work was January 29, 1995. Finally, she testified to three different versions of the same event regarding Complainant's complaints to her about Ty Hamilton. Those versions were: (1) In October 1994, Complainant told her that Ty was grabbing her breasts and crotch, but she doesn't think she went to Brenda Kysor because Complainant said she could handle it; (2) She thinks she did talk to Brenda and Bob Kysor about Ty's behavior and; (3) She did tell Brenda Kysor about Ty's behavior in October 1994. Finally, the forum notes that Vaughan, as Complainant's mother, has an obvious bias. As a result, the forum has credited only those portions of her testimony which were corroborated by other credible evidence.

30) Cathy Burkhartzmeir was extremely nervous and vague about dates in her testimony, demonstrating a poor recollection in general. However, she was no longer employed by Respondent at the time of the hearing and had no apparent motive to lie. Consequently, the forum has credited her testimony where it was corroborated by other credible evidence.

31) Leah Arstill's testimony was not credible. She seemed to have trouble hearing and understanding the questions posed to her. Her recollection was extremely poor. For example, although she was only 20 years old at the time of the hearing, she couldn't recall the year she dropped out of high school or the year she worked for Respondent. She gave general answers because of her apparent inability to recall specifics. Her testimony was inconsistent on material issues with Complainant's testimony, her prior statements, and other undisputed facts. For example, Complainant testified that Ron Dentler lifted her skirt inside the box office before Halloween 1994, and Arstill testified she saw Dentler lift Complainant's skirt outside the box office. Exhibit R7 shows that Arstill was not even employed before Halloween 1994. She testified at the hearing that she didn't hear Dentler make any sexual remarks to Complainant, but had earlier told Donna Renton, the CRD investigator, that she did hear Dentler make sexual remarks to Complainant. She recalled that Ty Hamilton was a new employee at the time she was discharged by Respondent, when everyone else was in agreement that

Hamilton was already an employee at the time Arstill was hired. Because of these disparities, the forum has discredited Arstill's testimony in its entirety except where corroborated by other credible evidence.

32) The testimony of Jennifer Joslin was not entirely credible. It was inconsistent with Complainant's testimony on a material issue in that she testified that she heard Complainant tell Dentler to "knock it off" after Dentler lifted Complainant's skirt, whereas Complainant testified that she didn't say anything to Dentler when this incident occurred. She also testified she complained to Navalta about Hamilton's harassment, which contradicts Navalta's credible testimony to the contrary. She was extremely nervous and had difficulty speaking clearly and audibly at times and was vague and confused on dates and the chronology of specific occurrences. Finally, as Complainant's cousin, she had reason to be biased. As a result, the Forum has credited only those portions of her testimony which were corroborated by other credible evidence.

33) The testimony of Nicholas Bridges was not credible. On several material issues, it was at odds with a verifiable fact or the testimony of Complainant. He testified that he worked fall 1994 and winter 1995, whereas his personnel records show he worked only from December 4, 1994, through January 26, 1995. He testified he saw Ty Hamilton grab Complainant, but he was not even employed by Respondent in October 1994, the time period in which Complainant alleges Hamilton's behavior occurred. Finally, he testified that he heard Dentler call Complainant a "slut" to her face on three occasions, a fact not even alleged by Complainant.

34) The testimony of Chialeah Byrd, Darlene Rivera, Scott Hicks, and Christine Moyer was credible.

35) Although he became nervous during cross examination and appeared confused at times regarding the chronology of material events, the testimony of Robert Kysor was generally credible.

36) Brenda Kysor was defensive concerning the allegations made against Robert Kysor, her husband. Although her testimony that Janette Vaughan told her three different versions of the skirt lifting incident were less than credible, she did admit she had passed on two complaints of sexual harassment to her husband from Janette Vaughan and the Forum has found her testimony to be generally credible.

37) The testimony of Garon Primmer was not entirely credible. At the time of the hearing, he had been Complainant's boyfriend since early 1994 and was biased as a result. The Forum has credited only those portions of his testimony which were corroborated by other credible evidence.

38) The testimony of Ron Dentler was in some respects unreliable. His explanation that he "tugged" on Complainant's skirt in the context of commenting about Respondent's dress code, is simply unbelievable. Likewise, his explanation that he did not apologize to Complainant when he called Complainant's home because Janette Vaughan hung up on him is incredible, given the undisputed fact that Complainant answered the phone,

giving Dentler a perfect opportunity to apologize to her. He testified Robert Kysor didn't tell him to apologize the Complainant, but Kysor testified credibly to the contrary. Finally, because he was the manager accused of sexually harassing Complainant, he had a substantial motive to lie, even though he was no longer employed by Respondent at the time of the hearing. As a result, the Forum has credited only those portions of his testimony which were corroborated by other credible evidence.

39) The testimony of Ty Hamilton was suspect. Although his testimony was brief, his testimony that he had never been to Ron Dentler's house was at odds with Dentler's credible testimony that Hamilton had been to his house to watch a basketball game. Like Dentler, he was accused of sexually harassing Complainant and had a motive to lie about the harassment, even though he was no longer employed by Respondent at the time of the hearing. Although he testified that he had used the name Tylan "Nilson" in his application with Respondent and his personnel file showed he in fact used the name "Hamilton", the Forum does not attach significance to this disparity because there was no apparent effort to disguise his identity.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Moyer Theatres, Inc., was a corporation operating theaters in the state of Oregon that utilized the personal services of one or more employees, reserving the right to control the means by which such service was performed.

2) Complainant is a female who was employed by Respondent from August 3, 1994 until January 29, 1995 at its Rose Moyer theater facility.

3) Ty Hamilton, a male co-worker, did not grab Complainant's breasts or crotch.

4) Ron Dentler, a male assistant manager, grasped Complainant's skirt and commented on her dress and appearance once. He did not refer to Complainant as a "slut" or spread rumors that she was sleeping with male co-workers at Dentler's house.

5) Complainant voluntarily quit Respondent's employment.

6) Respondent had a published sexual harassment policy in effect at all times material that was provided to all new employees, including Complainant, at their time of hire. The policy stated that any sexual harassment should be reported to the supervisor/manager or personnel department.

7) When Respondent manager Kysor learned of Complainant's allegations of sexual harassment against Dentler, and Dentler admitted touching Complainant's skirt, Kysor told Dentler he should not do this again. Dentler did not do it again.

8) When Scott Hicks, Respondent's operations manager, learned of Complainant's allegations of sexual harassment against Dentler, he immediately investigated. Although the allegations were not substantiated, he told Dentler he would be fired if there were any further allegations of a similar nature.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in part:

"As used in ORS 659.010 to 659.110 * * * unless the context requires otherwise:

" * * * * *

"(6) 'Employer' means any person * * * who in this state * * * engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.

" * * * * *

"(12) 'Person' includes one or more * * * corporations * * *."

At all times material herein, Respondent Moyer Theatres, Inc. was an employer subject to ORS 659.010 to 659.110.

2) ORS 659.040 (1) provides:

"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 * * * no later than one year after the alleged unlawful employment practice."

Under ORS 659.010 to 659.110, the Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein.

3) The actions, inactions, statements and motivations of Darlene Navalta, Ronald Dentler, Robert Kysor, and Scott Hicks are properly imputed to Respondent herein.

4) ORS 659.030 provides, in part:

"(1) For the purposes of ORS 659.010 to 659.110 * * * , it is an unlawful employment practice:

" * * *

"(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual * * * in terms, conditions or privileges of employment."

" * * * * *"

Former OAR 839-07-550 provided, in part:

"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

" * * * * *

"(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."

Former OAR 839-07-555 provided, in part:

"(1) An employer * * * is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether:

"(a) The specific acts complained of were authorized by the employer;

"(b) The specific acts complained of were forbidden by the employer; or

"(c) The employer knew or should have known of the occurrence of the specific acts complained of.

"(2) An employer is responsible for acts of sexual harassment by an employee against a co-worker where the employer, its agents, or supervisory employees knew or should have known of the conduct, unless it can be shown that the employer took immediate and appropriate corrective action."

Former OAR 839-07-565 provided:

"Generally an employee subjected to sexual harassment should report the offense to the employer. Failure to do so, however, will not absolve the employer if the employer otherwise knew or should have known of the offensive conduct."

Current OAR 839-007-0550[3] provides, in part:

"(1) Sexual harassment is unlawful discrimination on the basis of gender. Sexual harassment includes the following types of conduct:

"(a) Unwelcome sexual advances, requests for sexual favors or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's gender; and

"(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment;

" * * *.

"(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive working environment .

"(2) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complainant would so perceive it.

" * * *.

"(4) Harassment by Supervisor, No Tangible Employment Action: Where sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred but no tangible employment action was taken:

"(a) The employer is liable if the employer knew of the harassment unless the employer took immediate and appropriate corrective action.

"(b) The employer is liable if the employer should have known of the harassment. The Civil Rights Division will find that the employer should have known of the harassment unless the employer can demonstrate:

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[3]The current OAR 839-005-0010 became effective on October 23, 1998.

"(A) That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and

"(B) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

"(5) Harassment by Co-Workers or Agents: An employer is liable for sexual harassment by any of the employer's employees or agents who do not have immediate or successively higher authority over an offended individual where the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action."

Complainant's co-worker Ty Hamilton did not direct unwelcome sexual advances or requests for sexual favors or any conduct that would create an intimidating, hostile or offensive working environment towards Complainant. Respondent's assistant manager Ron Dentler did not direct unwelcome sexual advances or requests for sexual favors or any conduct towards Complainant that was sufficiently severe or pervasive to create a hostile, intimidating, or offensive work environment for Complainant. Respondent did not violate ORS 659.030(1)(b).

5) ORS 659.030 provides, in 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. * * *"

OAR 839-005-0012[4] provides:

"Constructive Discharge.

"Constructive discharge occurs when an employee leaves employment because of unlawful discrimination. The elements of a constructive discharge are:

"(1) The Respondent intentionally created or intentionally maintained discriminatory working conditions related to the Complainant's protected class status;

"(2) Those working conditions were so intolerable that a reasonable person in the Complainant's position would have resigned because of them;

"(3) The Respondent desired to cause the Complainant to leave employment as a result of those working conditions or knew or should have known that Complainant was certain, or substantially certain, to leave employment as a result of those working conditions; and

"(4) The Complainant did leave employment as a result of those working conditions."

Complainant did not quit because of discriminatory working conditions that

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[4]This rule became effective October 23, 1998. It recites, verbatim, the language contained in *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841, 856 (1995), that the forum adopted as its test for constructive discharge in the case of *In the Matter of Thomas Myers*, 15 BOLI 1, 14-15 (1996).

actually existed and was not constructively discharged in violation of ORS 659.030(1)(a).

6) 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

Introduction

The Agency alleged Complainant was subjected to a hostile, offensive, and intimidating work environment through physical sexual harassment by Ty Hamilton, a co-worker, and verbal and physical sexual harassment by Ron Dentler, a supervisor, and that Complainant was constructively discharged as a result.

Hostile Environment

The Specific Charges state a prima facie case of "hostile environment" sexual harassment which, if proven, would give rise to damages. To prevail, the Agency must prove its allegations by a preponderance of the evidence. *In the Matter of Sunnyside Inn*, 11 BOLI 151, 165 (1993). The Agency specifically alleges that the hostile environment arose through verbal and physical acts of a sexual nature by Hamilton and Dentler that were directed at Complainant based on her sex. During the course of the hearing, the Agency presented testimony supporting all of Complainant's specific allegations of harassment. In defense, Respondent presented testimony rebutting the same allegations. There were no undisputed material facts, although evidence did establish that Dentler had "tugged" on Complainant's skirt, told her she had a "nice dress," and made a comment to her along the lines of "looking mighty fine today, are you." However, these incidents, standing alone, were not severe or pervasive enough to create a hostile, intimidating, or offensive work environment as a matter of law. Consequently, the outcome of the case hinges on an assessment of the credibility of the witnesses testifying as to the allegations.

First, the allegations against Hamilton. There were no credible witnesses who observed Ty Hamilton's alleged grabbing of Complainant's breasts and crotch. Although Jennifer Joslin testified that Ty Hamilton also grabbed her breasts and crotch, and that she and Complainant complained to Darlene Navalta about it, both she and Complainant were found to be less credible witnesses than Navalta, who denied that the complaints were made. As a result, the Agency has not proved the sexual harassment allegations regarding Hamilton by a preponderance.

Next, the allegations against Dentler, with the skirt raising incident, the "slut" remarks, and the rumors of sleeping with co-workers at Dentler's house being the most significant. The Agency relied on the testimony of Complainant and several other witnesses to establish that the alleged acts had in fact occurred. An evaluation of this testimony shows that it is a maze of inconsistencies and contradictions which, taken together, do not prove by a preponderance that any specific alleged act occurred in any specific time frame. Chief among these contradictions is Complainant's absolute certainty that the skirt incident occurred in October 1994 in the box office, whereas unrebutted

documentary evidence shows that Complainant did not even work in the box office until December 1994. Testimony by Complainant's mother and by co-workers who were not employed in October 1994 that they observed the alleged act at a later date does not rehabilitate Complainant's testimony. As for the "slut" remarks and alleged rumors, there is simply no credible witness testimony that anyone actually heard Dentler make these remarks. Although Dentler's credibility was also suspect, the burden of proof rests with the Agency and they did not carry that burden. As a result, the forum is unable to conclude that Dentler ever made the alleged remarks or spread the alleged rumors. No matter what Complainant may have perceived, the forum cannot hold Respondent liable for remarks attributed to Dentler that Dentler did not make.

Immediate and Appropriate Corrective Action

Where an employer "knew or should have known" of sexual harassment by a co-worker, OAR 839-007-0550(5) states that the employer will be liable for the harassment unless the employer took "immediate and appropriate corrective action." The co-worker in this case is Ty Hamilton. Since the forum has determined that the alleged sexual harassment attributed to Hamilton did not occur, the question of whether or not Respondent took immediate and corrective action is moot.

OAR 839-007-0550(4) states that an employer can be held liable "Where sexual harassment by a supervisor with immediate or successively higher authority over an individual *is found to have occurred*." (emph. added) The supervisor in this case is Ron Dentler. The Agency has established, by preponderance of the evidence, only the acts cited in Findings of Fact -- The Merits 13 and 15. These acts do not rise to the level of sexual harassment as defined in OAR 839-07-0550. Since the forum has determined that Dentler did not engage in sexual harassment, the forum is not required to evaluate whether or not Respondent proved the affirmative defenses set out in OAR 839-07-0550(4)(a) and (b).

Constructive Discharge

For a constructive discharge to occur, the Respondent must have intentionally created or intentionally maintained discriminatory working conditions related to the Complainant's protected class status. As stated earlier, the preponderance of evidence fails to establish that discriminatory working conditions existed related to Complainant's protected class, her sex. Consequently, there can be no constructive discharge.

ORDER

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

In the Matter of
SOUTHERN OREGON FLAGGING, INC.

Case Number 54-98
Final Order of the Commissioner
Jack Roberts
Issued April 7, 1999.

SYNOPSIS

The Agency failed to prove that between October 1 and December 31, 1996, and between April 30 and September 30, 1997, Respondents, a corporation and its president, intentionally failed to pay 100 workers the prevailing wage rate on 32 state regulated projects, in violation of ORS 279.350(1); and where Respondents made contributions to an invalid employee benefit plan between January 1 and April 30, 1997, the Commissioner found that Respondents intentionally failed to pay workers the prevailing wage rate on state regulated projects, in violation of ORS 279.350(1); and where Respondents performed a subcontract on a public works project and posted the prevailing wage rates by using a job book approved by a BOLI compliance specialist, the Commissioner found that Respondents did not intentionally fail to post the prevailing wage rates at the project in violation of ORS 279.350(4); and where Respondents performed a subcontract on a public works project and posted notice of their fringe benefit plan by using a job book approved by a BOLI compliance specialist, the Commissioner found that Respondents did not intentionally fail to post notice of their fringe benefit plan in violation of 279.350(5); and where Respondents performed a subcontract on a public works project and were found by the Commissioner not to have taken action to circumvent the payment of prevailing wage rates, in violation of ORS 279.350(7); and where Respondents performed a subcontract on a public works project and filed inaccurate and incomplete certified statements, in violation of ORS 279.354, Respondents became ineligible for a period of one month to receive any contract or subcontract for public works, pursuant to ORS 279.361, and the Commissioner assessed Respondents civil penalties of $6,000.00 for violations of ORS 279.354, pursuant to ORS 279.370. ORS 279.350(1), (4), (5), (7); 279.354; 279.361; 279.370; OAR 839-016-0085, 839-016-0095, and 839-016-0520 to 839-016-0540.

The above-entitled contested case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 21, 22, & 23, 1998, in the Bureau of Labor and Industries Office, Conference Room, 700 E. Main Street, Suite 105, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Southern Oregon Flagging, Inc. (Respondent SOFI) and Kimberlie Hollinger (Respondent Hollinger) were represented by Thomas Murphy, Attorney at Law. Kimberlie Hollinger was present throughout the

hearing on her own behalf and as Respondent SOFI's representative.

The Agency called the following witnesses: Lance Duane Clay, former Respondent employee; John Orsetti, Respondent Hollinger's son-in-law; Jessica Orsetti, Respondent Hollinger's daughter; Shirley Harms, former Respondent employee; Jenny Villalovos-Giles, former Respondent employee; John Richard LeDoux, former Respondent employee; Kathy Dillenburg, former Respondent employee; Shirley Anne Holstad, former Respondent employee; Kathy Lelack-Acevedo, Labor Compliance Officer, Oregon Department of Transportation; Linda Kathleen Harvey, former Respondent employee; Sherryl DeVore, former Respondent employee; Eugene Russell, former Respondent employee; Jim Reynolds, Investigator/Auditor, Workers' Compensation Division, Department of Consumer Business Services; Kimberlie Dee Hollinger, Respondent; David Gerstenfeld, Compliance Specialist, Wage and Hour Division, BOLI; Sanford Groat, Police Officer, Salem Police Department (former Wage and Hour Compliance Specialist).

Respondents called the following witnesses: Michael Thomas Moore, General Manager, J. C. Compton Contractors; Tim Roseboro, former Respondent employee; Margaret Atkins, former Respondent employee; Brian Keith Lambert, former Respondent employee; Wanda Holcomb, former Respondent employee; Warren Perrine, Respondent employee; Everett Moreland, attorney, Hirschner, Hunter, Andrews, Neil & Smith; Tom Atkins, Respondent employee; Robin D. Richardson, self-employed tax preparer; Kimberlie Dee Hollinger, Respondent.

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

FINDINGS OF FACT -- PROCEDURAL

1) On March 2, 1998, the Agency issued a Notice of Intent to Make Placement on List of Ineligibles and to Assess Civil Penalties ("Notice of Intent") to Respondents. The Notice of Intent alleged that (1) Respondents intentionally failed to post the applicable prevailing wage rates on a Port of Hood River bridge public works project in violation of ORS 279.350(4); (2) Respondents intentionally failed to post a notice describing its fringe benefit plan on that project in violation of ORS 279.350(5); (3) Respondents filed inaccurate and incomplete certified statements on the Port of Hood River bridge public works project and on a Lane County paving public works project in violation of ORS 279.354; (4) Respondents intentionally failed to pay the prevailing wage rate to 100 of its workers on 32 public works contracts in violation of ORS 279.350(1); and (5) Respondents took action to circumvent the payment of the applicable prevailing wage on the Port of Hood River bridge public works project and the Lane County paving public works project in violation of ORS 279.350(7). The Agency alleged aggravating circumstances. The Agency proposed to place Respondents' names on the list of

contractors ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the ineligible list, pursuant to ORS 279.361, and to assess civil penalties against Respondents in the amount of $178,160.30, pursuant to ORS 279.370 and applicable rules. The Agency attached an appendix "A" listing 100 workers who were not paid prevailing wages on 32 public works contracts and listing related civil penalties. The Agency also attached an appendix "B" listing 32 state regulated prevailing wage contracts on which the Agency alleged Respondents intentionally failed to pay workers at the prevailing rate of wage.

2) On March 24, 1998, Respondents filed an answer. They denied the violations alleged above in the Notice of Intent and stated nine affirmative defenses. Respondents requested a contested case hearing.

3) On May 27, 1998, the Hearings Unit issued to Respondents and the Agency a Notice of Hearing setting forth the time and place of the requested hearing. With the 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 839-050-0440.

4) On June 2, 1998, Respondents moved for a postponement of the hearing based on Respondents' counsel's need for additional time to conduct discovery and to take care of personal business and Respondents' busy work schedule during the summer months. The ALJ denied the motion because Respondents failed to show good cause as defined in OAR 839-050-0020(10). To alleviate some personal hardship on Respondents' counsel, however, the ALJ rescheduled the hearing for two weeks later than originally scheduled.

5) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondents each filed a Summary of the Case.

6) On July 16, 1998, Respondents moved to disqualify the ALJ. The ALJ denied the motion based on Respondents' failure to make a substantial showing of actual prejudice or bias on the part of the ALJ. The ALJ's ruling stated in part:

> "Administrative agencies and their staffs typically investigate, prosecute, and adjudicate cases within their jurisdiction. As a result, it is not uncommon for qualified agency staff to perform different functions during their tenure with an agency. It is also not uncommon for agency staff to have occasion to work together at some point in their tenure. That a designated agency adjudicator previously prosecuted a case or cases involving similar issues does not demonstrate actual prejudice against a particular Respondent. Neither does a pre-existing professional relationship between an adjudicator and an agency witness obviate a full and fair hearing before the adjudicator. If that were the case, few hearings would be held in this forum.
>
> "Due process does not require a formal separation between the investigative and adjudicative functions of an administrative

agency, nor does it preclude those who perform the latter from participating in the process. *In the Matter of Clara Perez*, 11 BOLI 181 (1993), citing *Fritz v. OSP*, 30 Or App 1117, 569 P2d 654 (1977); *In the Matter of Albertson's, Inc.,* 10 BOLI 199 (1992), citing *Withrow v. Larkin,* 421 US 35 (1975); *In the Matter of City of Salem*, 4 BOLI 1 (1983) (respondent claimed it was denied its rights to an impartial tribunal because the hearings referee was a former BOLI Civil Rights Division employee), citing *Boughan v. Board of Engineering Examiners*, 460 Or App 287, 611 P2d 670 (1980).

"The ALJ has not participated in any way in the investigation or prosecution of this particular case. The ALJ has no knowledge of the particular facts in this case and it is the evidence to be presented at hearing that will form the basis of the ALJ's decision. The ALJ is bound by the laws enforced by the Bureau of Labor and Industries and will apply the applicable law to the evidence presented at hearing. In fact, it is the Commissioner, not the ALJ, who makes the ultimate determinations of law and fact. Even if Respondents had demonstrated bias on the part of the ALJ, Respondents did not even attempt to show bias on the part of the Commissioner. *See, In the Matter of Oregon Department of Transportation*, 11 BOLI 92 (1992).

"This forum has previously held that without a showing to the contrary, state administrators are assumed to be men and women of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. *In the Matter of Albertson's, Inc.*, 10 BOLI 199 (1992). The same holds true for administrative law judges designated by the agency administrator. The ALJ in this case has no prejudice or bias against Respondents nor Respondents' agents or representative.

"Respondents must make a substantial showing of actual prejudice or bias. *In the* Matter *of Albertson's, Inc.*, 10 BOLI 199 (1992)*; In the Matter of the City of Salem*, 4 BOLI 1 (1983). Respondents have not done so in this case.

"Respondents' motion to disqualify the Administrative Law Judge is **denied**."

7) At the start of hearing on July 21, 1998, Respondents' attorney said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

9) The participants waived the requirement that the ALJ advise them of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. ORS 183.415(7).

10) The proposed order, containing an exceptions notice, was issued November 20, 1998. Two extensions of time were granted to the Agency and Respondents for filing exceptions. The Agency timely filed exceptions received by the forum on January 15, 1999. The forum received no exceptions from Respondents.

FINDINGS OF FACT - THE MERITS

1) At all times material, Respondent SOFI was an Oregon corporation. Respondent Hollinger was Respondent SOFI's president and sole owner.

2) Mowat Construction Company ("Mowat") was the prime contractor on the Widen Washington Approach -- Hood River/White Salmon Bridge ("Washington Approach") public works project. Port of Hood River was the contracting agency. Respondent SOFI was a subcontractor. Respondents provided flaggers and pilot car drivers on the project.

3) J. C. Compton Contractors ("Compton") was the prime contractor on a Lane County grading, basing, and paving project ("Coburg Road"). Lane County Public Works was the contracting agency. Respondent SOFI was a subcontractor. Respondents provided flaggers and pilot car drivers on the project.

4) The Washington Approach project was 100% funded by the State of Oregon and the Coburg Road project was 100% locally funded and therefore both were not regulated by the federal Davis-Bacon Act.

5) Between February 17 and July 13, 1997, Respondents employed about 35 flaggers on the Washington Approach project.

6) Between June 2 and June 29, 1997, Respondents employed about 15 flaggers on the Coburg Road project.

7) The prevailing wage rates, from the January, 1997, PWR booklet, for flaggers was $15.50 for straight time and $7.05 for fringe benefits. The overtime rate was $23.25.

8) In December of 1996, Respondents adopted an employee benefit plan designated as the Southern Oregon Flagging Medical Reimbursement Plan ("Plan #1") effective October 1, 1996. The plan provided for reimbursement of "qualified medical expenses" incurred by eligible employees (called "participants") during the "plan year." Preferred workers were not covered by the plan. Preferred workers are those workers who are unable to return to regular duty due to an on-the-job injury. Participants were paid their hourly rate and their fringe benefits were dedicated to the medical reimbursement plan. Preferred workers were paid their fringe benefits in cash. The plan administrator was Respondent SOFI. In Article III of the plan it states "[i]f any balance remains in the Participant's account for any Plan Year after the Employer has made all reimbursements for the Plan Year, the Participant will forfeit the unused amount." In Article VI, the plan states " * * * The Participant may submit the claim for benefits under the Medical Plan during the Plan Year in which incurred or within a 90 day period after the close of the Plan Year. The Participant will forfeit any credits remaining at the end of such 90 day period. Any forfeited amount will inure to the general credit of the Employer." The plan also provided that an administrative fee equal to 5% of each reimbursement be assessed against the reimbursement account to cover processing costs. Prior to the

plan's implementation, fringe benefits for workers other than preferred workers went into a pension fund.

9) Employers receive a six month wage subsidy for each preferred worker they hire. Employers receive a rebate for 50% of the worker's wages, including fringe benefits. The preferred worker program benefits workers by providing retraining and specialized tools or equipment, if needed. Respondent Hollinger participated in the preferred worker program. After the six month program ended for a worker, their fringe benefits went into the medical reimbursement plan.

10) On December 31, 1996, BOLI compliance specialist, Sanford Groat, advised his supervisor, Ursula Bessler, that he had reviewed Respondents' payroll records, time sheets, and benefit plan and all appeared to be "in order." He also indicated that he had spoken with the company handling the benefit plan and that Respondents appeared to be following "the guidelines set forth in the law." He told his supervisor that Respondents "appear to be doing a good job of paying their employees the proper rates and they will fix problems quickly when identified to them." He reviewed the Respondents' benefit plan with his supervisor and there were no problems with it at that time.

11) In December, 1996, Groat told Respondent Hollinger that BOLI approved Respondents' benefit plan.

12) In March, 1997, the Oregon Department of Transportation ("ODOT") received an inquiry from a contractor about Respondents' benefit plan. Kathy Lelack-Acevedo ("Lelack"), an ODOT Labor Compliance Officer, faxed a letter to Respondent Hollinger on March 21, to express her concerns about whether the benefit plan met Davis-Bacon requirements. Lelack indicated that (1) Respondents' plan did not specify what happens to the employees' money if there is a balance in their account at the end of the plan year, (2) that the plan stated an administrative fee equal to 5% of the reimbursement would be deducted from the employee's account for processing of claims which is inconsistent with Davis-Bacon requirements, and (3) that the plan named Respondent SOFI as plan administrator, contrary to Davis-Bacon requirements that fringe benefit contributions be irrevocably made to a trustee or to a third person not affiliated with the contractor or subcontractor. Respondent Hollinger retained attorney, Everett Moreland, to assist her in getting her benefit plan approved by ODOT. She informed Moreland that BOLI had already approved the plan. Moreland revised the plan to Lelack's specifications and the revised plan, entitled Southern Oregon Flagging, Inc. Employee Benefits Plan (Plan #2), was sent by Lelack to the Oregon Department of Justice ("DOJ") for evaluation. DOJ was unable to give an opinion and Lelack advised Moreland to send the revised plan to the U.S. Department of Labor ("USDOL") for review. She told Moreland that if USDOL approved, ODOT would approve the plan. Lelack, in the meantime, contacted Groat who told her that BOLI had previously reviewed Respondents' benefit plan and it met the standards enforced by BOLI. On May 8, 1997, Moreland sent the revised plan to USDOL in Portland and it was then sent to the regional office in San Francisco. On August 1, 1997, a USDOL represen-

tative responded to Moreland's request for review and accepted the plan as within the definition of a bona fide fringe benefit under the Davis-Bacon Act. Within a few days of its receipt, Moreland sent copies of the USDOL letter to Lelack, Respondent Hollinger, Groat, and BOLI Compliance Specialist David Gerstenfeld. The USDOL representative pointed out an area of potential concern involving eligible employees who perform no Davis-Bacon work and enclosed an opinion letter regarding a similar plan for Moreland's "guidance and future reference." Moreland addressed that issue in Article 4.2 of Plan #2 and the amended plan was adopted August 18, 1997, effective "as of January 1, 1997 and restates the Plan document for the [S0FI] Employee Benefits Plan adopted May 27, 1997."

13) In August, 1997, Lelack sent Michael Moore, General Manager for J. C. Compton Contractors a letter stating that Respondents' benefit plan was in compliance and she enclosed a copy of the USDOL letter. Moore understood that the letter from Lelack was in response to his concerns about the benefit plan and understood the letter as approval of the plan. Moore also received a call from Groat in August stating that BOLI approved the benefit plan.

14) Plan #2 established a medical expense reimbursement program and group health insurance program. Group health insurance coverage was funded by amounts held in a "general fund" that was funded in whole or in part from the reallocation of the participants' accounts and by the net earnings of the plan. Reallocation of the participant's accounts occurred when the balance in the participant's account exceeded $500 at the end of the plan year. The excess amount went into the general fund and was applied toward the purchase of medical insurance for qualifying employees. The remaining $500 carried over in the participant's account available for the reimbursement of the participant's medical expenses in the succeeding plan year. The net earnings of the plan for any plan year was allocated to the general fund. Participants whose account balances reached a level equal to or greater than the cost of securing a year's coverage could elect group health insurance coverage. If their accumulated account balance was at least 50% of the annual premium cost they could elect coverage and pay the rest of the premium on an after-tax basis. After 1998, all participants would be eligible to have health insurance coverage purchased on their behalf from the general fund. Available funds would be allocated to purchase the health insurance for particular participants based on the number of hours for which amounts were contributed. The insurance would be purchased starting with participants with the highest number of hours worked, then participants with the next highest number, and on down the line until all available funds were used.

15) Plan #2 eliminated the forfeiture clause contained in Plan #1 and established an employee benefits trust. Respondent Hollinger was the plan administrator and the designated trustee of the trust. Plan #2's Article 4.3 provided that "the Company shall establish a separate Medical Expense

Reimbursement Account for each Eligible Employee. Such Reimbursement Account shall be credited with the contributions made by the Company on behalf of the Eligible Employee, and shall be charged with all reimbursements made from such [account] and with all costs, charges and expenses incurred in the administration of the Plan that are allocated to such [account]." Plan #2's Article 8.2 provided that "[a]ll reasonable costs, charges and expenses incurred in the administration of the Plan shall be paid from the trust fund." Article 8.3 provided that "[t]he Company has no beneficial interest in the Trust Fund, and no part of the Trust Fund shall ever revert or be repaid to the Company, directly or indirectly, except that the Company shall upon written request have a right to recover any amount contributed by the Company through a mistake of fact, provided that such mistaken contributions are returned to the Company within one year after the date such contributions were made." Plan #2 also provided that when a participant's employment is terminated during a plan year, the participant is not eligible to receive reimbursements incurred after the pay period "in which occurs the participant's termination of employment." Plan #2 required the reimbursement requests of terminated employees be made within 90 days after the participant's employment termination date.

16) Sometime in August, 1997, Groat left his position at BOLI to become a police officer and BOLI Compliance Specialist David Gerstenfeld was assigned the case involving Respondents to follow up on a third party complaint filed in mid-1997, by Fair Contracting Foundation. The complaint involved concerns about Respondents' practice of banking hours, filing inaccurate certified payroll, and also mentioned Respondents' fringe benefit plan.

17) Before Gerstenfeld took over the file, Groat investigated two wage claims filed against Respondents in June, 1997, by Kathy Dillenburg and Jodi Underhill. The claims were based on underpayment of overtime. During the investigation, Groat told Respondent Hollinger that her method of calculating overtime was incorrect and he advised her against banking hours[1], splitting the night shifts at midnight to avoid paying overtime, paying straight time when employees work over eight hours in different classifications on the same day, and paying employees straight time when they work over eight hours on more than one project. Groat also advised her that her payroll records must be factually accurate and not just reflect what wages were actually paid. Respondent Hollinger did not know what the law was until July, 1997, when Groat told her that her overtime calculations were incorrect. She thought all of the practices were common in the flagging industry. In July, 1997, through Groat, Respondent Hollinger paid Dillenburg $141.01 and Underhill $14.32 for overtime wages owed. As a result of the wage claims and Groat's concerns about her overtime calculations, she determined that overtime was owed to Lance Clay in the amount of $304.72, Stephen Clay in the amount of $177.30, John LeDoux in the

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[1] *See* definition *infra* FOFM #20.

amount of $397.84, and Timothy Roseboro in the amount of $27.79. She paid the wages to the workers on August 4, 1997.

18) Between February and July, 1997, Respondent Hollinger used a "job book" to post the applicable prevailing wage rates for the Washington Approach project. The job book was actually a folder that contained certifications for the company, a company policy statement, the employee benefit plan, and a page listing the wage rate for flaggers as: "Regular $15.50[,] Overtime $7.75[,] Benefits $7.05. Due to the changing location of flaggers during the course of a shift, the job book was located in the pilot car with the lead flagger or lead foreman on the job. Employees were told about the job book when they were hired. Employees were mailed a summary of the medical benefit plan quarterly. Sometime in 1996, Respondent Hollinger discussed with Groat the difficulty of posting on flagging projects and he emphasized that she needed to post the wages on each job and encouraged her to come up with her own way of accomplishing the posting. Groat did not object when she described the idea of a job book. After July, 1997, the job book changed to include more information, including any updates on the medical reimbursement plan, information on how to fill out certain paperwork, and an actual copy of the prevailing wage rates out of the "spec" book written for that project. Respondent Hollinger also improved her mechanism for providing information to employees and, in addition to the job book, she now updates information and company policy by monthly newsletters to each employee and attachments to their paychecks.

19) Sometime prior to August, 1997, Respondent Hollinger met with representatives from the Workers' Compensation Division ("WCD") of the Department of Consumer and Business Services ("DCBS"), including Jim Reynolds, a DCBS auditor, to discuss the accuracy of some of Respondent Hollinger's requests for reimbursement under the WCD's preferred worker program. Respondent Hollinger acknowledged during the meeting that she had not provided accurate payroll records and that she had not been paying her employees properly. She told Reynolds her practices regarding the payment of overtime included (1) paying employees straight time after midnight if their hours exceeded eight in a day because she believed midnight started a new day, (2) paying employees straight time if they worked two different jobs during the same shift and their work day exceeded eight hours, and (3) paying employees straight time when they worked on more than one job site and their hours exceeded eight in a day. Prior to August, 1997, and due to the practices she ascribed to prior to her discussions with Reynolds and Groat, including banking hours, Respondent Hollinger's certified payroll statements to BOLI and WCD did not accurately document the number of hours or the specific days worked by her employees. After August, 1997, the certified payroll reports she provided to the WCD were accurate.

20) Respondents "banked" hours as a way of providing employees with funds that they would not ordinarily have at the beginning of a project. Typically, workers had to re

locate to start a new project and the first weeks were usually "short" weeks. During the project, Respondents paid for a 40 hour work week whether the worker worked more hours or less hours and presumed that the hours would even out at the end of the project. Respondents paid any overtime hours at the end of the project. Some workers did not want their hours banked and were paid for the actual hours worked each week. Upon advice from Groat, Respondent Hollinger stopped banking hours.

21) Throughout 1997, Respondent Hollinger took measures to control overtime by scheduling additional people to work on projects as break people. She considered the work day as midnight to midnight and tried to manage the overtime hours by sending in break people when an eight hour shift ended during that time frame. The effect was that it limited hours that people wanted to work. John LeDoux complained to Respondent Hollinger that being relieved by break personnel minimized his hours and Respondent Hollinger suggested that since his wife was present on most of the jobs he worked that he should have her certified so she could relieve him when his shift was finished. Respondent also suggested to Lance Clay that his wife be certified so they could share a shift instead of bringing in break people. She did not suggest to workers that they certify their spouses in order to convert their overtime hours into straight time hours for their spouse.

22) On August 6, 1997, Lora Lee Grabe, Lead Worker of the BOLI PWR Unit, sent Respondent Hollinger a letter that said in part: "Compliance Specialist, Sanford Groat, has advised me that he has completed an investigation regarding work performed by your company on a public works contract for the Oregon Department of Transportation. Mr. Groat's findings indicate a failure to pay the prevailing wage rate to certain workers employed on the contract. * * * This will advise you that [BOLI] will consider taking action to place Southern Oregon Flagging Company and any business in which you have a financial interest, on the List of Ineligibles should you or your company be found to have failed or refused to pay the prevailing wage rate *in the future*." (Emphasis added)

23) When Gerstenfeld was assigned the case in August, he asked Respondent Hollinger to provide time records on the Washington Approach project, documents showing all wages were paid on the Washington Approach project, and information regarding her fringe benefit plan. While reviewing the documents she provided, he also reviewed the prior wage claims and one complaint involving Respondents' pension plan. Gerstenfeld discussed with Respondent Hollinger some of the practices outlined in FOFM #17 of this Proposed Order. She was asked about and acknowledged splitting the night shift at midnight, but told Gerstenfeld that she stopped that practice after her discussions with Groat. Thereafter, Gerstenfeld's investigation focused on the validity of Respondents' employee benefits plan and determining the amount of back wages owed to the employees.

24) In the latter part of August, 1997, Moreland faxed to Gerstenfeld a copy of the 1997 revised benefit plan and a summary of its history, including information about BOLI's prior approval of the 1996 plan and USDOL's subsequent approval of the revised plan. Gerstenfeld reviewed both the 1997 revised plan and a summary of the 1996 plan. Gerstenfeld relied on the applicable statutes and rules and looked to the USDOL Field Operations Handbook for guidance when evaluating each plan.

25) After his review, Gerstenfeld advised Moreland that he did not agree with USDOL's assessment of the plan. On September 15, 1997, Gerstenfeld wrote to Moreland stating that his concerns about the plan "as currently written" were twofold: "1) All fringe benefit contributions must provide a benefit to the individual employee for whom they are contributed. Under the current plan, at the end of the year some of those funds go into the 'general fund' which can purchase benefits for other employees or even be used to cover administrative expenses of the trust. 2) Contributions into the plan must reflect an estimate of the cost of providing benefits, not merely the number of hours worked on covered projects. This issue is discussed at more length in *Tom Mistick & Sons, Inc.,* WAB Case Nos. 88-25 and 88-26." Gerstenfeld also indicated to Moreland that there were other problems with payments already made into the plan that affected Respondent Hollinger's ability to claim credit against the prevailing wages.

26) In the 1998 BOLI Prevailing Wage Rate Laws Handbook[2] prepared by the Wage and Hour Division, based on the same law that was in effect at times material, it states that to qualify for any credit, the fringe benefit plan must meet all of the following criteria:

> "[1] Contributions must be made regularly; at least quarterly.
>
> "[2] Contributions made for prevailing wage work may not be used to fund the plan or program for periods of non-prevailing wage rate work.
>
> "[3] Contributions must not be required by law (such as taxes, workers' compensation, etc.).
>
> "[4] Contributions must be determined and tracked separately for each employee.
>
> "[5] Contributions must be irrevocable and for the employee's benefit.
>
> "[6] Eligibility requirements of the plan itself (e.g. waiting periods) are permissible. If an employee is ineligible to participate in the program, however, no credit can be taken for that employee's fringe benefits. Pension plans with vesting provisions are eligible if they meet the requirements of the ERISA.
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> "[7]" Details of the plan must be posted conspicuously at the work site."

27) On September 16, 1997, Gerstenfeld and Grabe met with Respondent Hollinger and Moreland to

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[2]There was no BOLI Prevailing Wage Law Handbook before 1998.

discuss their difficulties with Respondents' benefit plan. Gerstenfeld advised Respondent Hollinger and Moreland that in BOLI's view Respondents did not have a bona fide benefit plan and therefore Respondents' payments to the plan did not qualify as fringe benefits. Gerstenfeld considered the payments as back wages related to an invalid plan that needed to be paid. He informed Respondent Hollinger and Moreland that BOLI can assess liquidated damages in addition to seeking back wages if back wages are owed and not paid but BOLI's policy is not to pursue liquidated damages where the back wages are paid. Gerstenfeld told Moreland that if Respondents paid the back wages found due without going through a hearing or court trial Respondents would not be assessed liquidated damages. Although he disagreed with Gerstenfeld's interpretation of the prevailing wage rules, Moreland emphasized to Gerstenfeld that he did not want his clients put at risk for penalties. He believed that Gerstenfeld understood he was indicating that his clients were agreeing to pay the wages determined owed provided his clients would not be subject to further penalties.

28) Gerstenfeld realized during the September 16 meeting, that the scope of back wages related to the plan was beyond the Washington Approach project. He requested that Respondents provide him with a summary, by employee, of how much was contributed into the benefit plan for all state regulated projects in order to determine how much in back wages was owed to Respondents' employees. Respondent Hollinger was permitted to offset reimbursement payments actually made to employees. For a period following the September 16 meeting, Respondent Hollinger, Hollinger's attorney, and Gerstenfeld engaged in dialogue by telephone and correspondence to clarify the information needed to determine the amount of fringe benefits owed to Respondents' employees. By November 6, 1997, Respondents provided Gerstenfeld with the information he requested.

29) Respondents, through Gerstenfeld, paid fringe benefits to their employees in the amounts and on the state funded contracts shown in the following table.3

30) Respondent Hollinger did not send Gerstenfeld checks for Ed Pauwell, Mike Spitzer, or Jessica and John Orsetti, her daughter and son-in-law. Respondent Hollinger co-signed on a $14,400.00 loan for Jessica and John Orsetti on June 30, 1997. Respondent Hollinger was making the payments on the loan. On October 19, 1997, Jessica Orsetti signed a promissory note authorizing Respondent Hollinger to deduct $61.15 out her paycheck to cover a Fred Meyer bill, $66.24 for money borrowed from Respondent Hollinger, and $450.00 for "back truck/5th wheel payments." In Ed Pauwell's case, Respondent Hollinger had a court order requiring her to withhold his paycheck for child support payments. The money owed to Pauwell was paid to support enforcement.

31) Between September and December, 1997, Moreland and Gerstenfeld continued to negotiate the

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[3]Ed. note: for ease of publication, the table originally located at this point in the Final Order has been moved to the end of the Order and has been titled "Appendix."

terms of Respondents' benefit plan. On January 2, 1998, Moreland submitted to Gerstenfeld an adopted revision of the SOFI Employee Benefits Plan (Plan #3) "effective as of January 1, 1997 and restates the Plan document for the [SOFI] Employee Benefits Plan adopted May 27, 1997, as amended and restated." Moreland also thanked Gerstenfeld for "allowing reasonable expenses of administering the Plan to be charged to Participant's Accounts." On January 8, 1998, Gerstenfeld notified Moreland by letter that "[t]he plan, as submitted, does meet the requirements for state prevailing wage rate purposes."

32) In Plan #3 Respondent SOFI remains as the plan's administrator and Respondent Hollinger remains as the trustee of the Employee Benefits Trust. Article 4.3 added an additional part to read: "[t]he Company shall establish a separate Medical Expense Reimbursement Account for each Eligible Employee. Such Reimbursement Account shall be credited with the contributions made by the Company on behalf of the Eligible Employee, and shall be charged with all reimbursements made from such [account], **with all amounts chargeable under Article 5 to such [account]**, and with all costs, charges and expenses incurred in the administration of the Plan that are allocated to such [account]. (Addition highlighted) Plan #3 eliminated the health insurance program and the general fund as written in Article 5.2 and replaced it with a group health and accident insurance program that provided: "In November of each Plan Year beginning after December 31, 1997, the Plan Administrator shall purchase and distribute one or more policies of accident and health insurance to each Eligible Employee who is then covered under the Plan and whose Medical Expense Reimbursement Account has a balance as of a prior date sufficient to purchase such policy or policies, and shall charge the cost thereof to the Eligible Employee's Medical Expense Reimbursement Account. To the extent practicable the Plan Administrator shall apply the balance of the Eligible Employee's Medical Expense Reimbursement Account to purchase such policy or policies. Such prior date shall be selected from year to year by the Plan Administrator and shall apply to all Eligible Employees. For purposes of this Article 5, a policy of accident and health insurance is one providing, with respect to the Eligible Employee or the Spouse or Dependent of the Eligible Employee, only one or more of the benefits allowed to be provided by an 'accident or health plan' within the meaning of Section 105 of the Internal Revenue Code and by a 'voluntary employees' beneficiary association' within the meaning of Section 501(c)(9) of the Internal Revenue Code. The selection of such policy or policies with respect to any Eligible Employee shall be made in the discretion of the Plan Administrator on a nondiscriminatory basis."

33) Plan #3 revised the provision concerning treatment of terminated employees and now states that terminated employees remain covered under the plan "for each pay period of the Company for which the Participant has an amount in the Participant's Reimbursement Account, determined on an accrual basis."

Plan #3 also added to Article 4.8 a provision reducing the amount to which a participant is entitled as a reimbursement by "(1) any prior reimbursements charged to the [account], (2) any prior charges under Article 5 to [the account], and (3) any prior charges to such [account] for costs, charges and expenses incurred in the administration of the Plan." In Plan #3 the timing of requests for reimbursements was changed to occur "on or before the end of the third calendar month following the end of the Plan Year in which the Qualified Medical Expense to be reimbursed is incurred." Plan #3 also provides that the net earnings of the plan for any plan year will be allocated among the participants' accounts as the trustee determines appropriate.

34) Under Article 8.2 of Plan #3 "(a) No cost, charge or expense incurred by the Company in the administration of the Plan shall be charged to any portion (the 'BOLI Portion') of a Participant's Reimbursement Account that is attributable to contributions (and earnings thereon) for Prevailing Wage Contract work that is subject to the jurisdiction of the [BOLI] with respect to qualification of the contributions for Prevailing Wage fringe benefit credit. The Company shall pay such costs, charges, and expenses that are allocable to the BOLI Portion of Participants' Reimbursement Accounts. For purposes of determining the BOLI Portion of a Participant's Reimbursement Account, charges to the Account for reimbursements for Qualified Medical Expenses, and charges to the Account under Article 5, shall be made prorata from the BOLI Portion of the Account and from the other portion (the 'Non-BOLI Portion') of the Account. * * * (b) Costs, charges and expenses incurred in the administration of the Plan (other than those to be paid by the Company as provided in Section 8.2(a) above) shall be paid from the Trust Fund. Such costs, charges and expenses incurred by the Company that are allocable to the Non-BOLI Portion of Participants' Reimbursement Accounts shall be charged to, and may be paid only from, income of the Trust Fund allocable to the Non-BOLI Portion of Accounts. The costs, charges and expenses incurred other than by the Company in the administration of the Plan shall be allocated among and charged to the Accounts as the Trustee determines appropriate."

35) Except for the changes described in FOFM ## 32, 33, and 34, Plan #2 and Plan #3 are the same.

36) The testimony of Respondent Hollinger, in general, was found to be credible. Her demeanor was direct and sincere. Most of her testimony was corroborated by other credible evidence. She did not attempt to deny or diminish the violations that occurred prior to the BOLI warning letter. Her testimony was responsive to the questions and did not conflict on any material point with any of the credible witnesses. There is no reason not to accept her statements as facts in this matter.

37) Gerstenfeld's testimony was at times inconsistent with other credible testimony and the documentary evidence. For instance, he gave the impression that there were several complaints, wage claims, and investigations involving Respondents prior to his assignment to the case. He

testified that "all of the investigations were the result of wage claims" and the complaints concerned unpaid overtime and Respondents' 1996 pension plan. He then acknowledged that the complaints about unpaid overtime were related to the wage claims and that there was one complaint involving the pension plan. The Agency offered documentary evidence of only one investigation of two wage claims. The Agency had the facility to produce the best evidence of additional claims or complaints and did not. Gerstenfeld also testified that Respondent Hollinger volunteered that she was not considering hours spent on two different projects when computing daily overtime. He said she told him that she paid John LeDoux overtime after he complained about it but that she did not go back after LeDoux's complaint and pay those who were also entitled to the overtime. Credible testimonial and documentary evidence shows that after she resolved the two wage claims and discussed her methods of calculating overtime with Groat, she paid $907.65 in overtime wages to four workers, including John LeDoux, on August 4, 1997, prior to the issuance of the BOLI warning letter. It is puzzling why it would be in Respondent Hollinger's interest to tell Gerstenfeld that she hadn't corrected any underpayments other than LeDoux's when she clearly had by the Agency's own evidence. In addition, Gerstenfeld's testimony about his review of Respondents' benefit plans is problematic. He testified that in the latter part of August, 1997, he reviewed a summary of the 1996 benefit plan in addition to the 1997 revised plan submitted by Moreland. He stated unequivocally that he only reviewed a summary of the 1996 benefit plan. He stated he had never seen the complete 1996 plan. He testified that based on his review of the 1996 summary, there were a "large number of problems as we saw it then." He said the plan permitted administrative fees which he did not believe were permissible. The other concern he had was that the plan also permitted the entire amount in each account be forfeited to the employer if the employee was fired or quit, and any remaining balance at the end of the year was forfeited to the employer. However, evidence in the record shows that there is no mention of forfeiture in the 1996 summary. The only forfeiture clause is found in the complete 1996 plan. The internal inconsistency is unexplainable. For these reasons, Gerstenfeld's testimony is given weight when corroborated by other credible evidence or inference.

38) Moreland's testimony was credible. His demeanor was straightforward and sincere. He readily responded to questions and his testimony about the September 16, 1997, meeting did not differ factually with Gerstenfeld's account of the meeting. He acknowledged that Gerstenfeld did not specifically say that BOLI would forego further action if his clients paid back wages found to be owed. However, his genuine understanding from the meeting that his clients would not be subjected to any further monetary penalties once they paid back wages was believable and not unreasonable. His statements are accepted as facts in this matter.

39) Though limited by his memory and the brief nature of his testimony, Groat's testimony was credible. He was straightforward about what he remembered and did not appear biased one way or the other. There is no reason not to accept his statements as facts in this matter.

40) Lelack and Reynolds testified credibly. They both gave straightforward and factual responses and neither was shown to have made inconsistent statements. The forum has no reason not to accept their testimony as establishing facts in this matter.

41) Jessica Orsetti's testimony was not wholly credible. At the time of her testimony she was not getting along with her mother, Respondent Hollinger, and had not since December, 1997. She appeared hostile toward her mother at the hearing. She acknowledged that she took her mother's car on one occasion without her mother's permission and forged her mother's signature to withdraw funds from a bank account. Although she claimed that she did not work on the Washington Approach project and was paid straight time for overtime hours her husband, John, worked, she confirmed that she signed her time sheets for the hours worked. Evidence shows that she also claimed $63.45 in fringe benefits were owed to her from the Washington Approach project. Because of the inconsistencies in her testimony and the obvious animosity between Orsetti and her mother, the forum has disbelieved all of her testimony except that which was corroborated by other credible evidence.

42) John Orsetti's testimony was not wholly credible. He was not on close terms with his mother-in-law, Respondent Hollinger. He denied any knowledge of a promissory note his wife signed in October, 1997, though his wife testified that he was aware of the note because they had discussed it together. His testimony that he was not aware that Respondent Hollinger was making all the payments on the loan she co-signed for him was inconsistent with his testimony that he knew he and his wife were three months behind in payments to her. Because of the inconsistencies in his testimony, the forum has disbelieved all of his testimony except that which was corroborated by other credible evidence.

43) Lance Clay's testimony was not wholly credible. The first time he testified he acknowledged the existence of the job book but did not reveal that it included information about the prevailing wage and the medical plan. He said that it contained employment paperwork for hiring, a basic outline for working conditions, and W2 forms. His testimony at the time was believable and the ALJ was impressed by his demeanor. He was recalled to the stand shortly thereafter and brought in what he claimed was the actual job book he was given as foreman on the Washington Approach job. The job book contained the prevailing wage information required by law. The information was divided into seven plastic sleeves. The last sleeve was empty and he stated that it had been as long as he had the job book. His testimony was contradicted by other credible witnesses, including Respondent Hollinger, who testified that

she didn't place an empty sleeve in the job book. Her credible testimony was that the benefit plan was in the seventh sleeve. Clay's initial testimony, sans job book, withheld information about the existence of the prevailing wage rates in the job book. After he produced it at a later time his testimony focused on the absence of the medical plan. His testimony was crafted to mislead the forum and for that reason he was not believed unless his testimony was corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) Respondent Southern Oregon Flagging, Inc. is an Oregon corporation. Respondent Hollinger is its president.

2) Respondent Southern Oregon Flagging, Inc. received subcontracts on the Washington Approach and Coburg Road public works projects.

3) Respondent Southern Oregon Flagging, Inc. intentionally failed to pay the prevailing rate of wage to workers employed upon its public works projects between January 1 and April 30, 1997.

4) Respondent Southern Oregon Flagging, Inc. did not intentionally fail to post in a conspicuous and accessible place in or about its public works project the applicable prevailing wage rates on the Washington Approach public works contract.

5) Respondent Southern Oregon Flagging, Inc. did not fail to post in a conspicuous and accessible place in or about its public works project a notice describing its fringe benefit plan to which Respondent made contributions on the Washington Approach public works contract.

6) Respondents failed to file accurate and complete certified statements on public works contracts prior to the issuance of a BOLI warning letter on August 6, 1997.

7) Respondents did not take action to circumvent the payment of the applicable prevailing wage on the Washington Approach and Coburg Road projects.

8) Respondent Kimberlie Hollinger, a corporate officer of Respondent Southern Oregon Flagging, Inc. was responsible for Respondent SOFI's failure to pay the prevailing rate of wage. She knew or should have known the amount of the applicable prevailing wages and that such wage rates must be posted.

CONCLUSIONS OF LAW

1) Respondent SOFI employed workers to perform work on public works projects and is subject to the provisions of ORS 279.348 to 279.363.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over Respondents and the subject matter herein. ORS 279.348 to 279.380.

3) 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 839-016-0035(1) provides in part:

"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 SOFI violated ORS 279.350(1) by failing to pay the prevailing rate of wage to workers employed upon its public works contracts between January 1 and April 30, 1997.

4) ORS 279.350(4) provides in part:

"Every contractor or subcontractor engaged on a project for which there is a contract for a public work shall keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project."

OAR 839-016-0033(1) provides:

"Contractors shall post the prevailing wage rates applicable to the project in a conspicuous place at the site of work. The posting shall be easily accessible to employees working on the project."

Respondent SOFI did not violate ORS 279.350(4) as alleged.

5) ORS 279.350(5) provides in part:

"Every contractor or subcontractor engaged on a project for which there is a contract for a public work to which the prevailing wage requirements apply that also provides for or contributes to a health and welfare plan or a pension plan, or both, for its employees on the project shall post notice describing such plans in a conspicuous and accessible place in or about the project. * * * In addition to the description of the plans, the notice shall contain information on how and where to make claims and where to obtain further information."

OAR 839-016-0033 provides in part:

"(3) When a contractor or subcontractor provides for or contributes to a health and welfare plan or pension plan for employees who are working on a public works project, the contractor or subcontractor shall post a notice containing the following information:

(a) A description of the plan or plans;

(b) Information on how and where claims can be made; and

(c) Where to obtain more information."

"(4) The notice required to be posted in section (3) of this rule shall be posted in a conspicuous place at the site of work and shall be easily accessible to employees working on the project. The notice shall be posted in the same location as the prevailing wage rate pursuant to section (1) of this rule."

Respondent SOFI did not violate ORS 279.350(5) by failing to post a notice describing its fringe benefit plan on the Washington Approach project in a conspicuous and accessible place in or about the project.

6) ORS 279.350(7) provides:

"No person shall take action that circumvents payment of the prevailing rate of wage to workers

employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279.348 to 279.380 in a manner that has the effect of offsetting the prevailing wage on a public works project."

Respondent SOFI did not violate ORS 279.350(4) as alleged.

7) ORS 279.354(1) provides in part:

" * * * [E]very subcontractor * * * shall file certified statements with the public contracting agency in writing in the form prescribed by the Commissioner of the Bureau of Labor and Industries certifying the hours and rate of wage paid each worker which the * * * subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the * * * subcontractor * * * that the * * * subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the * * * subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid."

Respondent SOFI violated ORS 279.354(1) by failing to file certified statements that set out accurately and completely the payroll records for the prior week.

8) ORS 279.361 provides in part:

"(1) 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 on public works, * * * or * * * a subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the * * * subcontractor or any firm, corporation, partnership or association in which the * * * subcontractor has a financial interest shall be ineligible for a period not to exceed three years from the date of publication of the name of the * * * subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. The Commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies.

"(2) 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 839-016-0095(1) provides:

"The names of the * * * subcontractor or other persons * * * shall remain on the list for a period of three (3) years from the date of publication of such name on the list."

Pursuant to ORS 279.361, the Commissioner has the authority to place the name of Respondents SOFI and Hollinger on the list of persons who are ineligible to receive any contract or subcontract for public works for a period not to exceed three years from the date of publication of their names on that list. Under the facts and circumstances in this record, the forum might be inclined not to place Respondents on the list of persons ineligible to receive public works contracts, but ORS 279.350(4) mandates debarment for a period not to exceed three years where there is a finding of intentional failure to pay the prevailing rate of wage to workers employed upon public works projects. Therefore, the forum is imposing a minimum debarment period.

Because Respondent SOFI intentionally failed to pay the prevailing rate of wage to workers employed upon public works projects between January 1 and April 30, 1997, as required by ORS 279.350(4), it shall be ineligible for a period of one month from the date of publication of its name on the ineligible list to receive any contract or subcontract for public works.

Because Respondent Hollinger was a corporate officer responsible for the failure to pay and post the prevailing wage rates, she shall be ineligible for a period of one month from the date of publication of her name on the ineligible list to receive any contract or subcontract for public works.

9) ORS 279.370 provides in 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 $5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto.

"(2) Civil penalties under this section shall be imposed as provided in ORS 183.090."

OAR 839-016-0530 provides in part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"(2) Civil penalties may be assessed against any contractor, subcontractor or contracting agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

"(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

"(a) Failure to pay the prevailing rate of wage in violation of ORS 279.350;

"(b) Failure to post the applicable prevailing wage rates in violation of ORS 279.350(4);

"(c) Failure to post the notice describing the health and welfare or pension plans in violation of ORS 279.350(5);

" * * * *

"(e) Filing inaccurate or incomplete certified statements in violation of ORS 279.354;

" * * * *

"(h) Taking action to circumvent the payment of the prevailing wage, other than subsections (e) and (f) of this section, in violation of ORS 279.350(7)[.]"

OAR 839-016-0520 provides in part:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules;

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

"(c) The opportunity and degree of difficulty to comply;

"(d) The magnitude and seriousness of the violation;

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation;

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in section (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of the same statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed 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 Claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OAR 839-016-0540 provides in part:

"(1) The civil penalty for any one violation shall not exceed $5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) For purposes of this rule 'repeated violations' means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.

"(3) Notwithstanding any other section of this rule, when the commissioner determines to as-

sess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty shall be calculated as follows:

"(a) An equal amount of the unpaid wages or $1,000, whichever is less, for the first violation;

"(b) Two times the amount of the unpaid wages or $3,000, whichever is less, for the first repeated violation;

"(c) Three times the amount of the unpaid wages or $5,000, whichever is less, for second and subsequent repeated violations.

" * * * *

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.

"(6) The civil penalties set out in this rule shall be in addition to any other penalty assessed or imposed by law or rule."

Under the facts and circumstances of this record, and according to ORS 279.370 and OAR 839-016-0500 to 839-016-054, 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 penalties specified in the Order below is an appropriate exercise of that authority.

OPINION

1. Ineligibility for Public Works Contracts

a. Intentional Failure to Pay the Prevailing Wage Rates

In its charging document, the Agency alleges that Respondents intentionally failed to pay the applicable prevailing wage rates to 100 workers by "not paying workers for all hours worked, by not paying overtime for hours worked in excess of eight per day or for hours worked in excess of forty per week and by not paying workers the prevailing hourly wage rates specified by the Commissioner for workers employed as flaggers and pilot car drivers" for the period covering October 1, 1996 to on or about September 30, 1997.

The Agency attached to its charging document an appendix ("Appendix 'A'") listing the 100 workers who were allegedly not paid, the wages for each worker that were allegedly not paid, and the civil penalty calculated for each worker based upon the unpaid wages. The Agency cited as "aggravating circumstances" Respondents' failure to pay workers the prevailing wage rate, failure to pay workers earned overtime, failure to post information regarding fringe benefits, failure to establish and maintain a regular pay day, and failure to file accurate and complete certified payroll as a result of prior investigations of Respondents' employment practices in 1996 and 1997. The charging document also alleges as an aggravating circumstance that as a result of the prior investigations, Respondents were placed on the Agency's "warning list" and issued a warning letter on August 6, 1997.

Under ORS 279.361(1), if a subcontractor has "intentionally failed" to pay or post the prevailing wage rates as required, then the subcontractor "shall be ineligible" for up to three years to receive any contract or subcontract for public works. Under ORS

279.361(2), any corporate officer who is responsible for the intentional failure or refusal to pay or post the prevailing rates shall also be ineligible for up to three years to receive any contract or subcontract for public works.

This forum has previously held that the terms "intentional" and "willful" are interchangeable. *P. Miller and Sons Contractors, Inc.,* 5 BOLI at 156 (citing *Starr v. Brotherhood's Relief & Compensation Fund,* 268 Or 66, 518 P2d 1321 (1974)) (1986). This forum also adopted the Oregon Supreme Court's interpretation of "willful" set out in *Sabin v. Willamette Western Corporation,* 276 Or 1083, 557 P2d 1344 (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." The *Sabin* court also noted that in defining the term "willful" as it applied to ORS 652.150 which provides for a civil penalty if an employer "willfully" fails to pay wages due, the "purpose is to protect workers from unscrupulous or careless employers who fail to do something although they are fully aware of their obligation to do so." (276 Or at 1093)

Hours worked/overtime: There is no dispute between the Agency and Respondents that Appendix "A" of the charging document lists only those workers who were allegedly paid less than the prevailing wage because portions of their wages (the fringe benefits) were paid into a benefit plan that the Agency ultimately determined was not a legally enforceable plan. The undisputed evidence in the record demonstrates that none of the unpaid wages listed in Appendix "A" of the Agency's pleadings were a result of Respondents' failure to pay for hours worked or overtime wages. The evidence does show, however, that as a result of prior investigations, Respondents did fail to pay overtime to two employees who filed wage claims in June, 1997. In July, 1997, Respondents paid out a total of $158.33 in overtime wages to the wage claimants. At the same time, Respondents were advised by the Agency that their overtime practices were not in compliance and, although no wage claims were filed, Respondents paid four other workers a total of $907.60 in overtime wages. The Agency subsequently issued a warning letter to Respondents on August 6, 1997, advising them that the Agency would consider placing them on the list of ineligibles if they failed or refused to pay the prevailing wage rate in the future. There is no evidence in the record that Respondents failed or refused to pay any employee overtime wages for work performed after August 6, 1997.

Respondents assert and the forum agrees that the warning letter issued August 6, 1997, threatened debarment for future violations. The Agency alleged violations resulting from prior investigations as aggravating circumstances, i.e., circumstances that enhance the principal charge, and that is the extent to which the forum views the evidence in the record pertaining to Respondents' failure to pay overtime prior to the issuance of the warning letter.

Payment of rates specified for flaggers and pilot car drivers: Again, there is no dispute that the principal charge involves only those workers who were allegedly paid less than the prevailing wage because their fringe benefits were paid into a

benefit plan that the Agency ultimately determined was not a legally enforceable plan. The prevailing wage rate includes fringe benefits paid into a bona fide benefit plan. ORS 279.348(1) & (4). The threshold issue is whether Respondents had a bona fide benefit plan in place between October 1, 1996, and September 30, 1997.

Bona Fide Fringe Benefit Plan

ORS 279.348(4) defines fringe benefits as:

> "(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a plan, fund or program, and
>
> "(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state or local law to provide any of such benefits." (Emphasis added)

OAR 839-016-0004(8) provides in addition to the above definition that "[o]ther bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses, nor contributions to industry advance funds (CIAF) for example)."

For a plan to be bona fide, contributions must be (1) irrevocable, (2) for the benefit of the employee, and (3) made to a trust or third party. Contrary to the Agency's argument that administrative costs are not permissible, the statute specifically provides that fringe benefits include the rate of costs to the contractor or subcontractor which may be "reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected."

The forum finds that Respondents' Plan #1 adopted in December, 1996, was not a bona fide benefit plan. The contributions under the plan were not irrevocable and they were not made to a trust or third party. The forfeiture clause provided that any remaining contributions in an employee's account at the end of the plan year were forfeited and credited back to Respondent SOFI. Any contributions made by Respondents under Plan #1 cannot be considered as fringe benefits.

Witnesses testified and documentary evidence shows that between October 1 and December 31, 1996, fringe benefits were directed into an employee pension plan. The validity of Respondents' pension plan is not at issue in this case. No evidence was presented to show what the prevailing wage was at that time or that

Respondents failed to pay applicable fringe benefits into a valid pension plan. The burden is on the Agency to prove that Respondents failed to pay the prevailing wage rates for that time period. It has not done so. The forum, therefore, finds that Respondents did not intentionally fail to pay the prevailing wage between October 1 and December 31, 1996, as alleged.

Plan #1, however, was not revised until ODOT questioned the plan's validity under Davis-Bacon and Respondents corrected the defects. The forfeiture clause was eliminated and an employee benefit trust was established April 30, 1997. Evidence shows that contributions were made to the plan before the revised plan was adopted. Because the plan did not meet the requirements of a bona fide benefits plan before it was revised, the forum finds that between January 1 and April 30, 1997, any contributions made under the plan were not fringe benefits and Respondents intentionally failed to pay the applicable prevailing wage rates.

Respondents presented evidence that as soon as the Plan #1's defects were brought to Respondent Hollinger's attention, she sought assistance from a qualified expert who worked with ODOT and USDOL closely and continuously until the plan met the agencies' approval. When BOLI later disagreed with USDOL's assessment, Respondents continued to cooperate. In spite of their disagreement with the Agency about the validity of the revised plan, previously approved by USDOL and ODOT, Respondents paid the underlying fringe benefits as back wages and made every effort to bring their plan into compliance. This forum has noted before, however, that such cooperation and effort are not considerations when determining whether to debar a subcontractor. *See, In the Matter of Larson Construction, Inc.*, 17 BOLI 54 (1998). OAR 839-016-0095 specifically permits the Commissioner to consider those matters, though, when reviewing a petition to remove a name from the ineligible list. Other matters may be considered by the Commissioner as well, such as a petitioner's history of correcting violations and its likelihood of violating the prevailing wage rate law in the future. The Commissioner may also consider those matters when determining the length of time a contractor shall remain on the list of ineligibles. *See, In the Matter of Intermountain Plastics*, 7 BOLI 142 (1988).

Respondents also contend that because BOLI approved the plan in 1996 and reiterated its approval in 1997, the Agency is estopped from imposing any sanctions against Respondents. This forum has held previously that the doctrine of equitable estoppel does not apply to the agency when enforcing a mandatory requirement of the law. *In the Matter of Larson Construction, Inc.*, 17 BOLI 54 (1998); *In the Matter of Albertson's, Inc.*, 10 BOLI 199, 299 (1992).

Under ORS 279.361(1), if a subcontractor has "intentionally failed" to pay the prevailing wage rates as required, then the subcontractor "shall be ineligible" for up to three years to receive any contract or subcontract for public works.

Under ORS 279.361(2), any corporate officer who is responsible for the failure or refusal to pay the prevailing wage rates shall also be

ineligible for up to three years to receive any contract or subcontract for public works. Here, the preponderance of the credible evidence shows that Respondent Hollinger is responsible for Respondent SOFI's intentional failure to pay the prevailing wage rates as required. She intended the benefits plan as adopted in December, 1996, and knew or should have known what the law required for a bona fide benefits plan.

Although technically the violation resulted in underpayment of wages to a number of employees, this is not a case of an artful employer violating the law. As noted previously in this order, Respondent Hollinger took immediate action to correct the deficiencies in her benefits plan even though she had been advised previously that the Agency approved her plan, she continued to cooperate with the Agency as she attempted to bring the plan into compliance, and she paid the underlying fringe benefits as back wages. It is notable that even the so-called experts, including the Department of Justice, could not judge conclusively what constitutes a bona fide benefits plan, although that didn't stop three agencies from approving Respondents' plan to Respondents' ultimate detriment. Therefore, pursuant to ORS 279.361, OAR 839-016-0085, and 839-016-0095(1), and based on the unique facts in this case, the forum mitigates the punishment otherwise appropriate to Respondents' conduct by limiting the period of ineligibility imposed to one month.

The forum is not persuaded that Respondents' Plan #2, adopted as amended August 18, 1997, was not a bona fide fringe benefit plan. The Agency's expressed concerns with Plan #1 were addressed in the revised plan. The forfeiture clause was eliminated and an employee benefits trust was established. When contrasted with the plan approved by BOLI in 1998, Plan #3, the primary distinctions have to do with the nature of the health insurance program and specifying who bears the costs associated with providing the benefits. ORS 279.349(4) provides that any costs to the subcontractor "reasonably anticipated in providing benefits to workers" are equivalent to fringe benefits. Plan #2 was not noticeably in conflict with the statute.

Plan #3 eliminated the health insurance program as written because, according to the Agency, "all fringe benefit contributions must provide a benefit to the individual employee for whom they are contributed" and under Plan #2 some of the contributions were allocated to the general fund at the end of the plan year to purchase insurance premiums that provided a benefit to some, but not necessarily all, employees. Under the guidelines found in section 15f12 of the USDOL Field Operations Handbook, employers can credit contributions to be made during the eligibility waiting period as fringe benefits "since it is not required that all employees participating in a bona fide fringe benefit plan be entitled to receive benefits from that plan at all times." (Emphasis in original) USDOL did not question Respondents' health insurance program as written in Plan #2. BOLI has a parallel policy of permitting eligibility waiting periods. In the absence of evidence to the contrary, the rationale

for permitting credit to be taken for contributions made during the waiting period must be the same. There was no testimony with regard to each plan so the forum has no guidance in interpreting the more esoteric provisions. However, it need not determine whether Plan #2 was a bona fide benefits plan. The Agency had the burden of proving it was not and has not done so. The forum finds that for the period between April 30 and September 30, 1997, Respondents did not intentionally fail to pay the prevailing wage rates.

b. Intentional Failure to Post the Prevailing Wage Rates

Respondents presented credible evidence showing Respondent Hollinger used a "job book" to post the prevailing wage rates on the Washington Approach project. The job book concept was approved by Sanford Groat in early 1997. The job book contained the prevailing wage rates and other information pertaining to worker concerns. The job book was located in the pilot cars with the lead workers and was accessible to any worker who asked. Respondent Hollinger told each new employee about the job book and where it could be found. Witnesses who testified were aware of the job book and what the prevailing wage rate was on the Washington Approach project. Although the witnesses testified that they did not see the prevailing wage rates posted on the Washington Approach job site, each one of them knew about the job book, where it was located, and what was in it. Respondents clearly intended that the rates be posted in some fashion. The statute and rules give no guidance on what constitutes conspicuous and accessible posting. In this case, Respondent Hollinger discussed her problems with posting and her proposed method of compliance with an agency compliance specialist before the Washington Approach project and received approval. The forum will not second guess the Agency's agreement to Respondents' solution. The forum finds that Respondents did not intentionally fail to post the prevailing wage rates.

2. Civil Penalties

a. Failure to Pay the Prevailing Wage Rates

The Agency alleged 100 violations of ORS 279.350(1) related to Respondent's contributions to its benefits plans. In its Notice of Intent it proposed to assess $139,160.30 in civil penalties for the 100 "third or subsequent violation[s]." The Agency ultimately proved that between January 1 and April 30, 1997, Respondents failed to pay workers the prevailing wage rates on its public works contracts during that period as a result of contributions made to a defective benefits plan. Civil penalties are authorized by ORS 279.370 and OAR 839-016-0530(3)(a).

Evidence shows that Respondents intended to and did adopt a medical reimbursement plan in December, 1996. BOLI, through Sanford Groat and his supervisor, approved the plan in December, 1996. When another agency found defects in the plan in March, 1996, Respondents immediately obtained an attorney experienced in employee benefit plans to rectify any problems with the plan. The plan was revised to meet the specifications of another agency

and it was approved by that agency August 1, 1996. Sometime around May, 1997, evidence shows that BOLI again reviewed and approved the plan. It was not until late August, 1997, that Respondents were put on notice by David Gerstenfeld that BOLI questioned their plan and did not consider their contributions to the plan as bona fide fringe benefits.

Given the increasing complexity of the plan as it underwent its metamorphosis, the forum is hard pressed to expect Respondents to know more about what qualifies as a bona fide employee benefit plan than the agencies that reviewed their plan. As soon as there was any indication that the plan had problems, Respondent Hollinger sought assistance from a qualified expert who worked with the agencies closely and continuously until the plan met the approval of both agencies. As noted before in this opinion, Respondents were cooperative and, in spite of their disagreement with the agency about the validity of the plan, they paid the underlying fringe benefits as back wages and made every effort to bring their plan into compliance.

The Agency alleged aggravating circumstances and requested civil penalties. The Agency presented no evidence that Respondents had any violations or warning letters prior to the period in which the violations were found.[4] Respondents presented credible evidence of mitigation. Due to the particular facts and circumstances in this record, no civil penalties are assessed for the violations of ORS 279.350(1).

b. Failure to Post the Prevailing Wage Rates

The Agency seeks a $5,000 civil penalty for Respondents' failure to post the prevailing wage rates on the Washington Approach project. A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(b). The forum finds Respondent Hollinger testified credibly that she posted the prevailing wage rates in the job book she developed to cure the posting problem on flagging job sites. Her testimony that she kept the job book with the lead worker in the pilot car and told employees when they were hired where the job book could be found was corroborated by other credible evidence. The job book concept was deemed acceptable posting by the Agency. For the same reasons described in 1.b. of this opinion, the forum finds Respondents did not violate ORS 279.350(4).

c Failure to Post Notice of Fringe Benefit Plan

The Agency proposed a $5,000 civil penalty for Respondents' failure to post notice of its fringe benefit plan on the Washington Approach project, in violation of ORS 279.350(5).

For the same reasons described in 2.b. of this proposed opinion, the forum finds Respondents posted the medical benefit plan in the job book. Respondent Hollinger testified credibly that the job notebook contained Respondents' benefit plan and her testimony was corroborated by other credible testimony. The forum finds Respondents did not violate ORS 279.350(5).

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[4]The wage claims and warning letter issued August 6, 1997, occurred after the period covered by the 1996 fringe benefits plan.

d. Failure to File Accurate and Complete Certified Statements

The Agency proposed a $24,000 civil penalty for Respondents' failure to file accurate and complete certified statements for 24 violations of ORS 279.354. A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(e). The penalty shall not exceed $5,000 per violation, and the amount will depend on all the facts and on any mitigating and aggravating circumstances. OAR 839-016-0540(1). Those circumstances, pursuant to OAR 839-016-0520(1), include:

> "(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules;
>
> "(b) Prior violations, if any, of statutes and rules;
>
> "(c) The opportunity and degree of difficulty to comply;
>
> "(d) The magnitude and seriousness of the violation;
>
> "(e) Whether the * * * subcontractor * * * knew or should have known of the violation."

Respondents acknowledged and the evidence shows that between February 17 to on or about July 20, 1997, they failed to accurately report hours and dates of work on 20 certified statements filed on the Washington Approach project. Respondents admitted that the certified statements they filed reflected their practices of banking hours, counting the hours after midnight as a new day, and paying straight time for hours worked in excess of eight in a day where workers worked different jobs or on different projects in the same day. Their practices resulted in two wage claims, payment to four other workers of over $900, and a BOLI warning letter that issued August 6, 1997. There is no evidence in the record that Respondents continued with those practices or filed inaccurate or incomplete certified statements after they received the warning letter. Nor is there any evidence that Respondents failed to pay the prevailing wage rate to any of their workers after the warning letter issued.

Clearly, the Agency's August 6, 1997, warning letter does not limit the Agency's ability to seek civil penalties six months later for violations that were cured by the Respondents as a result of the warning letter. However, while not expressly mentioned, the forum can infer from the evidence that the Agency's goal is to encourage compliance. Since the warning letter is a mechanism to give contractors the opportunity to correct the deficiencies that caused them to violate, it is inconsistent with this goal to impose substantial penalties months later for violations that were apparently cured, absent a showing of aggravating circumstances. Nevertheless, the forum is mindful that filing false certified statements is a serious violation. Respondent Hollinger knew or should have known she was certifying to false hours and days on the certified statements. All employers are charged with the knowledge of wage and hour laws governing their activities as employers. *In the Matter of Country Auction,* 5 BOLI 256 (1985). The law imposes a duty on employers to know the wages that are due to their employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950). Respondents

should have known that their payroll methods, as reflected in their certified statements, were illegal. These are without doubt aggravating circumstances.

Having considered the applicable aggravating and mitigating circumstances, the forum assesses Respondents a civil penalty of $6,000 ($250.00 per violation) for their 24 violations of ORS 279.350(7).

e. Taking Action to Circumvent the Payment of the Prevailing Wage Rate

The Agency proposed a $5,000 civil penalty for Respondents' action to circumvent payment of the prevailing wage by requiring overtime hours worked by a worker to be accepted as straight time hours by that worker's spouse, by attempting to coerce other workers to agree to such a plan, and by threatening retaliation and retaliating against workers who insisted on receiving the full prevailing wages to which they were entitled or if they complained to any government employees about their pay, in violation of ORS 279.370(7). A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(h).

There is no credible evidence in the record that Respondents required or coerced anyone to report their overtime hours as straight time in their spouse's name. Respondent Hollinger employed couples where both were certified and shared a shift, but it was a method to minimize overtime hours and give those who wanted a chance to increase the number of hours worked instead of being limited to eight in a day.

There is also no evidence that workers suffered adverse consequences if they insisted on receiving the full prevailing wages to which they were entitled or if they complained to government agencies about their pay. To the contrary, the evidence shows that any worker who complained of not receiving overtime hours was paid promptly by Respondents to no apparent detriment.

For the above reasons, there is no violation of ORS 279.370(7) and no civil penalties are assessed.

3. Agency's Exceptions to the Proposed Order

a. Warning Letter

The Agency asserts that the forum improperly relied on the Agency's warning letter as a bar to the imposition of sanctions for violations covered and not covered in the warning letter issued August 6, 1997. It is not this forum's intent to apply estoppel against the Agency in this case. That portion of the opinion that discusses the warning letter's impact on the sanctions imposed against Respondents is revised to better reflect the forum's view of the evidence.

b. Respondents' Fringe Benefit Plan

The Agency reiterates its argument that the initial versions of Respondents' benefit plan did not constitute bona fide fringe benefits. In particular, the Agency argues that the forum's interpretation of ORS 279.348(4) was incorrect and the "forum incorrectly used the 'rate of costs' definition to determine what can be paid for by money contributed into a bona fide fringe benefit plan." The statute is plain on its face. Included in the definition of fringe benefits is the rate of costs reasonably antici-

pated in providing benefits to workers, including medical benefits such as those provided in Respondents' benefit plan. Although the Agency, in its exceptions, continues to assert, contrary to the statute, that an employer's costs administering the type of plan contemplated in ORS 279.348(4) are not bona fide fringe benefits, the Agency ultimately approved Respondents' final version of the plan, including the provision "allowing reasonable expenses of administering the Plan to be charged to Participants' Accounts."

The forum's decision in this matter is not based on whether the previous version, other than Plan #1, was a bona fide fringe benefit plan or not, but on the Agency's failure of proof. The Agency's exception on this point is overruled.

c. Posting Violations

The Agency contends in its exceptions that the forum erroneously relied on Sanford Groat's statements to find that Respondents' method of posting met the legal requirements. It also argues that Groat's approval of Respondents' posting method is contrary to Agency policy and interpretation. The Agency, however, presented absolutely no evidence at hearing on this issue nor did it attempt to instruct the forum on what the Agency's policy is or how it would define conspicuous and accessible posting in this particular case. Respondents, on the other hand, presented credible evidence detailing the difficulties of posting in the flagging industry, including the dynamic nature of flagging and the lack of the traditional job shack. Credible and uncontroverted evidence in the record shows that prior to the conclusion of Groat's investigation, Respondents' posting method was considered to be in compliance by the Agency. There is no indication in the record that posting was ever an issue with Gerstenfeld after he began looking into Respondents' fringe benefits plan.

If the Agency wanted the forum to consider its posting policy and its interpretation of "conspicuous and accessible" in this particular case, then it should have offered evidence at the hearing to support its charge.

d. Gerstenfeld's Credibility

The Agency asserts that the forum confuses the lack of substantiating documentation with the existence of controverting evidence and that the forum found inconsistencies in Gerstenfeld's testimony where there were none. For those reasons, the Agency suggests that Gerstenfeld's testimony be found credible. The forum agrees that the question with Gerstenfeld's testimony was not of honesty but about the reliability of the evidence where the Agency has the documents within its control that would substantiate certain testimony but failed to produce those documents at hearing. Bare assertions that bear directly on the merits, particularly in a case involving debarment and substantial civil penalties, are accorded little or no weight where the Agency has the best evidence within its power to produce and fails to do so without explanation.

In its exception to the assessment of Gerstenfeld's testimony, the Agency attempts to explain certain inconsistencies and the explanations are plausible if not wholly supported in the record. Although the assessment stands for the most part, it is

revised to more accurately reflect the forum's determination that Gerstenfeld's testimony was unreliable in part rather than not credible.

e. Civil Penalty Calculation

The Agency contends the forum "incorrectly calculated" the civil penalties in this case. The exception is without merit. The Commissioner is authorized but not required to assess civil penalties pursuant to ORS 279.370 and OAR 839-016-0530 for the violations found herein. OAR 839-016-0520(4) provides that "the Commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of civil penalty to be assessed." The forum considered the mitigating evidence and under the facts and circumstances in this record the penalties assessed are appropriate.

f. Debarment Period

The Agency objects to the one month debarment period imposed by the forum citing *In the Matter of* Intermountain *Plastics*[5] as the only reported contested case that resulted in less than a three year debarment period. In that case, the forum determined that the contractor had not "surreptitiously violated the law" and imposed an eighteen month debarment. The forum found that, although the contractor subsequently refused to abide by the agency's determination of coverage regarding trade classifications, the contractor's "initial efforts to clarify the situation were a constructive and positive step [and] it is on this basis that the Forum mitigates the punishment otherwise appropriate to the Contractor's conduct by limiting the period of ineligibility imposed to eighteen months." 7 BOLI, at 160.

The Agency suggests that in the present case, it is inappropriate for the forum to consider mitigating factors and indicates that "since these factors should not be considered in determining the debarment, the discussion of those factors should be removed from the order." The Agency is confusing the difference between considering mitigation for determining whether to debar at all and considering mitigation when determining the length of the debarment period. ORS 279.361 mandates debarment for a period not to exceed three years for intentional failure or refusal to pay the prevailing rate of wage. Because the forum found that Respondents intentionally failed to pay the prevailing wage rate as a result of its invalid 1996 fringe benefit plan, the forum does not have a choice but to debar Respondents for some period not to exceed three years regardless of mitigating circumstances. Contrary to the Agency's contention, the forum is not precluded from considering mitigating circumstances in determining the length of the debarment period.

The forum, however, has revised the opinion section of this order to clarify and specify the reasons for determining the one month debarment period as an appropriate sanction under the circumstances.

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[5] 7 BOLI 142 (1988)

g. FOFM #20 Amendment

The Agency solicits an amendment to FOFM #20 to reflect that unpaid overtime wages were paid on August 4, 1997, rather than at the end of the project, and only after the general contractor on the project requested copies of Respondents' payroll records. FOFM #20 is a finding pertaining to Respondents' general prior practice of banking hours on projects. FOFM #17 addresses specific employees who, based on evidence in the record, claimed unpaid overtime and were paid on August 4, 1997, as a result of Sanford Groat's investigation on behalf of the Agency.

h. FOFM #28 Amendment

FOFM #28 is expanded, at the Agency's request, to more accurately reflect the evidence in the record.

ORDER

NOW THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents Southern Oregon Flagging, Inc. and Kimberlie Hollinger or any firm, corporation, partnership, 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 one month 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.

FURTHERMORE, as authorized by ORS 279.370, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents Southern Oregon Flagging, Inc. and Kimberlie Hollinger 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 Six Thousand Dollars ($6,000), plus any interest that accrues at the annual rate of nine percent between a date ten days after the issuance of the final order and the date Respondents comply with the final order. This assessment is for the following civil penalties against Respondents: $6,000 for 24 violations of ORS 279.354.

[Appendix on next page]

Appendix

EMPLOYEE	PROJECT	AMOUNT PAID
Laura Anderson	12th & Lovejoy	$105.75
Shirley Arenz	Pacific Hwy	$2,131.80
Evelyn Arthur	Grand Ronde	$356.03
Tom Atkins	Milton-Freewater, Grand Ronde, St. Helens, Vernonia, Clatskanie	$1,285.80
Margaret Atkins	Grand Ronde, Vernonia	$67.98
Hyram Brodniak	Grandpa Erfo, Pacific Hwy, Wilsonville, St. Helens, Fairgrounds	$593.87
Gina Brown	Hood River	$36.30
Jacques Buteau	Pacific Hwy, John Day, Vernonia	$472.06
Darcy Calchina	Wilsonville	$56.40
Phyllis Carson	Washington Approach	$10.58
Candace Chambers	Hood River	$61.56
James Clark	Pacific Hwy, John Day, Seaside, Newport, 12th & Lovejoy	$537.23
Jason Clark	Washington Approach, Grand Ronde, MP94	$1,149.56
Lance Clay	Washington Approach, Coburg Road	$4,984.36
Stephen Clay	Washington Approach	$178.33
John Conley	Coburg Road, Hwy 58	$244.58
Damon Cooper	Pacific Hwy, 12th & Lovejoy, Arlington	$454.58
Joseph Corn	Grand Ronde	$500.55
Debbie Denman	Milton-Freewater, Pacific Hwy, Washington Approach, Grand Ronde, 12th & Lovejoy, Vernonia, Clatskanie, Hood River,	$2,055.10

	Hermiston	
Eydie Dennis	Wilsonville	$24.68
Sherryldeen Devore	Grand Ronde	$1,128.00
Kathy Dillenburg	Grand Ronde	$523.25
Saundra Dodge	Hood River, SE Foster Rd	$60.57
Sean Duffy	Coburg Road, Vernonia, Junction City	$588.21
Ellana Flood	Washington Approach	$232.65
Katherine Flynn	Pacific Hwy	$56.10
James French	Milton-Freewater	$423.00
Stacey Fuller	42nd & Jasper, Filbert Lane, Fairgrounds, 32nd & Jasper	$627.45
Ricky Gillepsie	Hwy 58, 32nd & Jasper	$489.98
Elisha Groom	Wilsonville	$28.20
Daniel Guest	Coburg Road, Hwy 66, Vernonia, MP94	$729.45
Tamara Sue Hill	Pacific Hwy, Wilsonville, Grand Ronde, 12th & Lovejoy, SE Foster Road	$1,935.46
Rick Hoffman	John Day, Newport, Seaside	$225.60
Wanda Holcomb	Milton-Freewater, MP94, Washington Approach, Hood River	$1,885.47
Joshua Hollinger	Pacific Hwy, Washington Approach, Wilsonville, Hwy 66, 12th & Lovejoy, MP94, Arlington	$752.74
Edgar Hollinger	Chambers, Hwy 58, Broadway/Lincoln, 32nd & Jasper, MP94, Hood River	$343.88
Natasha Hollinger	Pacific Hwy, Washington Approach, 12th & Lovejoy,	$363.56
Mindy Hollinger	Pacific Hwy, Washington Approach, Wilsonville, St. Helens, 12th & Lovejoy, Columbia Slough	$1,562.79

Shirley Holstad	Wilson River, Grand Ronde	$511.13
Roger Hooper	Grandpa Erfo, Milton-Freewater	$401.85
Richard Hubbard	Hwy 58	$31.73
Warren Idzerda	Pacific Hwy, Grand Ronde	$153.30
Ralph Johnson	Grandpa Erfo	$52.88
Tratina Jones	Junction City	$66.98
Joshua Jones	Coburg Road, John Day, Hwy 66, Vernonia, 32nd & Jasper, Arlington	$807.25
Lois Kachaturian	Pacific Hwy, Wilsonville	$424.18
William King	Washington Approach, Milton-Freewater, Grandpa Erfo	$803.70
Karey Lamp	Coburg Road	$77.55
Cleo Larkin	MP94	$465.30
Matt Leavitt	Pacific Hwy, 10th & Willamette, Wilson River, Wilsonville, Fair-grounds, Grand Prairie	$1,718.42
Charles LeDoux	MP94	$172.73
John LeDoux	Washington Approach, MP94, Arlington	$1,885.88
Cherie Levig	Coburg Road	$14.10
Debbie Liniger	Pacific Hwy, Wilsonville	$78.60
Kim Mangold	Hwy 66	$112.80
James Martinson	42nd & Jasper, Wilsonville	$80.68
Candy McEntire	Milton-Freewater	$45.83
Teresa McGarry	Fairgrounds	$186.83
Scott McGetrick	Milton-Freewater	$116.33
Dorothy Morrison	MP94	$172.73
Scott Murry	Grandpa Erfo, Pacific Hwy, Grand Ronde, St. Helens, Vernonia	$342.23
Charlene Nelson	Pacific Hwy, Grand Prairie	$90.45
Joann Nelson	Wilsonville	$35.25

Jessica Orsetti	Washington Approach, Grand Ronde, MP94, Arlington	$0 [425.72 claimed]
John Orsetti	Washington Approach, Coburg Road, Grand Ronde, MP94, Arlington	$0 [$1,603.37 claimed]
Ed Pauwell	Filbert Lane, Milton-Freewater, Washington Approach	$0 [$55.00 claimed]
Warren Perrine	Milton-Freewater	$672.28
R Pierce	Milton-Freewater	$35.25
Nikki Pool	Hwy 66	$49.36
Ricardo Ramirez	Milton-Freewater	$102.23
Michelle Richards	Washington Approach, MP94, Hood River	$900.52
Jose Robles	Pacific Hwy, Wilsonville	$119.85
Joe Rogers	Grand Ronde	$45.83
Kathryn Roman	Pacific Hwy	$69.30
Tim Roseboro	Pacific Hwy, Coburg Road, John Day, Wilsonville	$874.10
Aaron Rosenberg	Coburg Road, 12th & Lovejoy, Vernonia, Arlington, Junction City	$306.66
Eugene Russell	Fairgrounds, Hwy 58, 32nd & Jasper	$109.28
Cheryl Salvey	MP94	$447.68
Joe Sanders	Coburg Road, Grand Ronde, Fairgrounds, 32nd & Jasper, Junction City, Broad-way/Lincoln	$426.53
Casey Sanders	Pacific Hwy, Coburg Road, Wilsonville, Fairgrounds, 32nd & Jasper	$523.14
Kyle Sanders	42nd & Jasper, Pacific Hwy, Coburg Road, Wilsonville, Fairgrounds, Chambers, 32nd & Jasper	$1,541.75
Travis Sanders	Wilsonville, Columbia Slough	$183.30

Walt Scott	Elk Creek, Coburg Road	$755.30
Karen Spence	Milton-Freewater	$42.30
Mike Spitzer	Grandpa Erfo, Pacific Hwy, Coburg Road, Wilsonville, St. Helens, Vernonia, 32nd & Jasper	$0 [1,349.80 claimed]
Tracy St. Clair	Grand Ronde	$56.40
Matthew Stokes	Hood River, Hermiston	$66.12
Debbie Stratton	Grand Ronde	$24.68
Tom Sunseri	Filbert Lane, Clackamas Hwy, Pacific Hwy, Wilson River, Wilsonville, Grand Prairie, Multnomah Blvd.	$49.35
William "Bucky" Taylor, Jr.	Hood River	$52.80
Bill Taylor	Hood River	$58.32
Belinda Taylor	Pacific Hwy, Wilson River, Grand Ronde, Clatskanie	$800.93
Shela Torrence	Arlington, Hermiston	$297.24
Sherrol Trent	MP94	$521.70
Jodi Underhill	Grand Ronde	$162.58
Kathy Wake	Pacific Hwy, Washington Approach, MP94	$919.93
Michael Waldron	Pacific Hwy, Wilsonville, Arlington	$609.38
Curt Wallace	Coburg Road, Grand Ronde, Fairgrounds, Hwy 58, 32nd & Jasper, Junction City	$509.14
Freddie Williams	MP94	$437.10
Alan Winans	Washington Approach, MP94	$0.20

In the Matter of
CENTENNIAL SCHOOL DISTRICT
NO. 28-J

Case Number 09-99
Final Order of the Commissioner
Jack Roberts
Issued April 8, 1999.

SYNOPSIS

Respondent, a public school district, allowed Complainant to take only half the OFLA leave to which he was entitled, in violation of ORS 659.478. The forum awarded Complainant $7682.40 in lost wages and $25,000.00 as damages for mental distress that Complainant suffered as a result of Respondent's unlawful employment practice. ORS 659.470 *et. seq.*, OAR 839-009-0210.

The above-entitled contested case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 3 and 4, 1998, in conference room 1004 of the Portland State Office Building, Portland, Oregon. The Civil Rights Division ("CRD") of the Bureau of Labor and Industries ("the Agency") was represented by Linda Lohr, an employee of the Agency. Respondent was represented by Andrea Hungerford, of the Hungerford Law Firm. Charlene Harris, Respondent's Director of Human Resources, was present throughout the hearing. The Complainant, Dennis Frederick, also was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses, in addition to Complainant: Laura Frederick (Complainant's wife) and David Wright (a senior CRD investigator). Respondent called Charlene Harris as its sole witness.

The ALJ admitted into evidence: Administrative Exhibits X-1 to X-9; Agency Exhibits A-1 to A-29[1]; and Respondents' Exhibits R-1 to R-4, R-11, R-13, R-17, and R-25.

Having fully considered the entire record in this matter, I, Jack 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 October 1, 1997, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging he was the victim of Respondent's unlawful employment practices. The Division found substantial evidence that Respondent had violated ORS 659.470 by terminating Complainant's employment at a time when he had not exhausted his leave under the Oregon Family Leave Act ("OFLA").[2]

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[1]Exhibits A-26 to A-28 were admitted only for limited purposes that are described in the Findings of Fact, *infra*.

[2]The Agency has jurisdiction to enforce only OFLA, not the federal Family Medical Leave Act ("FMLA"), and charged Respondent only with having violated OFLA. Consequently, this Order generally dis-

2) On October 7, 1998, the Agency requested a hearing.

3) On October 15, 1998, the Agency served on Respondent Specific Charges alleging that Respondent had violated ORS 659.470 by denying Complainant OFLA leave to which he was entitled. The Agency sought damages of $10,500.00 in back wages plus $25,000.00 for mental suffering.

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 Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; and c) a complete copy of the Agency's administrative rules regarding the contested case process.

5) The Notice of Hearing stated that Respondent's answer was due 20 days from receipt of the notice and that, if Respondent did not timely file an answer, it could be held in default.

6) On October 16, 1998, the Agency moved for leave to amend the Specific Charges to change the date specified on page 1, line 19 to "October 1, 1997." The ALJ granted the motion, which Respondent did not oppose.

7) Respondent timely filed its Answer and Affirmative Defenses on November 5, 1998.

8) On October 29, 1998, the ALJ ordered the Agency and Respondent each to submit a summary of the case including: a list of witnesses to be called; the identification and description of any document or physical evidence to be offered, together with a copy of any such document or evidence; a statement of any agreed or stipulated facts; and, from the Agency only, any damage computations. The Agency and Respondent submitted timely case summaries.

9) At the start of the hearing, counsel for Respondent stated that her client had received the Notice of Contested Case Rights and Procedures and had no questions about it.

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

11) At the close of the hearing on December 4, 1998, the ALJ asked the Agency and Respondent to submit briefs discussing whether Complainant's alleged depression had rendered him unable to perform any of the essential functions of his job. Respondent timely filed its closing brief and the Agency timely filed a written closing argument after obtaining two extensions of time.

12) On February 19, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. After receiving one extension of time, Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

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cusses only the Oregon law, although many of the same considerations would apply to a determination of whether Respondent violated FMLA.

FINDINGS OF FACT -- THE MERITS

1) At all material times, Respondent, a political subdivision of the State of Oregon, was an Oregon employer and utilized the personal services of 25 or more persons in the State of Oregon for each working day during both 1996 and 1997.

2) Complainant is married and has three children. Respondent hired Complainant to work as a custodian beginning on March 8, 1993. He started by working four hours per day and, in 1994 or 1995, was moved to a full-time position at Centennial Middle School. In January 1996, Complainant asked for a transfer away from the middle school. About six months later, Respondent assigned Complainant to work a split shift, with four hours at Pleasant Valley Elementary School (2:00 p.m. to 6:00 p.m.) and four hours at Lynch Meadows Elementary School (6:30 p.m. to 10:30 p.m.). Respondent implemented this work schedule in July 1996, when it reduced the number of custodians working throughout the school district.

3) Complainant found the work environment at Pleasant Valley to be very team-oriented. In his view, everybody who worked there understood that the school district did not have enough custodians and cooperated to do the best they could with the resources available. Employees prioritized the custodial work to ensure that important tasks were handled even if some less important jobs could not be completed.

4) Complainant perceived the work environment at Lynch Meadows to be quite different from that at Pleasant Valley. When the children returned to school in September, he found it difficult to complete all the custodial work that customarily had been performed, given the decrease in staff. One day, Complainant worked extra hours at Lynch Meadows to help prepare for an open house. He was instructed by a coworker to assist her with her duties before he performed his own. That left Complainant with insufficient time to complete his own assignments. The following day, he was reprimanded for having not completed his own work. From then on, Complainant felt that no spirit of teamwork or cooperation existed at Lynch Meadows. Nobody helped him with his assigned duties, which he sometimes was not able to complete because, at least in his view, he insisted on performing each assigned task impeccably. Complainant discussed this concern with his supervisor, whom he did not feel appropriately handled the problem. Complainant was very upset by this situation because he took his work seriously. When he received criticism from the other employees instead of cooperation, it was extremely hard for him to deal with.

5) At about this time, Leota Clark, field representative for the Oregon School Employees Association ("OSEA"), informed Harris that Complainant believed his workload at Lynch Meadows was too heavy. Harris had another employee, Sherril Havlock (phonetic) perform Complainant's duties; Havlock reported that she completed all assigned tasks within the allotted time. Harris sent Clark a memorandum outlining Complainant's responsibilities and schedule. Harris and the Lynch

Meadows principal met with Complainant and told him that they still had high expectations but understood that the custodians would not be able to accomplish everything they had in previous years. Clark did not pursue the issue any further at this point.

6) After September 1996, Complainant's mental state was "not good at all." He believed he was being penalized for the downsizing of custodial staff. When he discussed the increased workload, he was called a whiner. As a result of his conflicts with other staff at Lynch Meadows, and meetings about those conflicts, Complainant became depressed and frequently contemplated suicide. He could not sleep through the night and had anxiety attacks that made him feel like he was having a heart attack. He suffered chest pains, shortness of breath, and vomiting. Complainant sometimes cried when he called his wife during his breaks at work.

7) On October 8, 1996, during a stressful meeting with a union official, Complainant became progressively more ill. Later that day, Complainant visited his family doctor, John Loomis. The physician called Dr. Eric Mueller, a clinical psychologist, and scheduled an appointment for Complainant. Mueller saw Complainant the same day, administered verbal and written tests, and scheduled an appointment for the following week. Mueller also recommended that Complainant be put on medication to be prescribed by Loomis. For the duration of his employment with Respondent, Complainant saw Mueller once a week. These appointments were covered by the health insurance that Complainant received as an employment benefit.

8) Because of his visit to Loomis's office, Complainant was absent from work on Tuesday, October 8; he also missed work for the remainder of that week. Complainant informed Respondent that he was out for medical reasons and, at some point, stated that he had injured his shoulder. During those four days, Complainant had little communication with his wife or other family members. He mostly stayed in his bedroom and did not talk to anybody.

9) Complainant worked three days the following week. On October 15, 1996, Charlene Harris, Respondent's Director of Human Resources, sent Complainant a letter that stated in part:

> "This letter is to inform you that you are eligible for Medical Leave under the Family Medical Leave Act of 1993, and the Oregon Family Leave Act due to a 'serious health condition'. OFLA and FMLA entitles you to take up to 12- weeks of unpaid (paid if you choose to use your accrued sick leave), job-protected leave in a 12-month period."

On October 16, 1996, Mueller informed Respondent that Complainant would be returning to work only at Pleasant Valley, not at Lynch Meadows.

10) On or about October 17, 1996, Complainant gave Respondent a completed application form for family/medical leave. On that form, Complainant indicated that he needed the leave to obtain rehabilitative counseling for his severe depression. Complainant also stated: "leave will be from Lynch Meadows School only. [Complainant] is released to work at

Pleasant Valley." Complainant began taking leave on October 17,1996, when he started working only a four-hour shift at Pleasant Valley.

11) On October 22, 1996, Harris sent Complainant a document titled "FMLA NOTICE TO EMPLOYEE." In that document, Harris confirmed that Complainant would work only four hours per day at Pleasant Valley while he was on leave. Harris also stated that Complainant was required to furnish medical certification of a serious health condition by October 31, 1996. At this point, Harris believed that Complainant qualified for leave under the federal Family Medical Leave Act ("FMLA") but not for OFLA leave because she did not believe his depression was a "serious health condition" under Oregon law.

12) By letter dated October 24, 1996, Harris asked Complainant's physician, Dr. Loomis, to give his medical opinion regarding any accommodation Complainant might need to carry out his duties as a custodian and to specify any job duties that Complainant would not be able to perform. In response to Harris's letter, Loomis stated that he would defer to Dr. Mueller. Loomis's "contact with [Complainant] was too limited for [him] to be able to answer [Harris's] questions adequately." Complainant had given Harris permission to contact his doctors.

13) On or about October 31, 1996, Dr. Mueller provided Respondent with a completed "Certification of Health Care Provider," which is a FMLA form on which health care providers can describe their patients' health conditions and indicate whether the patients require medical leave from work. Mueller stated in the Certification that Complainant had major depressive symptoms that could take approximately four to six months to resolve with treatment (counseling and medication) and resolution of work stress. The Certification describes several categories of conditions that may qualify as "serious health conditions" and asks whether the patient's condition falls within any of those categories. Mueller indicated that Complainant had a serious health condition defined as follows:

> "Absence Plus Treatment
>
> "a. A period of incapacity * * * of more than three consecutive calendar days (including any subsequent treatment or period of incapacity * * * relating to the same condition), that also involves:
>
> "(1) Treatment * * * two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
>
> "(2) Treatment by a health care provider on at least one occasion which results in a regiment of continuing treatment * * * under the supervision of the health care provider."

For purposes of the Certification, the term "incapacity" was defined to mean "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or re-

covery therefrom." Mueller opined that, despite his depression, Complainant could work part-time "in a low stress setting." Mueller was not aware of any specific tasks that Complainant was unable to perform. Mueller completed the Certification while Complainant was in his office.

14) By letter dated November 4, 1996, Harris provided Mueller with a description of Complainant's job duties and asked him to identify any duties that Complainant would not be able to perform. Mueller did not identify any such duties, but stated that Complainant was not able to return to an eight-hour position until his depressive symptoms improved and his "work duties resolved." He recommended that Complainant work four hours per day. Mueller also recommended that Dr. Loomis continue to prescribe the medication that Complainant was taking.

15) By letter dated November 19, 1997, Harris again asked Dr. Loomis for his medical opinion regarding any accommodation Complainant might need to perform his job. In that letter, Harris stated that the information she had received from Mueller was not helpful, and asked Loomis to explain Complainant's medical condition. Harris's letter stated, in pertinent part:

> "Any stated need for accommodations, including reduction of the normal eight-hour work day, need to be supported by a rationale or explanation as to why such accommodations are necessary to treat or stabilize [Complainant's] particular mental or physical condition, and why that treatment or stabilization is necessary to allow [Complainant] to work eight hours per day, instead of only four hours per day. Further, the district needs a prognosis as to what period of time any accommodations, including a reduced work day, will be necessary.
>
> "Without this information, the district in no way can understand why [Complainant] can perform his job duties for four hours per day, but not for the entire eight hour work day. * * * *"

On the same day, Harris sent Complainant a letter explaining that she had contacted Loomis again. Harris provided Complainant with the letters she had sent Loomis and Mueller as well as Mueller's responses. Loomis did not respond to Harris's letter.

16) In a letter to Respondent dated November 21, 1996, Dr. Mueller made formal recommendations that he believed would help facilitate Complainant's return to work. These included: continuing Complainant's part-time work schedule at Pleasant Valley, where he got along well with his coworkers and supervisors; having Harris meet with Complainant and his wife two or three times "to discuss [Complainant's] concerns about the work environment and to learn from [Harris] that this conflict can be successfully resolved"; once sufficient trust had been achieved, to have "a few additional hour[s] * * * added each week" to Complainant's work schedule "as tolerated." Mueller explained that Complainant "needs to feel that a spirit of cooperation and trust exists so he can recover from his depression." Complainant would "not be able to return to work in a setting where he [felt] the pressure of others [*sic*] disapproval."

17) At about this time, Mueller and Harris also spoke by telephone. Mueller told Harris that working at Lynch Meadows was extremely difficult for Complainant because of his depression and his difficulties with a coworker. Mueller said that Respondent and Complainant needed to work on developing trust. Mueller and Harris discussed having Complainant and his wife meet with Harris two or three times to try to work out some solutions to Complainant's difficulties. Mueller also told Harris that Complainant genuinely wanted to work full-time, but was not then able to work at Lynch Meadows.

18) On December 9, 1996, Harris met with Complainant and his wife to discuss the problems Complainant had faced at Lynch Meadows. Complainant expressed anger about the situation at Lynch Meadows and said he wanted to work at Pleasant Valley full time; Harris told him that was not possible. The school district's winter break was approaching, and Harris felt that Complainant might be able to work out his problems with other Lynch Meadows custodial staff when there were not many other people around. Harris hoped that Complainant would be working full-time by the end of the break. She believed that Complainant and his wife felt this was a viable plan. Complainant also felt that progress was made during the meeting toward getting him back to work.

19) Harris thought that Complainant was a good employee worth retaining and thought mediation might help the situation. After her meeting with Complainant and his wife, Harris spoke with Mueller, who agreed that mediation might be productive.

20) After the December 9 meeting, Harris sent Complainant a memorandum in which she stated that Respondent could not accommodate Complainant's request that he be assigned full-time work at Pleasant Valley.[3] Harris told Complainant that, before he returned to work at Lynch Meadows, he would need to attend one or two mediation sessions "to agree to a resolution regarding [his] frustrations and concerns." Harris outlined the following schedule for Complainant's eventual return to full-time work:

> "The District will allow you to return to work, at Lynch Meadows, once resolution has been agreed upon by all parties, and you have received a `Release to Work' form from your treating physician allowing you to return to full time work. For the first five (5) days, of your return to work at Lynch Meadows, the District will require that you may only work two (2) hours each day for five (5) days, for a total of six (6) hours, four (4) hours at Pleasant Valley and two (2) hours at Lynch Meadows. On the sixth (6) working day, you will return to your regular four (4) hours per day at Lynch Meadows, for a total of eight (8) hours per day, between the two buildings.

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[3]Respondent's employees, including its custodial staff, are protected by a protective bargaining agreement that restricts Respondent's ability to switch employees' job assignments.

> "Since you are currently not working at Lynch Meadows, you are not to enter Lynch Meadows until you have submitted in writing, a `Release to Work' form from your physician, to the Human Resources office, and have completed the District's requirement as specified above.
>
> "The District looks forward to your full-time return."

During their meeting, Harris also had told Complainant verbally that he would need a full doctor's release before going back to work at Lynch Meadows.

21) On December 12, Harris met again with Complainant and his wife. Complainant was very concerned that people were gossiping about him and asked for a transfer to Pleasant Valley. Harris again explained that she could not effect such a transfer. Complainant could have filed a union grievance regarding his denied transfer request but did not. At the end of this meeting, Harris raised the possibility of entering mediation.

22) On December 19, 1996, Dr. Mueller sent two letters to Harris. In one, he stated that Complainant was "now able to work more than 4 hours a day." Mueller suggested that Respondent not require Complainant to work with coworkers "until a significant degree of success has been achieved in the mediation process." In the other letter, Mueller recommended that Complainant not be required to work additional hours on the day during which a first mediation session was scheduled. He also stated that he "need[ed] to clarify with you that [Complainant's] ability to work additional hours is contingent on successful mediation." Mueller recommended that Complainant not return to full-time work until that occurred. He believed the best resolution "would be successful mediation and return to full time work after the holidays."

23) On December 19, 1996, Complainant, Harris, the Lynch Meadows principal, the Lynch Meadows head custodian, and Sherril Havlock participated in a mediation session. Lavonne Sedgwick, a licensed mediator who was a former school district employee, served as mediator. Although Sedgwick was not personally acquainted with the Lynch Meadows employees involved, Complainant felt that she was partial to the school district and was more interested in getting him to make concessions than in addressing his illness. Complainant was extremely distressed by the mediation, which he characterized at hearing as a "total assassination of [his] character," and became extremely ill afterward. Harris thought the mediation was positive and believed that Complainant's coworkers were merely explaining their feelings, not attacking Complainant personally. Respondent did not require Complainant to perform any of his custodial duties the day of the mediation.

24) On December 23, 1996, Complainant requested a transfer from Lynch Meadows "due to health reasons." Complainant asked that he be assigned to work eight-hour days at Pleasant Valley. He stated that his "treating doctor" also had "requested

that [Complainant] be transferred from Lynch Meadows to Pleasant Valley in order for [his] condition to improve." Complainant believed that Pleasant Valley's full-time custodian was going to transfer to another school, so the position would be available for him. Complainant reiterated his request for a transfer in a letter to Harris dated January 10, 1997.

25) A second mediation session was held on January 10, 1997, which Complainant's wife attended. Sedgwick again served as the mediator and spent much more time alone with Complainant than she had in the first session. Complainant believed Sedgwick was more interested in getting him to sign documents than she was in addressing his illness. Complainant's wife also felt the mediation was hostile and Harris did not believe the mediation was successful.

26) At some point in early January 1997, Dr. Mueller and Complainant decided that Complainant was ready to go back to working two hours per day at Lynch Meadows. On January 16, 1997, Mueller confirmed in writing to Harris that he had released Complainant to work two hours per day at Lynch Meadows in addition to the four hours per day that Complainant previously had been released to work at Pleasant Valley. Mueller also suggested that a few additional hours be added each week as tolerated. Mueller reiterated that Complainant was "motivated to return to work" and needed "to feel that a spirit of cooperation and trust exists so he can recover from his depression."

27) After Harris received Mueller's letter, she reviewed the situation and concluded that Complainant had exhausted his FMLA leave. She also believed that Complainant did not qualify for OFLA leave because he did not have a serious medical condition -- she felt his difficulties related more to a personality conflict than to an illness. Harris concluded that the school district could not afford to keep hiring substitute custodians for Lynch Meadows, where the physical facilities were suffering from lack of attention. Despite the letters from Mueller, Harris concluded that Complainant was capable of performing his job at Lynch Meadows.

28) On January 16, 1997, Harris sent Complainant a letter that stated, in pertinent part:

> "Since your FMLA has expired and the District has not received from your treating physician a release to full time duty, effective Wednesday, January 22, 1997, you will be working four (4) hours per day at Lynch Meadows Elementary School.
>
> "If the District does not receive a release from your doctor for full time duty by January 22, 1997, your four hour job will become your permanent position at Centennial School District. You will need to report to Lynch Meadows at your normal work time on January 22, 1997.
>
> "If we do receive a release for full time duty from your physician, you will return to your eight-hour position, four hours at Pleasant Valley and four hours at Lynch Meadows Elementary School. You would then retain your regular work hours at both sites."

Complainant felt that Respondent was ignoring the fact that Mueller had released him to work two hours per day at Lynch Meadows and was presenting Complainant with an ultimatum: either return to working four hours per day at Lynch Meadows or lose his job.

29) Complainant was confused when he received Harris's January 16 letter because she previously had told him that he was not to report to Lynch Meadows until he had a full release from his doctor stating he was able to do so. Complainant also believed that his condition would not allow him to return to working four-hour shifts at Lynch Meadows.

30) For several days starting on January 16, 1997, Complainant worked four hours per day at Pleasant Valley. By letter dated January 21, 1997, OSEA field representative Clark asked for clarification of Harris's January 16 letter to Complainant. Specifically, Clark asked: "If the District does not have full release from his doctor by January 22, do you intend to terminate [Complainant] from his 4-hour position at Pleasant Valley effective January 22nd?" In response to that letter, Harris stated that Complainant had used his 12 weeks of FMLA leave, and if he was not released to full-time work, he would be provided with a part-time position at Lynch Meadows. Respondent confirmed that Complainant would "be terminated from his four-hour position at Pleasant Valley effective January 22, 1997, should he not return to full time on that date."

31) On January 22, 1997, Complainant worked four hours at Pleasant Valley but did not report for work at Lynch Meadows. Complainant did not go to Lynch Meadows because he did not have a medical release to work at that facility for four hours per day.

32) On January 23, 1997, Complainant called the Pleasant Valley custodial supervisor, who told Complainant that Respondent had replaced him with a substitute custodian for that shift. Complainant concluded that he should not report to work at Lynch Meadows, either, because he had not been released to work four-hour shifts there. That same day, Respondent's counsel sent Mike Tedesco, the union's attorney, a letter asserting that Complainant had exhausted his FMLA leave. Respondent also stated that Complainant's doctor had released him to work eight hours per day anywhere but Lynch Meadows and had also said that he could work two hours per day at Lynch Meadows until trust was restored. Because Respondent could not easily obtain a two-hour substitute, Respondent's counsel stated that Respondent was offering Complainant the following options:

> "1) Remain an 8-hour employee and immediately return to work his full job (2-6 p.m. at Pleasant Valley, 6:30-10:30 p.m. at Lynch Meadows), effective immediately.
>
> "2) Voluntarily reduce to a 4-hour part-time employee status. He would then be assigned to Lynch Meadows for one month so they can have some immediate help with undone work and so the District can attempt to hire a regular 4-hour custodian at Lynch Meadows. After the month, [Complainant] would go to his permanent assignment of four hours at Pleasant Valley. He

> would abandon any right to more than four hours, but could apply for positions of more than four hours as they came open."

Respondent's counsel sought an immediate response so Respondent would know whether it needed to obtain a substitute custodian for Pleasant Valley for that day. She stated that if Complainant reported to work at Pleasant Valley, "he should be prepared to work his entire 8-hour shift at both buildings, and failure to do so [would] be treated as neglect of duty."

33) Also on January 23, Dr. Mueller sent the OSEA a letter stating that Complainant continued to be depressed but was recovering. He believed Complainant had "improved to the point that he [was] able to work at a location where there [was] not significant emotional stress." Mueller explained further:

> "Location not number of hours of work, have resulted in job stress for [Complainant]. The work environment at Lynch Meadows created the stress that led to the depression. Given that there has not been a successful resolution of the situation there it is my opinion that [Complainant] would not be able to continue to recover if he was forced to return to work there full time. [Complainant] is able to work at Pleasant Valley. He appears to enjoy his work there and to get along fine with co-workers and the administration."

34) On January 24, 1997, Harris sent Complainant a letter notifying him that he was on paid suspension and would be given a pre-termination hearing on January 28. Harris explained:

> "You failed to show up for work on Wednesday, January 22, 1997, and Thursday, January 23, 1997. The district recognizes that on January 22, 1997, you only worked four (4) hours at Pleasant Valley Elementary School, however, this was not an option open to you at that time. As stated in the district's letter of January 16, 1997, if you worked four (4) hours at Pleasant Valley, you were to <u>also</u> work four (4) hours at Lynch Meadows. You failed to show up at Lynch Meadows on January 22 and January 23, 1997. On neither occasion did you notify the district of your intentions of not reporting to work. Your failure to report to work will possibly constitute a neglect of duty."

35) On January 28, 1997, Complainant and his wife met with Harris, the OSEA local president, a union field representative, and the field representative's supervisor. Harris asserted that Complainant had abandoned his job at Lynch Meadows; the purpose of the meeting was to determine whether Complainant's job with Respondent would be terminated as a result. The union representative told Complainant that he should have showed up for work and argued about it later.

36) By letter dated January 31, 1997, Harris informed Complainant that she would recommend that Complainant's employment be terminated for failing to report to work on January 22 and 23, for failing to timely notify the district that he would not be reporting to work, and for refusing to accept the job assignment Respondent had given him. By letter dated February 2, 1997, Respondent's superintendent notified Complainant

that he agreed with Harris's recommendation and was terminating Complainant's employment effective February 3, 1997. The union did not file a grievance over Complainant's termination.

37) If Respondent had complied with the term of Mueller's work release, it would have allowed Complainant to work two hours per day at Lynch Meadows plus four hours per day at Pleasant Valley, taking two hours per day of OFLA leave. Mueller and Complainant both believed Complainant was capable of working this schedule, but was not yet capable of working four hours per day at Lynch Meadows. The Agency proved by a preponderance of the evidence that Complainant would have been able to work this schedule.

38) Respondent challenged Complainant's subsequent application for unemployment benefits. An ALJ ruled in Complainant's favor; Respondent's appeal to the Employment Appeals Board was not successful. Complainant began receiving unemployment benefits toward the end of July 1997. [4]

39) From the time Complainant started having difficulties at Lynch Meadows, he suffered severe depression. Complainant, who had been very active in school activities, stopped attending his children's functions because entering school buildings and seeing school district employees caused him such distress. During the time he was on leave, Complainant felt slandered and harassed.

40) After Respondent terminated Complainant's employment, he sank further into his depression. At one point, he went into his room and did not emerge for about a week. Prior to his termination, Complainant's wages had been his family's major source of income, and the loss of income was devastating, particularly because Complainant did not start receiving unemployment benefits for several months. The family's home went into foreclosure, their credit ratings were ruined, and they had to rely on food stamps. Complainant's ability to communicate effectively deteriorated and his personality changed. He has become "gun-shy," tentative, and irritable around people and avoids dealing with them. Complainant's three school-age children recognize that he has changed and his relationship with them has weakened as a result. Complainant no longer participates in many activities with his wife and children; he sometimes "goes away" by himself, which he had not done before.

41) Complainant lost his medical benefits as a result of being fired. He paid for a few sessions with Dr. Mueller himself, but was unable to do so for very long because of his lack of income.

42) At the time his employment was terminated, Complainant was earning $10.67 per hour.

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[4] Respondent objected to the admission of these documents to the extent that they might be used to establish the events that led up to Complainant's termination or the legality of that act. The ALJ sustained the objection and received the documents only for the limited purpose of establishing the length of time it took for Complainant to begin receiving unemployment benefits.

43) Complainant did not find a new job until August 1997. He now works as a wholesale newspaper distributor, a job that does not demand much contact with other people.

44) David Wright, a senior investigator with the Agency, explained how he had determined that Respondent had not granted Complainant all the OFLA leave to which he was entitled. Under the Agency's administrative rules, leave may be taken intermittently, which means that a person eligible for leave may work half-time, using only four hours of leave per day. That person would exhaust his or her "12 weeks" of leave after 24 weeks because references to 12 weeks of leave assume that the employee is using 8 hours of leave time per day. Wright concluded that, at the time Respondent terminated Complainant's employment, Complainant had used only about half the number of hours of leave to which he was entitled. Wright also concluded that Complainant was not a person with a disability for purposes of the Americans with Disabilities Act because his limitations related to a particular work site, not to particular work duties.

45) At the hearing, Harris testified that she had come to believe that Complainant had not exhausted his 12 weeks of OFLA leave at the time his employment was terminated. Instead of arguing that Complainant had exhausted his leave, Respondent contended that he was not eligible for OFLA leave and that the procedures it had followed were fair. Respondent conceded that, if Complainant otherwise was eligible for OFLA leave, he had 240 hours left at the time his employment was terminated.

46) The Agency offered as Exhibit A-28 a form settlement agreement that Complainant had been asked to sign. Respondent objected to the admission of this proposed settlement and the ALJ admitted the document only for the limited purpose of helping to establish the degree of Complainant's mental suffering. Upon further review of the document, the forum has determined that it has no value in proving the amount of emotional distress Complainant suffered, and the forum has given it no weight in issuing this order.

47) The testimony of all witnesses was credible. Each appeared to honestly convey what he or she had perceived at the time relevant events occurred.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent, a political subdivision of the State of Oregon, was an Oregon employer and utilized the personal services of 25 or more persons in the State of Oregon for each working day during both 1996 and 1997.

2) Complainant was employed by Respondent from 1983 through January 1997. Complainant worked full-time for Respondent from 1994 or 1995 until he started working a reduced schedule in the fall of 1996.

3) Beginning in September 1996, Complainant suffered severe depression that required his absence from work for more than three days and which required ongoing care by a clinical psychologist, augmented by medication prescribed by a physician.

4) Complainant's depression caused him to be unable to work at Lynch Meadows Elementary School, although he could work at Pleasant Valley. Complainant's depression adversely affected only his ability to work at Lynch Meadows, not his ability to perform any particular task associated with his job as a custodian.

5) On October 17, 1996, Complainant began working a reduced work schedule of four hours per day, Monday through Friday. While working this schedule, Complainant used four hours of OFLA leave per work day. Respondent allowed Complainant to take only 240 hours of intermittent OFLA leave using this reduced work schedule. Respondent then required Complainant to return to working at least four hours per day at Lynch Meadows. Because his clinical psychologist had released him to work only two hours per day at Lynch Meadows, Complainant did not report to work at that school. Respondent terminated Complainant's employment for not accepting his work assignment at Lynch Meadows.

6) If Respondent had abided by the terms of the release provided by Complainant's clinical psychologist, it would have scheduled Complainant to work four hours per day at Pleasant Valley plus two hours per day at Lynch Meadows. If Respondent had done this, Complainant would have worked for six hours per day and used two hours of OFLA leave per day for 24 weeks, until he exhausted his remaining 240 hours of OFLA leave. At his pay rate of $10.67 per hour, Complainant would have earned $7682.40 before he exhausted his leave on about July 7, 1997. (24 weeks x 30 hours/week x $10.67/hour).

6) As a result of being terminated when he had not exhausted the 480 hours of OFLA leave to which he was entitled, Complainant suffered severe emotional distress, including ongoing clinical depression that caused personality changes that lasted at least until the date of hearing.

CONCLUSIONS OF LAW

1) The Oregon family leave laws apply to "covered employers," which are defined as:

> "employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken."

ORS 659.472(1); *see* ORS 659.470(1). At all material times, Respondent was a covered employer.

2) The actions, inactions, statements, and motivations of Harris, Respondent's director of human resources, properly are imputed to Respondent.

3) ORS 659.474(1) provides that "[a]ll employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659.476(1)(b) to (d)" except in circumstances not applicable here. Complainant was an eligible employee.

4) 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 659.492(2); ORS 659.010 *et seq*.

5) ORS 659.476 specifies the purposes for which OFLA leave may be taken:

> "(1) Family leave under ORS 659.470 to 659.494 may be taken by an eligible employee for any of the following purposes:
>
> "* * * * *
>
> "(c) To recover from or seek treatment for a serious health condition of the employee that renders the employee unable to perform at least one of the essential functions of the employee's regular position."

ORS 659.470(6) defines the term "serious health condition" as follows:

> "(6) `Serious health condition' means:
>
> "(a) An illness, injury, impairment or physical or mental condition that requires inpatient care in a hospital, hospice or residential medical care facility;
>
> "(b) An illness, disease or condition that in the medical judgment of the treating health care provider poses an imminent danger of death, is terminal in prognosis with a reasonable possibility of death in the near future, or requires constant care; or
>
> "(c) Any period of disability due to pregnancy, or period of absence for prenatal care."

OAR 839-009-0210(9) is identical to ORS 659.470(6). OAR 839-009-0210(10) provides a definition of "constant care":

> "(10) 'Constant care' means care wherever performed, whether at home or any nursing home, institution, hospice, or health care facility. Where, however, the family member is receiving long-term physical care at a nursing home, institution, hospice or other health care facility, leave shall apply only to those periods of transition from one home or facility to another, including time to make arrangements for such transitions, or when the family member requires transportation or other assistance in obtaining care from a physician."

ORS 659.494(2) provides:

> "ORS 659.470 to 659.494 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Family and Medical Leave Act of 1993. Family leave taken under ORS 659.470 to 659.494 must be taken concurrently with any leave taken under the federal Family and Medical Leave Act of 1993."

The Agency has interpreted these statutes and rules as follows:

> "Under OFLA, a Serious Health Condition includes:
>
> "1. an illness, injury, impairment, or physical or mental condition that requires inpatient care (ORS 659.470(6)(a));
>
> "2. an illness, injury, impairment, or physical or mental condition that poses imminent danger of death or is terminal with a reasonable possibility of death (ORS 659.470(6)(b));
>
> "3. an illness, injury, impairment, or physical or mental condition

that requires constant care (ORS 659.470(6)(b). Constant care means care wherever performed (OAR 839-009-0210(10)), including:

"a. care in a health care facility (OAR 839-009-0210(10));

"b. home care administered by health care professionals (OAR 839-009-0210(10)); or

"c. inability to work for more than three consecutive calendar days and 2 or more treatments by health care provider or one treatment plus continuing supervision by health care provider. (FMLA)

"i. includes `self-care,' i.e. person taking care of themselves (BOLI interpretation)

"ii. excludes colds, flu, earaches, upset stomach, minor ulcer, headache (except migraine), routine eye or dental care (FMLA);

"4. any period of disability due to pregnancy, or period of absence for prenatal care. (ORS 659.470(6)(c);

"5. a chronic condition (like asthma, diabetes and epilepsy) that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity (OAR 839 Div. 009 App. B);

"6. a permanent longterm condition under continuing treatment (like Alzheimers, stroke), which:

"a. Requires in-patient or constant care; or

"b. Poses imminent danger of death.

"(OAR 839 Div. 009 App. B)"[5]

(Exhibit A-29). ORS 659.470(5) defines "[h]ealth care provider" to include physicians and clinical psychologists. Complainant's depression was a "serious health condition" for purposes of the OFLA.

6) Complainant was entitled to take OFLA leave to recover from or seek treatment for his depression only if that depression rendered him "unable to perform at least one of the essential functions of the employee's regular position." ORS 659.476(1)(c). Agency rules do not further define "essential functions of the employee's regular position." The Agency's policy statement, however, further interprets the statutory provision:

"Essential Functions [OAR 839-006-0225(1)(b); 29 CFR §1630.2(n) (ADA)]

"1. The function or functions for which the position exists; or

"2. a function or function which only a few people are routinely able to perform; or

"3. a highly specialized function for which the employee has specialized knowledge."

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[5]Appendix B, referred to in this Agency policy statement, is an OFLA form included in a 1996 Agency handbook entitled *Family Leave Laws in Oregon*. Appendix B is analogous to the FMLA Certification of Health Care Provider that Dr. Mueller completed on Complainant's behalf. *See Family Leave Laws in Oregon* at 94-96.

(Exhibit A-29).[6] Complainant's depression rendered him unable to perform an essential function of his regular job, being a custodian at Lynch Meadows Elementary School.

7) ORS 659.478 provides, in pertinent part:

> "(1) Except as specifically provided by ORS 659.470 to 659.494, an eligible employee is entitled to up to 12 weeks of family leave within any one-year period.
>
> "* * * * *
>
> "(6) The Commissioner of the Bureau of Labor and Industries shall adopt rules governing when family leave for a serious health condition of an employee or a family member of the employee may be taken intermittently or by working a reduced workweek. Rules adopted by the commissioner under this subsection shall allow taking of family leave on an intermittent basis or by use of a reduced workweek to the extent permitted by federal law and to the extent that taking family leave on an intermittent basis or by use of a reduced workweek will not result in the loss of an employee's exempt status under the federal Fair Labor Standards Act.

The Agency has defined "intermittent leave" to mean "leave taken for a single serious health condition in multiple blocks of time that requires an altered or reduced work schedule." OAR 839-009-0210(11). Complainant was entitled to 12 weeks -- or 480 hours -- of OFLA leave. Respondent permitted him to take only 240 hours of leave during the time that he worked a reduced schedule of four hours per day. By denying Complainant the remaining 240 hours of leave, and firing him when he would not return to a job which his psychologist said he was not capable of performing, Respondent violated ORS 659.478 and committed an unlawful employment practice. ORS 659.492(1).

OPINION

Unlawful denial of OFLA leave

To establish a prima facie case that an employer committed an unlawful employment practice by denying an employee OFLA leave which that employee was entitled to take to recover from or seek treatment for his or her own serious health condition, the Agency must prove that:

1. The employer was a "covered employer" as defined in ORS 659.470(1) and ORS 659.472;

2. The employee was an "eligible employee" -- i.e., he or she was an employee of the covered employer7;

3. The employee had a "serious health condition";

4. The "serious health condition" rendered the employee "unable to perform at least one of

[6]This definition mirrors the definition of "essential functions" set forth in a then-effective Agency rule regarding disability discrimination. *See former* OAR 839-006-0225(1)(b).

[7]The employer may, as an affirmative defense, establish that the employee is exempted from the category of eligible employees because he or she falls within one of the exceptions set forth in ORS 659.474(1) and (2).

the essential functions of the employee's regular position";

5. The employee used (or would have used) the OFLA leave to recover from or seek treatment for the "serious health condition"; and

6. The employer did not allow the employee to utilize the entire amount of OFLA leave to which he or she was entitled, as specified in ORS 659.478.

In this case, only the third, fourth, and fifth elements are disputed. Although Respondent initially believed that Complainant had exhausted his OFLA leave on January 16, 1997, because he had been working a part-time schedule for 12 weeks, it now acknowledges that OFLA leave may be taken intermittently and, to the extent he was eligible for OFLA leave, Complainant was entitled to take 480 hours spread out over more than 12 weeks. Respondent's present understanding of the law is correct -- OFLA leave may be taken intermittently and Complainant had used only 240 of the 480 hours to which he was entitled when Respondent terminated his employment in January 1997.[8]

Respondent asserts, however, that Complainant did not suffer a serious health condition. Respondent's argument is based on its contention that it is not bound by the Agency policy statement admitted as Exhibit A-29. That contention has no merit, as explained below. The Agency properly has interpreted the statutory term "serious health condition" to include "an illness, injury, impairment, or physical or mental condition that requires constant care * * *, including * * * inability to work for more than three consecutive calendar days and 2 or more treatments by health care provider or one treatment plus continuing supervision by health care provider." Complainant was unable to work for more than three days because of his serious depression and sought ongoing treatment from clinical psychologist Mueller and physician Loomis throughout the remainder of his employment by Respondent. His depression, therefore, qualified as a "serious health condition."[9]

Complainant's depression also caused him to be unable to perform at least one of the essential functions of

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[8]FMLA leave also may be taken intermittently, and Complainant may have been entitled to additional FMLA leave at the time his employment was terminated. That analysis is beyond the scope of this order. *See* footnote appended to the first factual finding, *supra.*

[9]It is worth noting that FMLA does not "supersede[] any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA." 29 CFR 825.701(a). Nor does the Oregon law supersede the federal. Consequently, many employers (like Respondent) are subject to both laws and must apply whichever OFLA or FMLA provision is most beneficial to an employee entitled to leave. In this case, even if Respondent were correct that it was not bound by the Agency's policy statement regarding what qualifies as a "serious health condition" for purposes of OFLA, Respondent still would have been required to give Complainant 240 additional hours of FMLA leave, as his depression qualified as a "serious health condition" under the applicable federal statutes and regulations. *See* 29 CFR 825.114(a)(2). *See also* footnote appended to the first factual finding, *supra.*

his regular position -- being present at Lynch Meadows Elementary School to perform janitorial duties. Mueller informed Harris several times that Complainant was *unable* to work four hours per day at Lynch Meadows. Because Complainant could not be present at Lynch Meadows, he could not perform the function for which the position existed -- to clean and maintain the *Lynch Meadow* facilities.[10]

Respondent allowed Complainant to take only 240 hours of the 480 hours of OFLA leave to which he was entitled and then fired Complainant because he would not return to working four hours per day at Lynch Meadows, something Dr. Mueller did not believe Complainant was ready or able to do. Those actions violated ORS 659.478 and constituted an unlawful employment practice. ORS 659.492(1).[11]

Damages

Back pay

Instead of denying Complainant his remaining OFLA leave, Respondent should have complied with the terms of Dr. Mueller's release and allowed Complainant to work two hours per day at Lynch Meadows and four hours per day at Pleasant Valley. Had Respondent done so, Complainant could have worked this schedule for 24 weeks, using two hours of his remaining leave per day. Over that period of time, at his pay rate of $10.67 per hour, he would have earned **$7682.40**.[12] Respondent

[10]The cases Respondent cited in its post-hearing brief as having "substantially similar facts" are inapposite because they relate to whether the plaintiffs' mental conditions rendered them "disabled" for purposes of the Americans with Disabilities Act ("ADA"). That determination depends on an analysis completely different from that which determines whether a person can perform the "essential functions" of his or her job for purposes of the OFLA. *See Weiler v. Household Finance Corp*., 101 F3d 519, 524-25 (7th Cir 1996); *Dewitt v. Carsten*, 941 F Supp 1232 (ND Ga 1996), *aff'd* 122 F3d 1079 (11th Cir 1997); *Palmer v. Circuit Court of Cook County*, 905 F Supp 499 (ND Ill 1995), *aff'd* 117 F3d 351 (7th Cir 1997), *cert den* 118 S Ct 893 (1998). Indeed, in two of those cases, the courts went on to say that the plaintiffs were not "otherwise qualified" under the ADA because they could *not* perform the essential functions of their jobs. *Weiler*, 101 F3d at 525-26; *Palmer*, 905 F Supp at 508-09 *and* 117 F3d at 351-52.

[11]For the reasons discussed in this opinion, the ALJ denied Respondent's motion to dismiss, made after the Agency rested its case. That motion was premised on the incorrect assertion that the Agency had not proved that Complainant qualified for OFLA leave on the day of his termination.

[12]At the close of the hearing, the Agency moved to amend the Specific Charges to specify damages for back wages based on the fact that Complainant would have been able to work six hours a day -- four hours at Pleasant Valley and two hours at Lynch Meadows -- until he exhausted his OFLA leave. The ALJ granted that motion to amend and based its lost wages calculation on the fact that Complainant would have worked six hours a day until he used up his leave. Unfortunately, when it moved to amend the charges, the Agency also stated that it believed Complainant would have earned only $3841.20 had Respondent given him the remaining 240 hours of OFLA leave to which he was entitled. The Agency's calculation was incorrect -- Complainant actually would have earned twice that amount, as explained *supra*.

owes him that amount of money as damages for its violation of ORS 659.492(1). The Agency conceded at hearing that it could not prove that Complainant would have been able to work a full-time schedule (including four hours per day at Lynch Meadows) after his leave expired. Consequently, the Agency did not seek, and this forum does not award, any damages for lost wages based on pay Complainant might have earned after his OFLA leave was exhausted.

Mental suffering

Respondent also must compensate Complainant for the emotional distress he suffered as a result of Respondent's unlawful employment practice. That distress was severe. Dr. Mueller reported in mid-January that Complainant could work two hours per day at Lynch Meadows, which suggested his condition was improving. Complainant, too, believed he was ready to meet this challenge. But over the next few weeks, when Respondent violated the OFLA by denying Complainant the opportunity to continue working a reduced schedule, Complainant lost a job he took pride in and lost the medical benefits that had allowed him to seek psychological treatment. Instead of continuing on his path to recovery, Complainant sunk deep into his depression, which caused significant personality changes that lasted at least until the hearing. As a result of those personality changes, Complainant's relationships with his wife and children have significantly deteriorated. In addition, Complainant suffered considerable mental distress as a result of losing his income.

The forum acknowledges that Complainant had a lesser (but significant) degree of depression before Respondent denied him leave and terminated his employment. The forum is not compensating Complainant for that portion of his emotional distress, which is not attributable to Respondent's unlawful employment practice. Complainant suffered a severe set-back as a result of being denied leave, however, and the forum finds that $25,000.00 will compensate him for that additional suffering.

Consequently, on its own motion, the forum has reconsidered its ruling granting the Agency's motion to amend the Specific Charges. The Agency's motion to amend is hereby granted only to the extent that it seeks damages based on the fact that Complainant would have worked six hours per day until he exhausted his remaining OFLA leave. The motion is denied to the extent that it specified a particular amount of money Complainant would have earned during that time. Respondent is not prejudiced by this reconsideration of the Agency's motion to amend because the amount of damages hereby awarded is based on the underlying factual premise asserted by the Agency in that motion -- that Complainant would have worked six hours per day. No new *argument* is being accepted in this order -- only a new (correct) *calculation* of the damages that conforms with the evidence presented at hearing. *Cf.* OAR 839-050-0140(c) ("Charging documents may be amended to request increase damages * * * to conform to the evidence presented at the contested case hearing").

Statement of Agency policy

At hearing, the Agency submitted a policy statement setting forth its interpretation of "serious health condition" and "essential functions" as those terms are used in the OFLA. Respondent argued that it is not bound by the policy expressed in this statement because it had not been enacted pursuant to notice and comment rulemaking.

Oregon law does not require all agency rules and policies to be enacted through notice and comment rulemaking. Rather, rulemaking generally is required only where "the legislature has expressly required the agency to do so." *Coast Security Mortgage Corp. v. Real Estate Agency*, 155 Or App 579, 584, 964 P2d 306 (1998); *see Trebesch v. Employment Division*, 300 Or 264, 276, 710 P2d 136 (1985); *cf.* ORS 183.355(5) ("if an agency, in disposing of a contested case, announces in its decision the adoption of a general policy applicable to such case and subsequent cases of like nature the agency may rely upon such decision in disposition of later cases"). In the absence of an express rule-making requirement, the agency is free to adopt rules through orders in contested cases. *Coast Security*, 155 Or App at 584; *see Martini v. OLCC*, 110 Or App 508, 513, 823 P2d 1015 (1992) (an agency "may make policy refinements in deciding contested cases and * * * those may include changes in its interpretations of statutes and rules").

The legislature did not expressly require the Agency to enact rules defining the terms "serious health condition" and "essential functions of the employee's regular position." The legislature knew how to state such a requirement when it wished. For example, it expressly required the Agency to adopt rules "governing when family leave for a serious health condition of an employee or a family member may be taken intermittently or by working a reduced workweek." ORS 659.478(6).[13] No such requirement exists for the terms "serious health condition" and "essential functions." Consequently, the Agency was entitled to explain its interpretation of the statutory terms at the contested case hearing and that interpretation may be implemented through this order. Indeed, the Oregon Supreme Court has recognized that the Bureau of Labor and Industries has authority to announce a policy or rule in the context of issuing an order in a contested case. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 140, 903 P2d 351 (1995). Respondent's argument that it is not bound by the Agency's interpretations of "serious health condition" and "essential functions" has no merit.

Respondent's Exceptions

In section II of its exceptions, Respondent objects to the wording of proposed factual findings 3 and 4 insofar as they appear to accept Complainant's perception of workload problems at the Pleasant Valley and Lynch Meadows schools. These objections have merit and the findings at issue have been reworded to clarify that the Agency proved only how Complainant perceived the workloads at those schools, not whether, in fact, the custodial staff was given too

[13]The Agency has adopted such a rule. OAR 839-009-0210(11).

much to do. Respondent also objects to the lack of a finding that Agency investigator Wright did not include in his report a finding that Complainant had a serious health condition that prevented him from performing any of his essential job functions. That description of Wright's testimony, while accurate, is not pertinent to this forum's analysis of Complainant's eligibility for OFLA leave. The requested finding, therefore, has not been added.

Respondent next objects to the ALJ's conclusion that being a custodian at Lynch Meadows Elementary School was an essential function of Complainant's job. Respondent argues at length that only particular tasks can be essential job functions -- not the requirement that an employee work at a particular location. Respondent is wrong. The Agency's policy statement defines "essential function" to include "[t]he function or functions for which the position exists." *See* Conclusion of Law 6, *supra*. The position Complainant held with Respondent existed to provide the Lynch Meadows School with custodial services. If that were not the case, Respondent would not have terminated Complainant from that position when he became unable to provide services at Lynch Meadows -- instead, it would have transferred him to another facility.[14]

The federal cases cited by Respondent on pages 7 to 8 of its exceptions do not change this result. Those cases merely describe certain tasks that may constitute essential job functions; none of the cases holds that working at a particular location cannot constitute an essential function.

Respondent also argues that Complainant was not really unable to work at Lynch Meadows -- that he only was unable to get along with one particular coworker at that school. Respondent's argument misses the point. Dr. Mueller found that Complainant had a serious medical condition -- depression -- that rendered him unable to work at Lynch Meadows. The underlying cause of that serious medical condition is immaterial, as is the reason why Complainant's depression would be exacerbated if he were forced to work at that school. An employer is not entitled to decide that some types of serious medical conditions merit OFLA leave and some do not. Nor may an employer decide that some workplace circumstances that have caused an employee to suffer genuine medical problems justify that employee's absence from work, but others are nothing more than normal workplace stresses that employees must endure. Where the uncontroverted medical evidence establishes

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[14] Respondent attempts to rely on a job description that it submitted with its post-hearing brief to demonstrate that job location was not an essential function of Complainant's job, but that document was not received into evidence at the hearing and is not part of the evidentiary record in this case. Even assuming, however, that it was proved that Complainant's official job description did not list working at Lynch Meadows as an essential job function, that would not change the result of this case. The essential nature of the requirement that Complainant work at Lynch Meadows was proved when Respondent terminated Complainant's job when he became unable to work at that single school.

that an eligible employee's serious health condition leaves him unable to perform essential functions of his job, the employer must give the employee all the OFLA leave to which he is entitled, regardless of the cause of that health condition.

Respondent also objects to the ALJ's reliance on a statement of agency policy interpreting the term "serious health condition." Respondent argues that, even if such policies may be adopted during contested cases, they may be applied only to "subsequent disputes." That is not correct. Oregon appellate courts repeatedly have held that agencies may apply policy interpretations established at contested cases to the matters that are the subjects of those cases. *See Meltebeke*, 322 Or at 140 n 11; *Forelaws on Bd. v. Energy Fac. Siting Coun.*, 306 Or 205, 215-16, 760 P2d 212 (1988); *Martini*, 110 Or App at 513.

Finally, Respondent objects to the award of $25,000.00 damages for mental suffering, claiming that it was improper for the ALJ to base such a large award solely on the testimony of Complainant and his wife. To the contrary, the testimony of a single credible witness is sufficient to prove any element of a claim, including damages. *Cf. Peery v. Hanley*, 135 Or App 162, 165, 897 P2d 1189 (in claim for intentional infliction of emotional distress, "plaintiff's testimony, if believed, established a direct causal relationship between defendant's conduct and her symptoms. The trial court did not err in denying defendant's motion [to dismiss]"), *adhered to on reconsideration*, 136 Or App 492, 902 P2d 602 (1995). Respondent also notes that the ALJ awarded the entire sum sought by the Agency, and insinuates that this consistency has something to do with the fact that the ALJ is the case presenter's co-worker.

Respondent's conclusion regarding the reason for the congruence between the amount of damages sought and the amount awarded is completely unfounded. In some cases, this forum has agreed with the case presenter's assessment of the amount of money that adequately will compensate an individual who has suffered emotionally as the result of an unlawful employment practice; in others, it has not. In this case, the amount of mental suffering was extreme, as discussed in factual finding 40, *supra*. Complainant's emotional distress lasted at least through the time of hearing, caused lasting personality changes, and profoundly affected his relationships with family members. These lasting harms are roughly similar in severity to those suffered by the three complainants in *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 124 (1997), who became depressed, anxious, and fearful of men as a result of sexual harassment. This forum awarded $30,000 to each of two of those complainants and awarded $25,000.00 to the other complainant as compensatory damages for their mental suffering. The record in this case amply supports the $25,000.00 award to Complainant.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), to eliminate the effects of Respondents' violation of ORS 659.030(1)(a), (b), and (f), and in payment of the damages awarded, the Commissioner of the Bureau of

Labor and Industries hereby orders Respondent **CENTENNIAL SCHOOL DISTRICT, NO. 28-J** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in trust for Complainant **Dennis Frederick in the amount of:**

a) SEVEN THOUSAND SIX HUNDRED EIGHTY-TWO DOLLARS AND FORTY CENTS ($7682.40), less appropriate lawful deductions, representing wages Complainant lost from January 1997 through July 7, 1997, as a result of Respondent's unlawful practices found herein; plus

b) Interest at the legal rate on said wages and benefits from July 8, 1997, until paid; plus

c) TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practices found herein; plus

d) Interest on said damages for mental suffering at the legal rate, accrued between the date of the Final Order and the date paid.

In the Matter of
LESLIE ELMER DeHART, Roxanne Lea DeHart, and
Pacific Northwest Recovery, Inc.

Case Number 13-99
Final Order of the Commissioner
Jack Roberts
Issued April 8, 1999.

SYNOPSIS

Where Respondents submitted an answer to the Order of Determination and requested a hearing, but failed to appear at the hearing, the Commissioner found Respondent in default of the charges set forth in the Order of Determination. Respondent Leslie DeHart, who operated a repossession business, employed Claimant as a "spotter" and failed to pay Claimant all wages due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and Respondent was ordered to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2), 652.150.

The above-entitled contested case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries (BOLI) for the State of Oregon. The hearing was held on January 13, 1999, 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

David Gerstenfeld, an employee of the Agency. Lester Dale Myer (Claimant) was present throughout the hearing. Respondent Leslie DeHart was not present after due notice and was in default. Respondent Pacific Northwest Recovery, Inc., was not represented at the hearing and was in default.

The Agency called the following witnesses: Lester Dale Myer, Claimant; Margaret Trotman, Wage and Hour Division Compliance Specialist; and Andy Joe Myer, Claimant's son.

Administrative exhibits X-1 to X-11 and Agency exhibits A-1 through A-7 were offered and received into evidence. The record closed on January 13, 1999.

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

FINDINGS OF FACT -- PROCEDURAL

1) On February 12, 1998, Claimant Lester Dale Myer filed a wage claim with the Agency. He alleged that he had been employed by Respondents Leslie and Roxanne DeHart, doing business as Pacific Northwest Recovery, 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 Labor, in trust for Claimant, all wages due from Respondents.

3) On August 31, 1998, the Agency issued an Order of Determination based upon the wage claims filed by Claimant and the Agency's investigation. The Order named Leslie Elmer DeHart and Roxanne Lea DeHart, partners, and Pacific Northwest Recovery, Inc. as Respondents. On September 3, 1998, the Agency served Leslie and Roxanne DeHart with an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. Leslie DeHart was served as a partner and registered agent for Respondent Pacific Northwest Recovery, Inc. The Order of Determination alleged that Respondents owed a total of $1,806.15 in wages and $1,471.20 in civil penalty wages based on work Claimant had performed for Respondents from November 2, 1997, through January 9, 1998. 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.

4) On September 24, 1998, Respondents, through counsel, filed an answer to the Order of Determination and requested a hearing. In the answer, Respondents raised two affirmative defenses. First, that Claimant was an independent contractor. Second, that Respondents and Claimant agreed to the payment by Claimant of $100 on account of damage to a tow truck by Claimant's son, and that it was agreed by Claimant and Respondents that the damages would be repaid to Respondents at the rate of $50 from two separate fee payments.

5) On November 10, 1998, 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 839-050-0000 to 839-050-0440.

6) On December 7, 1998, the Agency filed a motion for a discovery order seeking documents related to Claimant's employment with Respondents. Respondents did not file a response to the Agency's motion.

7) On December 15, 1998, the ALJ issued a discovery order in response to the Agency's motion for a discovery order that required Respondents to provide the Agency with all documents requested by the Agency.

8) On December 15, 1998, the ALJ issued a discovery order directing each participant 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 839-050-0210(1). The summaries were due by January 4, 1999. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary.

9) On January 4, 1999, the Agency submitted its Case Summary. Included in the Case Summary was a motion to reduce the wages and penalty wages sought by the Agency from $1,806.15 to $1,518.50 and $1,471.20 to $1,334.40, respectively.

10) On January 5, 1999, Respondents' counsel John O'Hara resigned as counsel for Respondents.

11) At the start of the hearing, Respondents did not appear and had not announced that they would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondents did not appear or contact the hearings unit by telephone, the ALJ declared Respondents in default at 9:32 a.m. and commenced the hearing.

12) At the start of the hearing, the Agency moved to dismiss Roxanne Lea DeHart as a Respondent. The ALJ granted the motion.

13) At the start of the hearing, the ALJ granted the Agency's motion to reduce the wages and penalty wages sought by the Agency from $1,806.15 to $1,518.50 and $1,471.20 to $1,334.40, respectively.

14) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) The proposed order, which contained an exceptions notice, was issued February 22, 1999. Exceptions were due March 4, 1999. No exceptions were received.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, Leslie Elmer DeHart (hereafter "Respondent"), an individual person, did business under the assumed business name of Pacific Northwest Recovery at 4721 SE 82nd Avenue, Portland, Oregon, and en-

gaged the personal services of one or more persons in the State of Oregon.

2) Claimant and Respondent entered into an agreement on or about November 2, 1997 that Claimant would perform work as a "spotter" for Respondent. There was no agreement as to how long Claimant would perform this work.

3) Respondent and Claimant initially agreed that Claimant would be paid $6.00 per hour. Shortly thereafter, Respondent and Claimant agreed that Claimant would be paid $150 per week, no matter how many or how few hours he worked.

4) Claimant performed work for Respondent from November 2, 1997, through January 9, 1998.

5) Claimant's primary job duty for Respondent was working as a "spotter". As a "spotter," Claimant's job was to locate property that Respondent was trying to repossess. The primary types of property were cars, boats, and trailers. Between November 2, 1997, and January 9, 1998, Claimant also drove a tow truck for Respondent, washed cars and a trailer home belonging to Respondent's father, and acted as a security guard when work was slow.

6) Claimant had never worked as a "spotter" before November 2, 1997. Respondent told Claimant when to show up for work, when to go home from work, and what jobs to perform.

7) Claimant had no opportunity to make a profit or loss while working for Respondent.

8) Claimant did not invest any money in Respondent's business.

9) To perform his job as "spotter," Claimant used paperwork from Respondent describing the item and address of the property to be repossessed, Respondent's cell phone, Respondent's "Thomas Guide,"[1] Respondent's tow truck, and Respondent's business cards. Respondent paid for the gas used by the tow truck.

10) Respondent paid Claimant by check on Saturdays in November, then on Fridays in December and January. The checks had the names of Leslie and Roxanne DeHart and Pacific Northwest Recovery on them.

11) Claimant's son, Andy, scratched Respondent's tow truck during Claimant's employment. Respondent deducted $50 from each of two paychecks to Claimant to pay for the scratch. Claimant did not agree to this deduction and did not sign an authorization for the deduction.

12) Respondent paid Claimant a total of $1,275 in gross wages. Respondent paid this amount knowingly and intentionally. Respondent was a free agent.

13) Claimant worked 440 hours between November 2, 1997, and December 31, 1997, earning $2,420 in wages.[2] The number of hours he worked per week ranged from a minimum of 40 to a maximum of 56.

14) Claimant worked 62.25 hours for Respondent between Janu-

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[1]A guidebook that contained detailed maps of the Portland metropolitan area.

[2]The figure of $2,420 was computed by multiplying 440 hours x $5.50/hr., the minimum wage in Oregon for the calendar year 1997. *ORS 653.025*.

ary 1, 1998, and January 9, 1998, earning $373.50 in wages.[3]

15) Claimant's last day of work for Respondent was January 9, 1998. Claimant quit work on January 14, 1998, without giving prior notice.

16) January 16, 1998, was Claimant's next regularly scheduled payday. Claimants' wages were due and owing on January 16, 1998.

17) At the time Claimant quit, Respondent owed Claimant $1,518.50 in unpaid wages.

18) The Forum computed civil penalty wages, in accordance with ORS 652.150, as follows for Claimant: (a) $2,793.50 (total wages earned) divided by 502.25 (total hours worked) equals an average hourly rate of $5.56/hr.; (b) $5.56/hr. multiplied by 8 hours per day equals $44.48; and (c) $44.48 multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) equals $1,334.[4]

19) Respondent did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued; nor did he provide any such evidence for the record.

20) The only evidence presented to establish that Pacific Northwest Recovery, Inc., was Claimant's employer at times material was a Corporation Division general inquiry. It showed that Pacific Northwest Recovery, an assumed business name for Leslie DeHart, voluntarily canceled on November 14, 1997, and that Pacific Northwest Recovery, Inc. was incorporated effective November 14, 1997, with Leslie Dehart as the registered agent at the same address that Claimant worked.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent Leslie Elmer DeHart was a person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent DeHart employed Claimant in Oregon from November 2,1997, until January 9, 1998.

3) Claimant was not employed by Pacific Northwest Recovery, Inc. during times material herein.

4) Claimant earned $2,793.50 in wages during his employment with Respondent.

5) Claimant was paid $1,275 in wages during his employment with Respondent .

6) Respondent deducted $100 from Claimant's wages to pay for a scratch that Claimant's son put on Respondent's tow truck. Claimant did not agree to this deduction and did not sign an authorization for the deduction.

7) Claimant quit Respondent's employment without notice on January 14, 1998.

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[3]The figure of $373.50 was computed by multiplying 62.25 hours x $6.00/hr., the minimum wage in Oregon for the calendar year 1998. *ORS 653.025*.

[4]Although the ALJ granted the Agency's motion to amend civil penalty wages sought to $1,334.40, pursuant to agency policy, this figure must be rounded off to the nearest dollar, or $1,334. *In the Matter of Staff, Inc.,* 16 BOLI 97, 119 (1997).

8) When Claimant quit, Respondent owed Claimant $1,518.50 in unpaid wages.

9) Respondent willfully failed to pay Claimant $1,518.50 in earned, due, and payable wages at the next regularly scheduled payday after Claimant quit, and more than 30 days have elapsed from the date Claimant's wages were due.

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. During all times material herein, Respondent employed Claimant.

2) During all times material herein, Pacific Northwest Recovery, Inc. was not Claimant's employer.

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

4) 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."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid on Friday, January 16, 1998, Claimant's next regularly scheduled payday after Claimant quit employment without notice.

4) 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 hourly rate for eight hours per day 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."

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

5) ORS 652.610(3) provides:

"No employer may withhold, deduct or divert any portion of an employee's wages unless:

"(a) The employer is required to do so by law;

"(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and

are recorded in the employer's books;

"(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books; or

"(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party."

Respondent's purported reason for deducting $100 from Claimant's wages, that Claimant's son had scratched his tow truck, was not a legal defense under the facts presented.

6) OAR 839-050-0330(1) and (2) provide, in pertinent part:

"(1) Default can occur in four ways:

" * * *

"(d) Where a party fails to appear at the scheduled hearing.

"(2) When a party notifies the agency that it will not appear at the specified time and place for the contested case hearing or, without such notification, fails to appear at the specified time and place for the contested case hearing, the hearings referee shall take evidence to establish a prima facie case in support of the charging document and shall then issue a proposed order to the commissioner and all participants pursuant to OAR 839-050-0370. Unless notified by the party, the hearings referee shall wait no longer than thirty (30) minutes from the time set for the hearing in the notice of hearing to commence the hearing."

Respondents did not appear at the hearing at all and were properly found to be in default when 30 minutes had elapsed after the specified time for the contested case hearing.

7) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

Introduction

The Agency alleged in its Order of Determination, as amended, that Claimant was employed by Respondents Leslie and Roxanne DeHart and Pacific Northwest Recovery, Inc., from November 2, 1997, through January 9, 1998, that Claimant was not paid in full for all wages earned, that $1,518.50 in back wages are due and owing to Claimant, and that $1,334 in penalty wages should be assessed against Respondents.

Respondents

The Agency named Leslie and Roxanne DeHart, partners, and Pacific Northwest Recovery, Inc., as Respondents. At the commencement of the hearing, the Agency moved to dismiss the charges against Roxanne DeHart, and the motion was granted. The Agency provided the evidence cited in Finding of Fact - The Merits

#20 in support of the theory that Pacific Northwest Recovery, Inc. was Claimant's employer from November 14, 1997, through January 9, 1998. These Corporation Division documents, weighed against testimony by Claimant that all of his paychecks had the name of Respondent DeHart and his assumed business name, Pacific Northwest Recovery, printed on them, do not establish by a preponderance of the evidence that Pacific Northwest Recovery, Inc. was Claimant's employer during the last seven weeks of his employment. *In the Matter of Sunnyside Inn*, 11 BOLI 151, 165 (1993). The forum concludes that the proper Respondent in this case is Leslie Elmer DeHart (hereinafter "Respondent). Accordingly, the charges against Pacific Northwest Recovery, Inc. are dismissed.

Default

Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. OAR 839-050-0330(1) and (2). 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. *In the Matter of Tina Davidson,* 16 BOLI 141, 148 (1997); *see also* OAR 839-050-0330(2).

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. *Id*. In a default situation where a Respondent's total contribution to the record is a 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. *Id*.

The Agency has established a prima facie case. A preponderance of credible evidence on the whole record showed that Respondent employed Claimant during the period of the wage claim[5] and willfully failed to pay him all wages, earned and payable, when due. The evidence that established the hours Claimant worked and the amount Respondent owed Claimant was credible, persuasive, and the best evidence available, given the failure of Respondent to appear at the hearing. Having considered all the evidence on the record, the forum finds that the Agency's prima facie case has not been controverted by the unsworn and unsubstantiated assertions in Respondent's answer and request for hearing.

Independent Contractor

Respondent's answer contends that Claimant was not owed any wages because he was an independent contractor. This is an affirmative defense. Respondent bears the burden of proof on this issue, and did not

[5]In the answer, Respondent asserts the affirmative defense that Claimant was an independent contractor, and as such, not employed by Respondents. This issue is resolved in Claimant's favor in the next section of this Proposed Opinion.

provide any evidence to support this defense other than the assertion in the answer. Consequently, the forum looks to the credible evidence on the record to see if it overcomes Respondent's defense. *Id*.

This forum has adopted an "economic reality" test to determine whether a claimant is an employee or independent contractor under Oregon's minimum wage and wage collection laws. *In the Matter of Frances Bristow,* 16 BOLI 28, 37 (1997); *In the Matter of Geoffroy Enterprises, Inc.,* 15 BOLI 148 (1996) (relying on *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993)). The focal point of the test is "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services." *Geoffroy Enterprises, Inc.*, 15 BOLI at 164. The forum considers five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative. These factors are:

(1) The degree of control exercised by the alleged employer;

(2) The extent of the relative investments of the worker and alleged employer;

(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;

(4) The skill and initiative required in performing the job;

(5) The permanency of the relationship. *Id.*

In this case, the preponderance of credible evidence on the whole record establishes the following:

(1) The degree of control exercised by the alleged employer

Respondent exercised extensive control over Claimant's work. He instructed Claimant when to report to work, when to go home, what jobs to perform, and when to perform those jobs. He exercised control over Claimant in a wide-ranging way that indicates an employer-employee relationship.

(2) The extent of the relative investments of the worker and alleged employer

Respondent supplied the vehicle, phone, maps, and instructions that Claimant needed to perform his job. Claimant had no financial interest in the business; his only investment was his time. Claimant's lack of financial interest indicates an employee-employer relationship.

(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer

Respondent established the terms of the compensation agreement with Claimant; however, this agreement was illegal because it brought Claimant's rate of pay below the minimum wage. There was no opportunity for Claimant to suffer a profit or loss. This evidence shows an economic dependence by Claimant on Respondent's business and indicates an employee-employer relationship.

(4) The skill and initiative required in performing the job

Claimant had never performed the job of "spotter" before starting work for Respondent and began perform-

ing the duties of that job on his first day of work. Claimant was given specific instructions as to which specific property he was to repossess and the address that property could be located at. Claimant had very little opportunity to exercise initiative; his job was purely responsive. The job did not require any specialized skills that suggest the job was one performed by independent contractors. The lack of skill and initiative required of Claimant in performing his job indicate an employee-employer relationship.

(5) The permanency of the relationship

Claimant was hired for an indefinite period. No evidence suggests that Respondent hired Claimant for a temporary, limited period. Claimant worked for slightly more than two months before quitting. These facts indicate employee status.

Conclusion

Considering each factor of the economic reality test, the only conclusion possible is that Claimant was economically dependent upon Respondent's business. Accordingly, as a matter of law, he was an employee and not an independent contractor.

Payroll Deduction

Respondent contends in the answer that he was entitled to deduct $100 from Claimant's earnings on account of an agreement between Claimant and Respondent that Claimant would repay $100 based on damage caused to a tow truck by Claimant's son. ORS 652.610(3) prohibits employers from deducting any part of an employee's wage unless the employer is required to do so by law; the deductions are for the employee's benefit, in which case they must be authorized in writing by the employee and recorded in the employer's books; or the deductions are authorized by a collective bargaining agreement to which the employer is a party. There is no evidence on the record that any of these tests were met. Consequently, the $100 deduction from Claimant's paychecks must be disallowed as a matter of law and repaid to Claimant. *See also In the Matter of Handy Andy Towing, Inc.*, 12 BOLI 284, 292-95 (1994).

Claimant's Wage Rate

Respondents and Claimant agreed that Claimant would be paid $150 per week, regardless of the number of hours he actually worked. Respondents did not assert in the answer that Claimant fit into one of the exclusions set out in ORS 653.020, but did contend that Claimant was an independent contractor. The forum has already concluded that Claimant was an employee, not an independent contractor.

ORS 653.025 prohibits employers from paying their employees at a rate less than minimum wage for each hour of work time and sets the minimum wage at $5.50 and $6.00 per hour for the calendar years of 1997 and 1998, respectively. ORS 653.055(1) provides that "[a]ny employer who pays an employee less than the [minimum wage and overtime] 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 and overtime] is no defense to an action under subsection (1) of this section." Thus, the salary agreement between Respondent DeHart and Claimant is no defense to Respondent's failure to pay the minimum wage, and Respondent is liable for the statutory minimum wage for all hours worked by Claimant. *See also In the Matter of Diran Barber*, 16 BOLI 190, 198 (1997)

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Evidence established that Respondent intentionally failed to pay wages, and that he acted voluntarily and as a free agent. He must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150 as computed in Finding of Fact - The Merits # 18.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondent Leslie Elmer DeHart's violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders LESLIE ELMER DeHART as payment to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Lester Dale Myer in the amount of TWO THOUSAND EIGHT HUNDRED FIFTY TWO DOLLARS AND FIFTY CENTS (2,852.50), less appropriate lawful deductions, representing $1,518.50 in gross earned, unpaid, due, and payable wages; and $1,334.00 in penalty wages; PLUS

a) Interest at the legal rate on the sum of $1,518.50 from January 16, 1998, until paid; and interest at the legal rate on the sum of $1,334.00 from February 16, 1998, until paid.

In the Matter of

NORMA AMEZOLA, dba Taqueria El Rey

Case Number 22-99

Final Order of the Commissioner

Jack Roberts

Issued April 23, 1999

SYNOPSIS

Respondent operated a restaurant and employed Claimant as a cook. Respondent failed to pay Claimant all the wages due upon termination, in violation of ORS 653.025(2) (minimum wages), OAR 839-020-0030(1) (overtime wages), and ORS 652.140. Respondent´s failure to pay the wages was willful, and the Commis-

sioner ordered Respondent to pay civil penalty wages. ORS 652.140, 652.150, 653.025(2), 653.045, 653.055(1), 653.261(1), and OAR 839-20-030(1).

The above-entitled contested case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 18, 1999, in the conference room of the Oregon Bureau of Labor and Industries, 3865 N.E. Wolverine Street, Salem, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Rocio Ramirez Cruz (Claimant) was present throughout the hearing and was not represented by counsel. Respondent Norma Amezola was present throughout the hearing and represented herself.

The Agency called two witnesses: Claimant and Gerhard Taeubel, a compliance specialist with the Wage and Hour Division of the Agency. Respondent called herself, Salvador Amezola, Connie Jo Bacon, and Claimant as witnesses.

The ALJ received into evidence Administrative Exhibits X-1 to X-11, Agency Exhibits A-1 to A-14 (submitted with the Agency´s case summary), and Agency Exhibits A-15 and A-16 (offered at hearing). The ALJ did not receive into evidence any documentary exhibits from Respondent, but did enter into the record as offers of proof two documents marked R-1 and R-2. The evidentiary record closed on February 18, 1999.

Having fully considered the entire record in this matter, I, Jack 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 6, 1998, Claimant filed a wage claim with the Agency. She alleged that Respondent employed her and failed to pay wages earned and due to her.

2) When she filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) Claimant brought her wage claim within the statute of limitations.

4) On September 14, 1998, the Agency served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency´s investigation. The Order of Determination alleged that Respondent owed a total of $5637.75 in unpaid wages and $1562.40 in civil penalty wages, plus interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On or about October 1, 1998, Respondent filed an answer to the Order of Determination in which she denied that she owed Claimant any amount of unpaid wages. Respondent later requested a contested case hearing.

6) On December 22, 1998, the Agency requested a hearing in this matter. On January 5, 1999, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Summary 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 839-050-0000 to 839-050-0440.

7) On January 29, 1999, ALJ McCullough issued an interim order notifying the participants that the case would be reassigned to ALJ Hadlock. The same day, ALJ McCullough issued a case summary order requiring the Agency and Respondent each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, a statement of any agreed or stipulated facts, and, by the Agency only, any damage calculations. The ALJ ordered the participants to submit case summaries by February 9, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

8) The Agency submitted a timely case summary with attached exhibits. Respondent did not submit any case summary to the hearings unit. On February 10, 1999, Respondent verbally told case presenter Lohr that she planned to call Salvador Amezola and Jim Bacon as witnesses. On February 16, 1999, Respondent mailed a letter to Lohr that included a list of three potential witnesses (Jim Bacon, Sandra Romero, Salvador Amezola), but did not send a copy of that document to the hearings unit or the ALJ. Lohr received that letter the day before hearing. The ALJ treated Respondent´s letter to Lohr as a belated case summary and received a copy of it into evidence as Exhibit X-11.

9) The ALJ granted the Agency´s February 5, 1999, request that a Spanish interpreter be available during the hearing for the benefit of Claimant. Robert Mogle, a certified translator, was present throughout the hearing and, under oath or affirmation, translated the proceedings in their entirety.

10) At the start of the hearing, Respondent said she had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

11) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing. The ALJ also explained most of the procedural matters identified in ORS 183.413(2), all of which had been addressed in the materials received by Respondent prior to hearing.

12) Toward the close of the hearing, Respondent offered as evidence the written statements of two individuals, which were marked R-1 and R-2 for identification. Respondent stated that R-2 was a letter from Connie Jo Bacon that provided essentially the same information that Bacon had given in her testimony. The ALJ excluded the proffered exhibit as unduly repetitious. The ALJ excluded the written statement of Sandra Romero, marked as R-1, because it had not been submitted with a timely case summary, it was not at-

tached to Respondent´s late case summary, and Respondent had not identified Sandra Romero as a potential witness in her February 10, 1998 conversation with case presenter Lohr. The Agency had no notice that Respondent intended to rely on any sort of statement from Romero until it received Respondent´s belated case summary the day before hearing. Respondent did not offer a satisfactory reason for having failed to timely identify Romero either as a witness or as the author of a written statement to be offered into evidence. Furthermore, from the offer of proof, the ALJ concluded that she would not violate her duty to conduct a full and fair inquiry by excluding the proffered exhibit.

13) After presenting the Agency´s rebuttal case, case presenter Lohr made a verbal closing argument. The ALJ granted Respondent´s request to submit a written closing argument and the forum received that timely filed document on March 2, 1999. The forum gave the Agency the opportunity to file a written rebuttal argument if it wished; the Agency did not submit such a document.

14) On March 25, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) During all material times, Respondent, a person, did business as Taqueria El Rey, a sole proprietorship located in Woodburn, Oregon, and employed one or more persons to work at that business. For some time, Respondent´s business operated only out of a trailer; Respondent later opened a restaurant in a permanent building and also continued selling food from the trailer. Both the restaurant and the trailer operated under the name Taqueria El Rey.

2) Beginning in August 1996, Respondent employed Claimant to work as a cook for Taqueria El Rey. Claimant worked every day of the week except Wednesday, the day the business was closed. Claimant worked at least 8 hours per day, and frequently worked overtime. Claimant´s starting hourly wage was $5.50. At some time prior to January 1998, her wage was raised to $6.00 per hour.

3) When Claimant first became Respondent´s employee, she worked in the trailer; she later worked in the restaurant. Respondent´s brother, Salvador Amezola, also worked in the restaurant kitchen during the time Claimant worked there. A woman named Lucero Mendoza worked for Respondent as a waitress and cashier during March and April 1998.

4) Respondent did not create or maintain records of the number of hours Claimant or her other employees worked. Claimant kept a list of the hours she worked and showed that document to Respondent at the end of each two-week pay period. Respondent relied on Claimant´s records to determine the wages she had earned. Respondent paid Claimant in cash and made no deductions.

5) Beginning in January 1998, Respondent told Claimant she could not afford to pay her wages and promised she would pay Claimant in one lump sum after she sold her trailer. From January 16, 1998, through May 29, 1998, Claimant continued working for Respondent but received no pay for her labor, although she asked for her wages each payday. During this time, Claimant worked a total of 865.75 hours, 147.75 of which were hours worked in excess of 40 per week. May 29, 1998, was Claimant´s last day of work; the record does not establish whether Claimant quit or was fired.

6) On May 29, 1998, Claimant asked Respondent for her wages; Respondent stated that she did not have money with which to pay Claimant. Respondent never paid Claimant any wages for the hours she worked from January 16, 1998, through May 29, 1998.

7) Respondent still was operating her restaurant at the time of the February 1999 hearing, but planned to close it shortly thereafter. During the time the restaurant remained open, Respondent purchased food to sell to customers and timely paid the associated bills. For example, Respondent paid cash to her produce supplier each time produce was delivered.

8) Agency investigator Taeubel was assigned to investigate Claimant´s wage claim. During his investigation, Taeubel spoke with Lucero Mendoza and Carmen Navarrete and memorialized those conversations. Mendoza and Navarrete also submitted letters on behalf of Claimant. Mendoza, who had been employed by Respondent, told Taeubel that Claimant worked for Respondent until about May 1998 and had not received her wages. The forum finds this statement credible because Mendoza also stated that Respondent had paid Mendoza the wages she was due; because Respondent did not maintain records, Mendoza could easily have lied about this had she wanted to. Navarrete told Taeubel that she had provided child care services for Claimant, who worked all day for Respondent until about the end of May 1998. Navarrete also went to eat at the restaurant and saw Claimant working there. The forum finds Navarrete´s statements credible because they comport with the credible statements of Mendoza, and because of Navarrete´s unchallenged statement that she was a friend of Respondent as well as a friend of Claimant. The forum has relied on Mendoza´s and Navarrete´s statements as corroboration of Claimant´s testimony.

9) The forum observed Claimant carefully throughout the hearing and found her testimony generally to be credible. She gave straightforward answers to questions and did not go out of her way to portray Respondent in a bad light. For example, Claimant readily acknowledged that Respondent had paid her in full for all the hours she worked from August 1996 until January 16, 1998. In addition, Claimant´s testimony was corroborated by the statements of Mendoza and Navarrete. The forum has relied heavily on Claimant´s testimony in making its findings of fact. The forum has given no weight to Claimant´s testimony that Respondent promised to pay her more than $6.00 per hour at some point after January 1998 because Claimant did not identify the

specific time at which she purportedly was given the raise. On this point, however, Claimant´s testimony was merely too vague, not untrustworthy.

10) Respondent´s testimony was less credible than Claimant´s. Respondent testified that she calculated Claimant´s pay by assuming Claimant worked 7 or 8 hours per day, six days per week. The forum finds this testimony less credible than Claimant´s explanation that she kept track of her own hours and showed those records to Respondent on each payday. The forum disbelieves Respondent´s testimony that Claimant only worked part-time starting in January 1998 because Claimant´s credible testimony to the contrary is corroborated by the statements of Mendoza and Navarrete. The forum also finds incredible Respondent´s testimony regarding the date on which she claims Claimant stopped working altogether -- March 16, 1998. Respondent said she determined that Claimant quit on that day because that was the same day Respondent´s child had stayed late after school, a date that was marked on Respondent´s calendar. Respondent did not, however, provide this calendar to Taeubel or produce it at hearing. The forum has not given any weight to Respondent´s testimony where it conflicted with other credible evidence in the record.

11) The testimony of Salvador Amezola, Respondent´s brother, generally appeared credible. Amezola´s memory of dates, however, was extremely vague and his testimony regarding the length and extent of Claimant´s employment by Respondent was of little use to the forum.

12) Connie Jo Bacon, who has supplied produce to Respondent for several years, testified that she never saw anybody working in the restaurant other than Respondent and Salvador Amezola. The forum has given this testimony no weight for two reasons. First, Bacon spent only a few minutes at the restaurant each week. Second, Bacon´s statement that she *never* saw Claimant working at the restaurant demonstrates either a lack of credibility or a remarkable lack of observation, given Respondent´s acknowledgment that Claimant worked for her full-time until January 1998 and her testimony that Claimant continued working part-time for two months after that. In other respects, Bacon´s testimony was credible.

13) From January through May 1998, the minimum wage in Oregon was $6.00 per hour and that also was the rate at which Respondent agreed to pay Claimant.

14) Pursuant to ORS Chapter 653 (Minimum Wages), OAR 839-020-0030 (Payment of Overtime Wages) and Agency policy, the Agency calculated Claimant´s total earnings to be $5637.75. Those calculations, which comport with the forum´s, reflect the hours recorded on Claimant´s original records.

15) The Agency calculated penalty wages of $1562.40. The forum reached the same result, in accordance with ORS 652.150, OAR 839-001-0470, and Agency policy, as follows: $5637.75 (total wages earned) divided by 865.75 (total hours worked) equals an average hourly rate of $6.51. This figure is multiplied

by 8 (hours per day) and then by 30 (the maximum number of days for which civil penalty wages continue to accrue) for a total of $1562.40. According to Agency policy, this figure is rounded off to $1562.00, the amount this forum hereby awards Claimant as penalty wages.

16) Respondent alleged in her answer and at hearing an affirmative defense of financial inability to pay the wages due at the time they accrued. The forum finds that Respondent failed to meet her burden of proving this affirmative defense, as she remained financially able to operate her business for at least nine months after the termination of Claimant´s employment.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a person doing business as Taqueria El Rey in the state of Oregon, and engaged the personal services of one or more employees in the operation of that business.

2) Respondent employed Claimant from August 1996 through May 29, 1998. During that time, Respondent suffered or permitted Claimant to render personal services to her.

3) The state minimum wage during 1998 was $6.00 per hour and that is the rate at which Respondent agreed to pay Claimant.

4) From January 16, 1998, through May 29, 1998, Claimant worked 865.75 hours for Respondent, 147.75 of which were hours worked in excess of 40 per week. Claimant earned $5637.75 in wages during that period of time. Respondent paid Claimant none of those wages and owes her **$5637.75** in earned and unpaid compensation.

5) Respondent willfully failed to pay Claimant the $5637.75 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) Civil penalty wages, computed in accordance with ORS 652.150, OAR 839-001-0470, and Agency policy, equal **$1562.00**.

7) Respondent did not meet her burden of proving financial inability to pay Claimant´s wages at the time they accrued.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

> "(3) ´Employ´ includes to suffer or permit to work;"
>
> "(4) ´Employer´ means any person who employs another person."

ORS 652.310 provides, in pertinent part:

> "(1) ´Employer´ means any person who in this state, directly or through an agent, engages personal services of one or more employees."
>
> "(2) ´Employee´ means any individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

At all material times, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) ORS 653.025 requires that, except in circumstances not relevant here:

> "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:
>
> "* * * * *
>
> "(2) For calendar year 1998, $6.00."

Oregon law required Respondent to pay Claimant at a fixed rate of at least $6.00 per hour. Respondent failed to pay Claimant the minimum wage rate of $6.00 for each hour of work time, in violation of ORS 653.025(2).

4) ORS 653.261(1) provides:

> "The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-020-0030(1) provides that, except in circumstances not relevant here:

> "all work performed in excess of forty (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 when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Oregon law required Respondent to pay Claimant one and one-half times her regular hourly rate, in this case the minimum wage of $6.00, for all hours worked in excess of 40 hours in a week. Respondent failed to pay Claimant at the overtime rate, in violation of OAR 839-020-0030(1).

6) ORS 652.140 provides, in pertinent part:

> "(1) 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 or termination shall become due and payable not later than the end of the first business day after the discharge or termination.
>
> "(2) 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."

Claimant´s credible testimony proves that May 29, 1998, was her last day of work, but the record does not establish whether Claimant quit or was fired. Even assuming, however, that Claimant quit without notice to Respondent, her wages would have been due on June 5, 1998. Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid by that date.

8) 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 hourly rate for eight hours per day 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."

OAR 839-001-0470 provides:

"(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

"(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

"(b) The rate at which the employee´s wages shall continue shall be the employee´s hourly rate of pay times eight (8) hours for each day the wages are unpaid;

"(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee´s hourly rate of pay times 8 hours per day times 30 days.

"(2) The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period."

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.

9) 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. ORS 652.332.

OPINION

Minimum Wage and Overtime

ORS 653.025(2) prohibited employers, during 1998, from paying their employees at a rate less than $6.00 for each hour of work time. OAR 839-020-0030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half the regular rate of pay. Respondent was legally obliged to pay Claimant at least $6.00 per hour worked plus one and one-half times that wage for all hours worked in excess of 40 hours in a week.

Work Time

This forum has ruled repeatedly that, pursuant to ORS 653.045, it is the employer´s duty to maintain an accurate record of an employee´s time worked. *See, e.g., In the Matter of Diran Barber*, 16 BOLI 190, 196-97 (1997) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946)); *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997). Where the forum concludes that an employee was employed and was improperly compensated, it becomes the employer´s burden to produce all appropriate records to prove the precise amounts involved. *In the Matter of Diran Barber,* 16 BOLI at 196. Where the employer produces no records, the Commissioner may rely on the evidence produced by the Agency " ´to show the amount and extent of [the employee´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.´ " *Id.* (quoting *Mt. Clemens Pottery Co.*, 328 US at 687-688).

Here, Respondent kept no records of the days or hours that Claimant worked. The forum has accepted Claimant´s credible testimony that she kept her own records of the hours she worked for Respondent and showed those records to Respondent at the end of each pay period so Respondent could calculate her pay. The forum does not believe Respondent´s contrary testimony that she calculated the wages she owed Claimant purely by relying on her own memory of the hours Claimant had worked. Because Respondent did not maintain legally required records of the hours Claimant worked, and because Claimant´s testimony on this point was credible, the forum relies on the evidence produced by the Agency. That evidence establishes that Claimant worked a total of 865.75 hours from January 16, 1998, through May 29, 1998, 147.75 hours of which were overtime hours. At an hourly rate of $6.00 for straight time and $9.00 for overtime, Claimant earned $5637.75.

ORS 653.055(1) provides, in part, that "[a]ny 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." The forum has accepted Claimant´s credible testimony that Respondent did not pay her any of the wages she earned during the relevant time period. Respondent therefore owes Claimant unpaid wages in the amount of $5637.75.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if the respondent acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due her employee. *McGinnis v. Keen,* 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, the evidence established that Respondent voluntarily, intelligently, and as a free agent failed to pay Claimant any of the wages she earned from January 16, 1998, through May 29, 1998. Respondent acted willfully and is liable for penalty wages.

As this forum previously has explained, penalty wages are calculated in accordance with the relevant laws and Agency policy as follows:

> "´Total earned during the wage claim period divided by the total number of hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days.´ Statement of Agency Policy, July 23, 1996."

In the Matter of Mark Johnson, 15 BOLI 139, 143 (1996). Using that formula and rounding to the nearest dollar, Respondent owes Claimant $1560.00 in penalty wages. *See* factual finding 16, *supra*.

Respondent raised the affirmative defense that she was financially unable to pay Claimant´s wages at the time they accrued. The evidence, however, is to the contrary. Respondent was operating her business at the time she failed to pay Claimant´s wages and still was operating that business at the time of the February 1999 hearing, although she planned to close it soon thereafter. Bacon, who supplied produce to Respondent, testified credibly that Respondent always paid cash for the produce when it was delivered. Where a respondent continues to operate a business, and in doing so chooses to pay certain debts and obligations in preference to an employee´s wages, there is no financial inability to pay. In the Matter of Country Auction, 5 BOLI 256, 265 (1986). Respondent did not meet her burden of proving that she could not have paid Claimant the wages due her at the time they accrued. Consequently, Respondent cannot escape liability for penalty wages.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and penalty wages she owes as a result of her violations of ORS 653.025(2), ORS 652.140, and OAR 839-020-0030(1), the Commissioner of the Bureau of Labor and Industries hereby

orders **Norma Amezola, dba Taqueria El Rey,** to deliver to the Fiscal Services 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 Rocio Ramirez Cruz in the amount of SEVEN THOUSAND ONE HUNDRED NINETY-NINE DOLLARS AND SEVENTY FIVE CENTS ($7199.75), less appropriate lawful deductions, representing $5637.75 in gross earned, unpaid, due, and payable wages, and $1562.00 in penalty wages; plus interest at the legal rate on the sum of $5637.75 from June 6, 1998, until paid and interest at the legal rate on the sum of $1562.00 from July 6, 1998, until paid.

In the Matter of

THOMAS L. FERY, dba TOM FERY FARM

Case Number 16-99

Final Order of Commissioner

Jack Roberts

Issued May 6, 1999

SYNOPSIS

Respondent, a licensed farm/forest labor contractor, failed to provide ten reforestation workers with written statements of their rights, in violation of ORS 658.440(1)(f), and failed to execute written agreements with the workers, in violation of ORS 658.440(1)(g). Respondent also failed to timely submit one certified true payroll report, in violation of ORS 658.417(3), but the Agency failed to prove a second alleged violation of that statute. The Agency also established that Respondent violated ORS 658.437(2) by failing to inspect the farm/forest labor contractor's license of a person who acted on Respondent's behalf in supplying Respondent with four reforestation workers. The Commissioner ordered Respondent to pay civil penalties of $500.00 for each violation of ORS 658.440(1)(f), $750.00 for each violation of ORS 658.440(1)(g), $500.00 for the single violation of ORS 658.417(3), and $500.00 for the violation of ORS 658.437(2), for a total of $13,500.00. ORS 658.405, 658.407, 658.417(3), 658.437(2), 658.440(1)(f)- (g), 658.453(1), 658.501; OAR 839- 015-0004, 839-015-0300, 839-015- 0310, 839-015-0360, 839-015-0510.

The above-entitled contested case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 24, 1999, in the conference room of the Oregon Bureau of Labor and Industries, 3865 N.E. Wolverine Street, Salem, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Respondent was present and was not represented by counsel during the hearing.

The Agency called Respondent, Agency compliance specialist Katy D. Bayless, and Virgilio Urena as witnesses. The Agency also called Agency compliance manager Nedra Cunningham as a rebuttal witness. Respondent called himself, Alejandro Corona, and Seraphim Garcia Corona as witnesses.

The ALJ received into evidence Administrative Exhibits X-1 through X-13, Agency Exhibits A-1 through A-5 (submitted with the Agency's case summary), Agency Exhibit A-6 (offered at hearing), Respondent Exhibits R-1 through R-9 (submitted with Respondent's case summary), and Respondent Exhibits R-10 through R-12 (offered at hearing). The evidentiary record closed on February 24, 1999.

Having fully considered the entire record in this matter, I, Jack 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 7, 1998, the Agency issued a Notice of Intent to Assess Civil Penalties to Respondent. The Notice of Intent cited the following bases for the assessment: 1) Using an Unlicensed Farm/Forest Labor Contractor * * * in violation of ORS 658.437((2). **CIVIL PENALTY OF $2,000.** ONE VIOLATION"; 2) "Failure to Provide Workers With Written Statements of Terms, Conditions and Rights * * * as required by ORS 658.440(1)(f) and OAR 839-015-0360(4). **CIVIL PENALTY OF $7,500.** TEN VIOLATIONS"; 3) "Failure to Execute Written Agreement With Workers at Time of Hiring * * * as required by ORS 658.440(1)(g) and OAR 839-015-0360(4). **CIVIL PENALTY OF $7,500.** TEN VIOLATIONS"; and 4) "Failure to File Certified True Payroll Reports * * * in violation of ORS 658.417(3) and 839-015-0300. **CIVIL PENALTY OF $2,000.** TWO VIOLATIONS * * *." The Notice of Intent stated that Respondent had 20 days from the date he received the Notice to request a contested case hearing.

2) The Notice of Intent was served on Respondent on October 16, 1998.

3) By letter dated October 29, 1998, attorney Louis D. Savage, of Garvey, Schubert & Barer, notified the Agency that he represented Respondent in this matter. In that letter, Respondent requested a hearing on the Notice of Intent. Respondent's counsel also stated that he understood that Respondent had until November 16 to file an answer and that, if an answer was not filed by November 5, 1998, the Agency would issue a ten-day notice letter.

4) On November 9, 1998, the Agency issued a Notice of Intent to Issue Final Order by Default if Respondent did not submit an answer by November 19, 1998. Respondent submitted his Answer and Request for Contested Case Hearing on that date.

5) On December 17, 1998, pursuant to an Agency request for hearing, the ALJ issued to Respondent and the Agency a Notice of Hearing, which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent Respondent a "Summary of Con-

tested 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 839-050-0000 through 839-050-0440.

6) Respondent later filed a motion for leave to file an Amended Answer along with the proposed Amended Answer. The ALJ granted the motion.

7) On January 20, 1999, the ALJ issued a case summary order to the participants directing them each to submit a summary of the case, including: 1) a list of the witnesses to be called; 2) the identification and description of any document or physical evidence to be offered into evidence, together with a copy of any such document or evidence; and 3) a statement of any agreed or stipulated facts. The summaries were due by February 12, 1999. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The Agency and Respondent submitted timely summaries, although Respondent sent a copy of his summary only to the Agency case presenter and not to the Hearings Unit.

8) By letter dated February 12, 1999, Respondent's counsel, Louis Savage, informed the forum that he would not be representing Respondent in the contested case hearing.

9) At the start of the hearing, Respondent said he had received the Summary of Contested Case Rights and Procedures and had no questions about it.

10) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. The ALJ also explained most of the procedural matters identified in ORS 183.413(2), all of which had been addressed in the materials received by Respondent prior to hearing.

11) Pursuant to the Agency's request, the ALJ arranged for a Spanish interpreter to be available throughout the hearing. Under oath or affirmation, Ilse Wefers translated the questions put to, and the answers given by, witnesses Alejandro Corona and Seraphim Corona.

12) Just before making his closing statement, the Agency case presenter moved to amend the Notice of Intent by adding an allegation that Respondent had assisted an unlicensed contractor -- Alejandro Corona -- in violation of ORS 658.440(3)(e) and OAR 839-015-0508(1)(n).[1] The forum denied the motion. That ruling is hereby affirmed.

13) After the Agency case presenter delivered his verbal closing argument, Respondent asked for leave to file a written closing state-

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[1]In its exceptions to the Proposed Order, the Agency did not renew its motion to add an alleged violation of ORS 658.440(3) to the Notice of Intent. Instead, it argued that the pleading should be amended to include a second charged violation of ORS 658.437. That exception is denied. This forum generally will not grant a motion to add a new substantive allegation to a pleading -- whether it be a new charged violation or a new affirmative defense -- when that motion is made for the first time in exceptions to a proposed order.

ment. The Agency did not oppose that request, which the ALJ granted. Respondent timely filed a written closing statement and the Agency, pursuant to an order of the ALJ, timely filed a written rebuttal argument.

14) On April 8, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed timely exceptions, which are addressed in this Final Order. Respondent filed no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At the time of hearing, Respondent was a licensed farm labor contractor with a forest indorsement, and had been since at least 1994. By 1998, Respondent had about 70 people working for him.

2) Respondent authorized his supervisors to give his workers advances on their paychecks. Supervisors Alejandro Corona and Seraphim Corona often advanced money to workers so they could pay for rent and groceries.

3) Respondent paid his supervisors a higher hourly wage than he paid his other workers. Respondent's supervisors were responsible for ensuring the quality of other workers' job performance and had additional duties beyond those required of other workers. Respondent authorized at least one of his supervisors, Alejandro Corona, to find new workers, hire them, and help them fill out employment forms.

4) Respondent contracted to perform reforestation activities in the Malheur National Forest pursuant to United States Forest Service ("USFS") Contract No. 52-04KK-8-3B (the "Malheur contract"),[2] and performed that contract starting on April 27, 1998. Respondent's performance of the contract continued through June 1998.

5) At least ten individuals performed reforestation work for Respondent on the Malheur contract.

6) In May 1998, Respondent contacted Virgilio Urena to learn whether he was available to work as a supervisor on the Malheur contract. Urena agreed to work as a supervisor and asked whether Respondent could use the services of four workers Urena knew were available. Respondent, who unexpectedly was going to have to perform work on three USFS contracts at the same time, was relieved to hear that the workers were available and agreed to hire them. Seraphim Corona later spoke with Urena and asked him if he could organize a group to work on the Malheur contract, with Urena as supervisor. During that conversation and others, Seraphim Corona and Urena coordinated details of Urena's work, including organization of the work and the date and time at which Urena should bring the workers to John Day.

7) Respondent gave Urena $2000.00 during a May 15, 1998 meeting, which Respondent believed Urena would use to give living ex

[2]In some portions of the record, the contract is referred to as the "Wallowa-Whitman" contract. At hearing, Respondent clarified that the work had taken place in the Malheur National Forest, not in the Wallowa-Whitman National Forest.

pense advances to the workers he was going to bring to Respondent's job site. In Respondent's view, this arrangement was similar to the understanding he had with other supervisors that they were authorized to advance money to employees as they saw fit. Although Urena stated during the meeting that he would use the money for worker advances, he testified at hearing that he believed he was entitled to use some of the money to cover the expenses he incurred in transporting workers.

8) After Respondent had agreed to hire Urena and had given him the $2000.00, Urena did bring four workers to the Malheur contract job site: Juan Manuel Rivera, Pedro Jimenez, Arturo Varela, and Gerardo Martinez Rangel. Those individuals performed forestation/reforestation work on the contract, but Urena did not. Urena spent his time supervising and checking the quality of the other workers' labor.

9) At the time he supplied the four workers to Respondent, Urena was acting at Respondent's request, and Respondent had the right to control his actions. Urena also had agreed to act as Respondent's supervisor, subject to his control.

10) Respondent did not ask to examine Urena's farm/forest labor contractor's[3] license before allowing the four workers to begin working on the Malheur contract, did not examine a license, and did not keep a copy of one. In fact, Urena did not have a farm labor contractor's license or a forest indorsement.

11) Urena and Respondent agreed that Urena would bring more workers to the job site the following week. Urena did bring additional workers to the job site, but they left within a day, without performing any work for Respondent.

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[3]ORS 658.405(1) defines the term "Farm labor contractor" to include people who engage in certain activities related to the production and harvesting of farm products, the gathering of certain wild forest products, or the forestation or reforestation of lands. Persons who act as farm labor contractors are required to obtain a license. ORS 658.410(1). In addition, persons who act as farm labor contractors "with regard to the forestation or reforestation of lands" must obtain a special indorsement on their farm labor contractor licenses. ORS 658.417(1).

The Agency's administrative rules separate the terms "farm labor contractor" and "forest labor contractor." Under the rules, the term "farm labor contractor" is limited to persons who engage in certain activities related to the production or harvesting of farm products or to the gathering of wild forest products. Those persons who engage in certain activities related to the forestation or reforestation of lands are termed "forest labor contractors." OAR 839-015-0004(3), (4).

This order uses the common short-hand term "farm/forest labor contractor" to refer to a person engaged in activities related to the forestation or reforestation of lands that bring the person within both: 1) the statutory definition of a "farm labor contractor" who needs a forestation/reforestation indorsement; and 2) the regulatory definition of a "forest labor contractor."

12) Urena advanced a total of $456.00 to the four workers he originally had supplied to Respondent. Urena retained the remainder of the money and did not respond to an invoice for $1500.00 that Respondent sent him.

13) ORS 658.440(1)(f) requires farm/forest labor contractors to furnish each worker with a written statement that describes certain terms and conditions of employment, including: the method of computing the rate of compensation; the terms and conditions of any bonus offered; the terms and conditions of any loan to the worker; the conditions of any housing, health and child care services to be provided; the terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof; the terms and conditions under which the worker is furnished clothing or equipment; the existence of a labor dispute at the worksite; the name and address of the owner of the operation where the worker will be working; and the worker's rights and remedies under the worker's compensation laws, the farm and forest labor contractor laws, the Federal Service Contracts Act, the federal and Oregon minimum wage laws, the Oregon wage collection laws, the unemployment compensation laws, and civil rights laws.

14) ORS 658.440(1)(g) requires farm/forest labor contractors to execute written agreements with workers containing the terms and conditions outlined in the previous paragraph. These agreements must be executed at the time of hiring and prior to the worker performing any work for the farm labor contractor.

15) The Agency has developed forms that farm/forest labor contractors may use to fulfill the requirements of ORS 658.440(1)(f) and (g) -- Form WH-151 and Form WH-153, respectively. Farm/forest labor contractors may use these forms or may develop their own statements of rights and agreements with workers that contain all the elements of the Agency forms.

16) When Respondent renews his farm/forest labor contractor license each year, the Agency sends him a packet of information that includes Forms WH-151 and WH-153. Each year, he signs a document certifying that he received and understands the forms. Respondent signed such certifications of compliance each year from 1994 through 1997. At all material times, Respondent was aware that he was required to give WH-151 forms (or their equivalents) to workers and to enter into written agreements with workers.

17) In 1994, Respondent used the WH-151 and WH-153 forms supplied by the agency. After that, he began using an employee handbook, printed in both English and Spanish, that included information that Respondent believed met all legal requirements. When Respondent started using the handbook, he stopped using the WH-151 and WH-153 forms.

18) Respondent paid his workers different hourly wages depending on their job classification and experience. Respondent's employee handbook does not state what wages workers would earn for performing various jobs on the Malheur contract. Rather, Respondent's supervisors told the other workers how much they

would be paid. Nor does the handbook identify the name and address of the owner of the operations where workers would be performing any particular job. Instead, workers received that information at the job site. The handbook also does not contain information regarding: the starting date of the contract; the expected length of the season or period of employment; or the workers' rights and remedies under ORS Chapter 654. Respondent expressly reserved the right to change or revoke his employment policies at any time.

19) Respondent did not give WH-151 forms to any of the workers on the Malheur contract, including the four supplied by Urena. Respondent did make copies of the employee handbook available to the workers in company vans that transported them to the job site, and employees were able to take a copy of the handbook at that time, if they so desired. Respondent, did not, however, distribute a handbook to each worker either at the time they were transported to the job site or before that. Respondent also posted certain federally required materials in the vans, including information about the federal minimum wage for reforestation work.

20) Respondent did not execute a written agreement using Form WH-153 or an equivalent with any of the workers on the Malheur contract.

21) On May 27, 1998, Katy Bayless, an Agency Compliance Specialist, notified Respondent that several workers had claimed that they had not received all their wages from the Malheur contract job. Bayless determined that Respondent did owe wages to at least some of those workers.

22) Within a few days, Respondent called Bayless about the wage claims. He and Bayless arranged for Respondent to bring checks covering the claims to the Agency office. On June 5, 1998, Respondent delivered checks that covered most, but not all, of the hours claimed. Respondent told Bayless that one of the workers had agreed to be paid for only a certain number of hours; that worker told the Agency that he had not so agreed. Bayless determined that, after delivering the paychecks, Respondent still owed one worker an hour's pay and owed two other workers pay for four hours each. Respondent eventually paid all the wages that Bayless had determined were owed.

23) Respondent paid his employees on the Malheur contract directly.

24) By letter dated June 15, 1998, Bayless asked Respondent to furnish various records, including "all payroll for reforestation projects for Tom Fery Farm" and copies of Forms WH-151 and WH-153 "for each and every employee that appears on your payroll records for contracts performed under the definition of (ORS 658.440) farm/forest labor activity." When Bayless wrote this letter, she had not yet received any certified payroll reports ("CPRs") from Respondent for the Malheur contract.

25) With a letter dated June 21, 1998, Respondent enclosed checks covering the remaining amounts of wages claimed by the workers who had complained to the Agency. Respondent stated that it had always been his policy to pay employees what they thought they were due

when they thought they had been underpaid.

26) On or about June 28, 1998, Respondent gave Bayless a June 2, 1998, payroll record for the four workers Urena had brought to the job site. Respondent also provided employee time sheets for weeks 3 and 4 of the Malheur contract. Those documents did not include the USFS contract number, the time period covered by the payroll, the location of work, or an itemization of deductions. Before this date, Respondent had not submitted any payroll records or report for the Malheur contract (other than copies of paychecks) to the Agency.

27) In a cover letter submitted with the documents, Respondent informed the Agency of the USFS contract number for the Malheur contract. In that letter, Respondent also purported to provide information regarding the dates on which that contract had been performed. The information Respondent provided was incorrect. In fact, work on the Malheur contract began on April 27, 1998, not May 27, 1998, as stated in the cover letter. The cover letter also indicated the location where work on the contract had been performed.

28) On July 2, 1998, Respondent brought more information to Bayless, including a CPR. He told her that his CPRs were running late because he had been very busy with three USFS contracts and because he had a problem with his payroll clerk. Respondent also told Bayless that he believed his employee handbook covered the requirements of Forms WH-151 and WH-153, and sent a copy of the handbook to the Agency.

29) Although the record includes a document titled "TOM FERY FARM PAYROLL JOURNAL FOR THE PERIOD 06/01/98 TO 06/30/98," no testimony or other evidence established that this document (or any other document in the record) was the document Respondent submitted to Bayless on July 2, 1998.

30) On July 16, 1998, Bayless told Respondent that substantial information still was missing from his CPRs, including: location of work; contract number; dates work began and ended; and deductions from net pay. Respondent agreed to add the missing information to the reports.

31) ORS 658.417 and OAR 839-015-0300 do not describe what information must be included in CPRs, but provide that CPRs must contain certain "all the elements of Form WH-141," a reporting form available from the Agency. The record does not include a copy of the Form WH-141 in use at material times, and the record does not include testimony precisely describing the information Form WH-141 requests.

32) After the Agency conducted its investigation, Respondent started using Forms WH-151 and WH-153. Respondent, however, used 1993 versions of those forms, which since have been revised. The fact that the forms were outdated meant that some of the information conveyed was inaccurate. In addition, the Form WH-153 that Respondent submitted as an example of his current compliance does not include required information regarding the approximate ending date of employment and the workers' working hours and days.

33) Before investigating the charges that are the subject of this order, the Agency had not previously determined that Respondent had violated wage and hour laws. During the 1998 investigation, Respondent generally was cooperative and timely responded to Bayless's inquiries.

34) Respondent alleged that Bayless told him the Agency would not assess civil penalties against him, but offered no persuasive evidence to support that claim. In fact, Bayless assumed that civil penalties would be assessed because that almost always happens when violations are found.

35) At no time did Bayless give Respondent an extension of time in which to file CPRs. In her June 15, 1998, letter, she did state that Respondent should submit the missing CPRs by June 30. That statement did not constitute a waiver of the legal requirement that CPRs be filed no later than 35 days from the date Respondent began work on the contract. Rather, Bayless merely was setting a date by which Respondent should comply with a request associated with the Agency's investigation of a violation that already had occurred.

36) The ALJ carefully observed the testimony of Katy Bayless, Alejandro Corona and Seraphim Corona. All three witnesses delivered their testimony in a straightforward manner and did not appear to slant their testimony in favor of either Respondent or the Agency. The ALJ found the testimony of these three witnesses to be credible.

37) Respondent's memory regarding specific dates was not always accurate, and the forum has given little weight to his description of documents he gave Bayless on particular days during the investigation. In other respects, Respondent's testimony was credible, internally logical, and consistent with the testimony of other credible witnesses. The forum's decision in this matter is based largely on Respondent's testimony and admissions.

38) By the time of the hearing, the Agency had issued Urena a Notice of Intent to Assess Civil Penalties based in part on allegations that Urena improperly had supplied workers to Respondent. Urena had legal counsel with him while he testified, and testified by telephone. The forum has given little weight to Urena's testimony that he never entered into an agreement to supply any workers to Respondent. In part, that testimony was overly self-serving, given the pending charges. Moreover, Urena's testimony on this point was internally inconsistent -- he testified at times that he had no agreement to bring workers to Respondent; at other times, he testified he had satisfied Respondent's request that he furnish Respondent with a crew. Additionally, Urena's explanation of why he felt justified in keeping the $2000.00 Respondent paid him was unconvincing and somewhat contrived. For these reasons, the forum has not accepted Urena's testimony where it conflicted with other, more credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a farm/forest labor contractor doing business in the State of Oregon.

2) Urena solicited four workers to perform work on reforestation of lands for Respondent, and supplied the four workers to Respondent for that pur-

pose. Urena did not solicit or supply the four workers for an agreed remuneration or rate of pay.

3) Respondent and Urena mutually agreed that Urena would act on Respondent's behalf, subject to his control, in supplying the four workers to Respondent. Respondent had the right to control Urena's actions in supplying the workers.

4) Respondent did not examine or retain a copy of the farm/forest labor contractor's license that Urena was required to, but did not, have. Respondent knew or should have known that he was required to examine and retain a copy of the farm/forest labor contractor's license of any person who supplied workers to him on his behalf.

5) With regard to each of at least ten workers on the Malheur contract, Respondent failed to furnish the worker, at the time of hiring, recruiting, soliciting or supplying, a written statement of workers' rights that included all statutorily required information.

6) With regard to each of at least ten workers on the Malheur contract, Respondent failed to execute Form WH-153 or any written agreement incorporating the statutorily required information, at the time of hiring and prior to the worker performing work for Respondent on the contract.

7) Respondent knew or should have known that he was legally required to supply workers with written statements of their rights and to execute written agreements with the workers. Respondent's failure to take these actions was willful.

8) Respondent paid his employees on the Malheur contract directly, and was required to file his first CPR for the contract by June 2, 1998. Respondent filed no payroll records by that date.

9) Respondent knew or should have known that he was legally required to file timely CPRs. Respondent's failure to do so was willful.

10) Respondent was required to file another CPR for the Malheur contract by July 7, 1998. Respondent filed a CPR on July 2, 1998, and the Agency did not establish by a preponderance of the evidence that the CPR Respondent submitted did not contain all required information.

11) Respondent cooperated with the Agency's investigation and intends to comply with the requirements of ORS 658.440(1)(g) and OAR 839-015-360 in the future.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over this matter and Respondent pursuant to ORS 658.407 and ORS 658.501.

2) ORS 658.405 provides, in pertinent part:

> "'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 forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities or the production or harvesting of farm

products; or who recruits, solicits, supplies or employs workers to gather evergreen boughs, yew bark, bear grass, salal or ferns from public lands for sale or market prior to processing or manufacture; 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; or who bids or submits prices on contract offers for those activities; or who enters into a subcontract with another for any of those activities. * * *"

OAR 839-015-0004 provides, in pertinent part:

"(3) 'Farm labor contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the production or harvesting of farm products;

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the production or harvesting of farm products * * *

"* * * * *

"(4) 'Forest labor contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the forestation or reforestation of lands[.]"

At all material times, Respondent employed workers to perform labor for another to work in forestation or reforestation of lands pursuant to the USFS Malheur contract. Respondent was a farm labor contractor for purposes of ORS 658.405, a forest labor contractor for purposes of OAR 839-015-0004(4), and, at all material times, was a licensed farm/forest labor contractor.

3) Urena acted on Respondent's behalf in supplying him with four reforestation workers. In doing so, Urena acted as a farm/forest labor contractor.

4) ORS 658.437 provides, in pertinent part:

"(2) Prior to allowing work to begin on any contract or agreement with a farm labor contractor, the person to whom workers are to be provided, or the person's agent shall:

"(a) Examine the license or temporary permit of the farm labor contractor; and

"(b) Retain a copy of the license or temporary permit provided by the farm labor contractor pursuant to subsection (1)(b) of this section."

Respondent violated ORS 658.437(2) by failing to examine or retain Urena's license before Urena supplied him with workers.

5) ORS 658.440(1) provides, in relevant 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 the 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 child 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 chapters 654 and 656, ORS 658.405 to 658.503 and 658.830, the Service Contract Act (41 U.S.C. 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."

OAR 839-015-0310 provides:

"(1) Every Farm and Forest Labor Contractor must furnish each worker with a written statement of the worker's rights and remedies under the Worker's Compensation Law, the Farm and Forest Labor Contractor Law, and Federal Service Contracts Act, The Federal and Oregon Minimum Wage Laws, Oregon Wage Collection Laws, Unemployment Compensation Laws, and Civil Rights laws. The form must be written in English and in the language used by the contractor to communicate with the workers.

"(2) The form must be given to the workers at the time they are hired, recruited or solicited by the contractor or at the time they are supplied to another by the contractor, whichever occurs first.

"(3) The Commissioner has prepared Form WH-151 for use by contractors in complying with this rule. The form is in English and Spanish and is available at any office of the Bureau of Labor and Industries."

Respondent violated ORS 658.440(1)(f) and OAR 839-015-0310 by failing to furnish at least ten workers a written statement of rights

containing all of the information required by statute and administrative rule. Respondent's employee handbook does not satisfy the requirements of ORS 658.440(1)(f) both because it does not include all the required elements and because Respondent did not distribute a copy of it to each employee at the time of hiring, recruiting, soliciting, or supplying, whichever occurred first.

6) ORS 658.440(1) also provides, in relevant part:

> "Each person acting as a farm labor contractor shall:
>
> "* * * * *
>
> "(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 paragraph (f)(A) to (I) 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."

OAR 839-015-0360 provides:

> "(1) Farm and forest labor contractors are required to file information relating to work agreements between the farm and forest labor contractors and their workers with the bureau.
>
> "(2) The commissioner has developed Form WH-153 which, in conjunction with Form WH-151, Statement of Workers Rights and Remedies, can be used to comply with this rule. Farm and forest labor contractors may use any form for filing the information so long as it contains all the elements of Form WH-153 and Form WH-151.
>
> "(3) Farm and forest labor contractors must file the form or forms used to comply with this rule with the bureau at the same time that the contractors apply for a license renewal.
>
> "(4) Farm and forest labor contractors are required to furnish their workers with a written statement disclosing the terms and conditions of employment, including all the elements contained in Form WH-151 and if they employ workers, to execute a written agreement with their workers prior to the starting of work. The written agreement must provide for all the elements contained in Form WH-153. A copy of the agreement and the disclosure statement must be furnished to the workers in English and in any other language used to communicate with the workers. The disclosing statement must be provided to the workers at the time they are hired, recruited or solicited or at the time they are supplied to another by that contractor, whichever occurs first. Amended disclosure statements must be provided at any time any of the elements listed in the original statement change. A copy of the agreement must be furnished to workers prior to the workers starting work. Nothing in the written agreement relieves the contractor or any person for whom the contractor is acting of compliance with any representation made by the contractor in recruiting the workers."

Respondent violated ORS 658.440(1)(g) and OAR 839-015-360(4) by failing to execute written agreements with at least ten workers at the time of hiring and prior to the workers performing work on Respondent's contracts. Respondent's employee handbook does not satisfy the requirements of ORS 658.440(1)(g) both because it is not a written agreement contractually binding on Respondent and because it does not include all the required elements.

7) 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:
>
> "* * * * *
>
> "(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 the 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 839-015-0300 provides, in pertinent part:

> "(1) Forest labor contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or the contractor's agent pays employees directly as follows:
>
> "(a) 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;
>
> "(b) 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 have been issued as of the time of the report;
>
> "* * * * *
>
> "(2) The certified true copy of payroll records may be submitted on Form WH-141. This form is available to any interested person. Any person may copy this form or use a similar form provided such form contains all the elements of Form WH-141."

Respondent violated ORS 658.417 and OAR 839-015-0300 by failing to submit a certified true payroll record to the Agency within 35 days from the date Respondent began work on the Malheur contract (April 27, 1998). Respondent was required to submit another CPR by July 7, 1998, and did submit a CPR on July 2, 1998. The Agency did not prove by a preponderance of the evidence that the CPR Respondent submitted on July 2, 1998, did not include all required information.

8) The actions, inactions, and statements of Alejandro Corona and Seraphim Corona properly are imputed to Respondent because they

were made within the course and scope of their jobs as Respondent's supervisors.

9) 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), (e). With regard to the magnitude of the penalties, OAR 839-015-0510 provides:

> "(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 violations 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.
>
> "(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other person in violation of any statute or rule.
>
> "(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."

The assessment of the civil penalties specified in the Order below is an appropriate exercise of the Commissioner's authority.

OPINION

Failure to Inspect Urena's Farm/Forest Labor Contractor's License

1. Violation

The Agency claims Respondent violated ORS 658.437(2) by failing to examine and retain a copy of the farm/forest labor contractor's license that the Agency alleges Urena was required to have. The Agency argues that Urena acted as a farm/forest labor contractor by supplying Respondent with four workers: Juan Manuel Flores Rivera, Pedro Jimenez, Arturo Varela, and Gerardo Martinez Rangel. The evidence is clear that Urena did supply these four workers to Respondent to perform reforestation work on the Malheur contract -- he brought those workers from another location to John Day for the specific purpose of working for Respondent. The question in this case is whether the circumstances surrounding Urena's act of supplying workers to Respondent brought him within the definition of a farm/forest labor contractor.

The statute defining farm labor contractor includes two provisions regarding persons who supply other persons with farm workers. The first clause states that 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 forestation or reforestation of lands" is a farm labor contractor. The second clause states that any person "who recruits, solicits, supplies or employs workers on behalf of an employer engaged in" forestation or reforestation activities also falls within the definition of a farm labor contractor. ORS 658.405(1).

These clauses establish two circumstances under which the act of supplying workers makes a person a farm/forest labor contractor. First, if the person supplies workers "for an agreed remuneration or rate of pay," he or she is such a contractor and must be licensed. In this case, Respondent did give Urena $2000.00, of which Urena retained $1544.00. Based on Respondent's credible testimony, the forum finds that Respondent intended Urena to use the $2000.00 to give living expense advances to workers, a common practice for Respondent and his supervisors. Under these circumstances, the forum will not infer from the fact that Urena kept the bulk of the $2000.00 that Respondent paid him for supplying the workers. Likewise, this forum will not infer that, by giving a supervisor money to advance to workers for living expenses, Respondent paid the supervisor for the act of supplying workers. Nor will the forum draw that inference from the mere fact that Respondent paid his supervisors higher wages than other workers, given that the supervisors had more responsibilities than Respondent's other employees.

The Agency notes correctly that the second clause of the statute does not require an agreed remuneration or rate of pay for the act of supplying workers. The second clause does, however, contain an element not required under the first clause -- the act of supplying workers must be done "on behalf of an employer" engaged in reforestation to bring the supplier within the definition of farm/forest labor contractor.[4] To determine whether Urena's act of supplying workers made him a farm/forest labor contractor, this forum must decide whether Urena supplied the workers "on behalf of" Respondent.[5]

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[4]If the second clause of the statute did not contain this additional element, *all* persons who supply workers to perform reforestation work would be farm/forest labor contractors. That interpretation would render the first clause of the statute (that makes suppliers of workers farm/forest labor contractors *only if* they are paid for supplying the workers) meaningless. "[W]henever possible, [a forum] must construe different provisions of a legislative enactment so as to give effect to each provision." *Owens v. Maass*, 323 Or 430, 918 P2d 808 (1996). In addition, in interpreting a statute, this forum must not "omit what the legislature has inserted." *See Carlson v. Myers*, 327 Or 213, 223, 959 P2d 31 (1998). For these reasons, the phrase "on behalf of an employer" cannot be overlooked.

[5]This forum has not previously been called upon to discuss the significance of these two separate clauses regarding the recruitment, solicitation, supplying, and employment of workers. The Commissioner's earlier decisions construing this statute have related to the meaning of the

One person acts on "behalf of" another if he or she acts as the other's agent. *Cf. Larrison v. Moving Floors, Inc.*, 127 Or App 720, 724, 873 P2d 1092 (1994) (discussing existence of agency relationship in terms of whether one party was authorized to act on the other's "behalf"); *Gaha v. Taylor-Johnson Dodge, Inc.*, 53 Or App 467, 632 P2d 483 (1981) (same). Consequently, to establish that Urena was a farm/forest labor contractor, the Agency had to prove that in supplying the four workers to Respondent, Urena acted as Respondent's agent.

The Oregon Court of Appeals has defined agency as follows:

> "Agency is the fiduciary relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.
>
> "An agency relationship may be evidenced by an express agreement between the parties, or it may be implied from the circumstances and conduct of the parties. In all cases, however, both the principal's consent to the agency and the principal's right to control the agent are essential elements of the relationship."

Larrison, 127 Or App at 723 (citations and internal quotation marks omitted); *see also Gaha,* 632 P2d at 486 (1981) ("In order to establish an agency relationship, there need not be a formal contract, but the person for whom the service is performed must consent to the existence of the relationship and must have the right of control").

Under this definition, the Agency had to prove three things to establish that Urena acted as Respondent's agent: 1) that Respondent consented that Urena should act on his behalf; 2) that Respondent had the right to control Urena's actions; and 3) that Urena agreed to act on Respondent's behalf. In this case, the ALJ concluded that at least the second element had not been established because she found "no evidence in the record from which [she] reasonably [could] infer that Respondent had the right to restrain or direct Urena's actions in supplying the four workers." (Proposed Order at 25).

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terms "recruit" and "solicit," not to other portions of the statutory language. *See*, *e.g.*, *In the Matter of Joann West*, 13 BOLI 233, 244 (1994) (discussing cases). Perhaps for this reason, the forum has used the following shorthand to describe the acts that qualify a person as a farm/forest labor contractor: "A person acts as a farm labor contractor if the person 'recruits, solicits, supplies or employs' a worker for the purpose of forestation or reforestation of lands or the harvesting or production of farm products." *Id.* That shorthand has the unfortunate effect of appearing to eliminate the other elements the Agency must prove to establish that a person is a farm/forest labor contractor. To the extent *that In the Matter of Joann West* and any other cases imply that mere recruitment, solicitation, supplying, or employment of workers, without more, qualifies a person as a farm/forest labor contractor, they are overruled.

In its exceptions to the Proposed Order, the Agency argues that Urena already was acting as Respondent's agent when he brought the four workers to John Day. Specifically, the Agency points out that "[a]t the time Urena offered to supply four workers to Respondent he had been hired by Respondent." (Agency Exceptions at 3; footnote omitted). Upon further examination of the evidence, the forum agrees.

One of the regular duties of Respondent's supervisor Alejandro Corona was to locate and hire new workers when Respondent needed them. Here, it appears that Urena assumed a similar responsibility. On May 15, 1998 -- *before* Urena supplied him with the four workers -- Respondent agreed to employ Urena as a work crew supervisor and gave him $2000.00 to use for worker advances. Only after he had received the $2000.00 and knew he would be supervising any people he brought to Respondent's job site did Urena bring the workers to John Day.[6] The forum infers from these facts that Urena was acting as Respondent's agent when he supplied the workers -- Respondent and Urena mutually agreed that Urena should act on Respondent's behalf, and Respondent had the right to control Urena's actions in supplying the workers.[7] By supplying the workers on Respondent's behalf, Urena acted as a farm/forest labor contractor and was required to have the appropriate license and endorsement. ORS 658.405(1); ORS 658.410. Respondent violated ORS 658.437(2) by having Urena supply workers on his behalf without first examining and retaining a copy of such a license.

2. Civil Penalty

The Agency seeks a civil penalty of $2000.00 for the single violation of ORS 658.437(2), the maximum penalty allowed by ORS 658.453(1)(f). In determining the amount of a penalty, this forum considers all the facts of the case, the seriousness of the violation, and any mitigating and aggravating circumstances. OAR 839-015-0510, OAR 839-015-0512(1). The only aggravating factor in this case is that Respondent is a licensed contractor and should have known of the requirement to examine the farm/forest labor contractor's license of any person who supplied workers on his behalf. Respondent did, however, cooperate with the Agency's investigation and has no prior violations on his record. After considering the circumstances of the case and other cases in which this forum has imposed penalties for violation of ORS 658.437(2), the forum finds a **$500.00** penalty appropriate.[8]

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[6]Findings of Fact -- the Merits 6 through 9 have been expanded to make these facts more clear. Ultimate Finding of Fact 3 and Conclusions of Law 3 and 4 also have been amended accordingly.

[7]To some degree, Respondent exercised that right through his agent, Seraphim Corona, who coordinated with Respondent regarding such matters as the organization of work and the date and time at which Urena would supply the workers.

[8]*See In the Matter of Melvin Babb*, 14 BOLI 230, 238-39 (1995) ($500.00 penalty for single violation of ORS 658.437(2) where no mitigating or aggravating factors were found); *In the Matter of Boyd Yoder*, 12 BOLI 223, 231-232 (1994) (same).

Failure to Provide Workers with Written Statements of Rights

1. Violations

Respondent testified that he employed at least ten workers on the Malheur contract, and that fact also may be inferred from Respondent's amended answer. Respondent admitted at hearing that he had not provided Form WH-151 to any of those workers. Nonetheless, Respondent argued that he had satisfied all the requirements of ORS 658.440(1)(f) by giving his workers copies of an employee handbook in lieu of Form WH-151.

Respondent's argument fails for two reasons. First, Respondent did not provide each worker with a handbook "at the time of hiring, recruiting, soliciting or supplying, whichever occurs first," but merely made those handbooks available in the company van once the workers were being transported to or around the job site. Second, the handbook did not contain all information required by ORS 658.440(1), including: the method of computing the rate of compensation; the name and address of the owner of the operations where workers would be performing any particular job; the starting date of the contract; the expected length of the season or period of employment; or the workers' rights and remedies under ORS Chapter 654. Moreover, because Respondent expressly reserved the right to change or revoke the policies outlined in the employee handbook, that handbook does not qualify as a statement of workers' legal rights. By failing to provide at least ten workers with a written statement of rights containing all statutorily required information, Respondent committed ten violations of ORS 658.440(1)(f).

As his fourth affirmative defense, Respondent alleged that the penalties for any violations of ORS 658.440(1)(f) should be suspended because the violations were corrected within 15 days of the date on which Respondent was put on notice of them. This defense fails for two reasons. First, even if Respondent promptly had complied with the law after the investigation was initiated, the forum still would impose penalties for the initial failure to comply. *Cf. In the Matter of Andres Bermudez*, 16 BOLI 229, 242-43, 245 (1997) (penalties assessed for multiple violations of ORS 658.440(1)(f) despite the fact that Respondent "furnished the written statements * * * [to] the workers within at most 48 hours after they had begun work"). Second, the evidence established that, although Respondent started using Forms WH-151 and WH-153 after Bayless told him that was advisable, he used obsolete forms that contained inaccurate information.[9]

2. Civil penalties

The Agency has asked the forum to impose a civil penalty of $750.00 for each of the ten violations of ORS 658.440(1)(f). In determining the appropriate amount of civil penalties, this forum considers the seriousness and magnitude of the violation. *See* OAR 839-015-0510(1)(c). In this

[9]Respondent's similar third and fifth affirmative defense (to the charged violations of ORS 658.437(2) and ORS 658.440(1)(g)) fail for the same reasons.

case, the violations are serious because the workers were not provided with some of the information required by statute. In addition, Respondent knew or should have known of the violations because he was a licensed farm/forest labor contractor and regularly received information from the Agency, including Form WH-151, that explained his legal obligations. There are mitigating factors in this case -- Respondent used an employee handbook that contained some of the statutorily required information; Respondent cooperated with the Agency's investigation; Respondent has no previous violations on his record; and Respondent intends to comply with ORS 658.440(1)(f) in the future.

Under the circumstances, and after considering penalties this forum previously has imposed for violations of ORS 658.440(1)(f),[10] the forum finds that a penalty of **$500.00** for each of the ten violations is appropriate.[11]

Failure to Execute Written Agreements with Workers

1. Violations

ORS 658.440(1)(f), discussed above, requires farm/forest labor contractors to provide workers with certain information. Subsection (g) of the statute imposes an additional requirement -- it orders farm/forest labor contractors to enter binding written agreements with their workers that spell out the terms and conditions of employment. Those agreements protect workers by providing concrete evidence of the terms and conditions of employment -- including the hourly wage rate -- to which farm/forest labor contractor have bound themselves. By executing written agreements with their workers, farm/forest labor contractors also provide themselves with a means of defending against false wage claims. *See In the Matter of Paul A. Washburn*, 17 BOLI 212, 223 (1998).

Respondent admitted in his answer that he failed to execute written agreements with any of the workers on the Malheur contract. Respondent also admitted in his testimony that he had not executed written agreements with his workers. Respondent's employee handbook does not satisfy the requirements of ORS 658.440(1)(g) for two reasons: 1) it does not contain all the information required by statute;[12] and 2) it is not a binding agreement executed by Respondent

[10] *See*, *e.g.*, *In the Matter of Andres Bermudez*, 16 BOLI 229, 242-43, 245 (1997) ($250.00 penalty assessed for each of 41 violations of ORS 658.440(1)(f) where both aggravating and mitigating factors were found, including the fact that Respondent "furnished the written statements * * * [to] the workers within at most 48 hours after they had begun work"); *In the Matter of Manuel Galan*, 15 BOLI 106, 138 (1996) (assessing $1000.00 penalty for each of 14 violations of ORS 658.440(1)(f) where no mitigating factors were found), *aff'd without opinion*, *Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, *rev den* 326 Or 57, 944 P2d 947 (1997).

[11] The forum's findings regarding the appropriate magnitude of penalties in this case dispose of Respondent's second affirmative defense.

[12] The same missing information that makes the handbook insufficient to meet the requirements of ORS 658.440(1)(f) also makes it deficient for purposes of ORS 658.440(1)(g).

and his workers. By failing to execute a binding written agreement with at least ten workers on the Malheur contract, Respondent committed ten violations of ORS 658.440(1)(g).

2. Civil penalties

The Agency requests a $750.00 penalty for each of the ten violations of ORS 658.440(1)(g). The forum agrees with the suggested magnitude of the penalty for the following reasons. First, a farm/forest labor contractor's complete failure to provide workers with a binding written agreement is extremely serious. *See In the Matter of Paul A. Washburn*, 17 BOLI at 225. The violation of ORS 658.440(1)(g) goes to "the heart of farm labor contractor statutes" because it denies workers the ability to protect themselves in the event of a dispute. *Id.* The seriousness of the violations weighs in favor of a heavy civil penalty. Second, as noted above, the forum also has found that Respondent knew or should have known of the violations. On the other hand, Respondent was cooperative with the investigation and intends to comply with the law in the future. These violations, however, remain more serious than Respondent's violations of ORS 658.440(1)(f) because Respondent did not provide his workers with *any* sort of binding written agreement, not even one that contained only some of the statutorily required terms. For that reason, and after considering the penalties imposed in other cases, the forum finds that a penalty of **$750.00** for each of the ten violations of ORS 658.440(1)(g) is appropriate.[13]

Failure to File Certified True Payroll Reports

1. Alleged violations

The evidence clearly establishes both that Respondent's first CPR was due on June 2, 1998, and that he filed no payroll records by that date. Those facts establish a single violation of ORS 658.417(3) and OAR 839-015-0300. The forum's finding that the Agency did not extend the deadline by which the CPR was to be filed disposes of Respondent's first affirmative defense.

Respondent was required to file a second CPR by July 7, 1998, pursuant to OAR 839-015-0300. Respondent filed a CPR on July 2, 1998. As stated in Proposed Finding of Fact -- the Merits 29, *supra*, it is not clear whether there is a copy of that

[13] *See*, *e.g.*, *In the Matter of Paul A. Washburn*, 17 BOLI at 225-26 (imposing $750 penalty for each violation of ORS 658.440(1)(g)). Respondent argues that he can be fined only a total of $2000.00 for the ten violations of ORS 658.440(1)(g) because those violations do not fall within the definition of "repeated violations" found in OAR 839-015-0512(2). Respondent is mistaken. The Agency's rules provide that "[e]ach violation is a separate and distinct offense." OAR 839-015-0507. A separate penalty may be imposed for each violation. *See*, *e.g.*, *In the Matter of Andres Bermudez*, 16 BOLI at 242-43, 245 ($250.00 penalty assessed for each of 41 violations of ORS 658.440(1)(f)). The only effect of OAR 839-015-0512(1) is to limit the penalty for *each* violation to no more than $2000.00. OAR 839-015-0512(2), upon which Respondent relies, applies only to penalties assessed for acting as a farm or forest labor contractor without a license, and sets only *minimum*, not maximum, penalties for such violations.

document in the record. Although Bayless testified that the CPR Respondent submitted on July 2, 1998, did not contain all the required elements of Form WH-141, no copy of that form is in the record, and Bayless did not describe precisely what information the document requires farm/forest labor contractors to include in their CPRs. In sum, there are proof problems regarding both the content of the CPR Respondent submitted and the information that CPR was legally required to include. The forum will not conclude that Respondent violated the law based solely on Bayless's conclusory testimony to that effect. The Agency did not prove by a preponderance of the evidence that the CPR Respondent submitted on July 2, 1998, did not contain all required information, and the second charged violation of ORS 658.417(3) is hereby dismissed.

Respondent's sixth affirmative defense is that any violations of ORS 658.417(3) should be suspended, "as the matter for which the civil penalty was assessed was corrected within 15 days of the time Fery Farm received notice of violation." Again, this forum has not previously suspended, and generally will not suspend, penalties for violations of the farm/forest labor statutes merely because they were corrected after the Agency began an investigation. Moreover, there is no persuasive evidence in the record to support Respondent's claim that he submitted a CPR that included all required information within 15 days of June 2, 1998.

2. Civil penalty

Respondent knew he was required to file a CPR for the USFS contract by June 2, 1998, and failed to do so. The violation is aggravated by the fact that several workers claimed they were due additional wages, and Respondent's difficulty with keeping his payroll up to date may have contributed to those claims. The violation is Respondent's first, however, and in light of other recent orders related to violations of ORS 658.417(3), the forum finds that a civil penalty of **$500.00** is more appropriate than the $1000.00 requested by the Agency.[14]

The Agency's Exceptions

The Agency's exceptions focus on the ALJ's conclusion that Urena did not act as a farm/forest labor contractor in supplying four workers to Respondent. After further consideration, the forum agrees with the Agency's argument that Urena supplied the workers on Respondent's behalf, thereby acting as a farm/forest labor contractor whose license Respondent was required to examine. The Findings of Fact, Conclusions of Law, and Opinion section of this Order have been amended accordingly.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and in payment for the penalties assessed as a result of Respondent's violations

[14] *See, e.g., In the Matter of Tolya Meneyev*, 14 BOLI 6, 15-16 (1995) ($500 for the first violation, consisting of late submission of certified payroll records ["CPRs"], and $1,000 for the second violation, consisting of failure to submit CPRs, where Respondent knew of his obligation to submit CPRs and was twice reminded by the Agency to submit them).

of ORS 658.417(3), ORS 658.440(1)(f), and ORS 658.440(1)(g), Respondent Thomas L. Fery, dba Tom Fery Farm, 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 **THIRTEEN THOUSAND FIVE HUNDRED DOLLARS** ($13,500.00), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondent complies with the Final Order. This assessment is made as civil penalty against Respondent as follows: $500.00 for each of ten violations of ORS 658.440(1)(f); $750.00 for each of ten violations of ORS 658.440(1)(g); $500.00 for the single violation of ORS 658.417(3); and $500.00 for the single violation of ORS 658.437(2).

In the Matter of
CATALOGFINDER, INC.
Respondent.

Case Number 10-99
Final Order of Commissioner
Jack Roberts
Issued May 7, 1999

SYNOPSIS

Where Respondent submitted an answer to the Order of Determination and requested a hearing, but failed to appear at the hearing, the Commissioner found Respondent in default of the charges set forth in the Order of Determination. The Order of Determination alleged that Intelligent Catalogs, Inc., failed to pay 15 wage claimants all wages due upon termination, in violation of ORS 652.140, and that Respondent was liable to pay the wages as a successor employer and a lessee or purchaser of Intelligent Catalogs, Inc. The Agency established a prima facie case of unpaid wages for four of the 15 claimants, and the Commissioner held that Respondent was liable to pay those wages, both as a successor employer and a lessee or purchaser of Intelligent Catalogs, Inc., pursuant to ORS 652.310. The Commissioner ordered Respondent to pay four Claimants $27,218.49 in unpaid wages due upon termination, in violation of ORS 652.140(2). The Order of Determination also alleged that $24,081 was paid out to the claimants by the Wage Security Fund, pursuant to ORS 652.414, and the Commissioner ordered Respondent to repay this sum, along with a 25 percent penalty of $6,020.25, pursuant to ORS 652.414(2). ORS 652.140(2), 652.310, 652.414.

The above-entitled contested case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries (BOLI) for the State of Oregon. The hearing was held on January 26, 1999, at the offices of the Oregon Bureau of Labor and Industries, 165 E. 7th, Room 220, 165 E. Seventh, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by

David Gerstenfeld, an employee of the Agency. Respondent Catalogfinder, Inc., was not present after due notice and was in default.

The Agency called the following witnesses: Fannilee Lynne Sheppard, Wage and Hour Division Compliance Specialist; Janetta A.M. Gallagher, Anthony Vos, Benjamin Moseley, and Carolyn L. Higgins, Claimants; and Sheriss M. Corliss, Respondent's former employee.

Administrative exhibits X-1 to X-18 and Agency exhibits A-1 through A-34 were offered and received into evidence. The record closed on January 26, 1999.

Having fully considered the entire record in this matter, I, Jack 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 April 6, 1998, Claimants Marie Lynn Ehalt, Aaron W. Foster, Janetta M. Gallagher, Ian J. Potts, John Procopio, and Anthony Vos filed wage claims with the Agency. They alleged that they had been employed by Intelligent Catalogs, Inc. (hereinafter "ICI"), and that ICI had failed to pay wages earned and due to them. At the same time that they filed their wage claims, Claimants assigned to the Commissioner of Labor, in trust for Claimants, all wages due from ICI.

2) On April 7, 1998, Claimant Eathan M. Mertz filed a wage claim with the Agency. He alleged that he had been employed by ICI, and that ICI had failed to pay wages earned and due to him. At the same time that he filed his wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from ICI.

3) On April 8, 1998, Claimants Carolyn L. Higgins and Lowell G. Swartz filed wage claims with the Agency. They alleged that they had been employed by ICI, and that ICI had failed to pay wages earned and due to them. At the same time that they filed their wage claims, Claimants assigned to the Commissioner of Labor, in trust for Claimants, all wages due from ICI.

4) On April 9, 1998, Claimants Shawn S. Kilger, Mark R. Miner, and Janetta M. Gallagher filed wage claims with the Agency. They alleged that they had been employed by ICI, and that ICI had failed to pay wages earned and due to them. At the same time that they filed their wage claims, Claimants assigned to the Commissioner of Labor, in trust for Claimants, all wages due from ICI.

5) On April 13, 1998, Claimant Kerry P. Stapleton filed a wage claim with the Agency. He alleged that he had been employed by ICI, and that ICI had failed to pay wages earned and due to him. At the same time that he filed his wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from ICI.

6) On May 29, 1998, Claimant Benjamin G. Moseley filed a wage claim with the Agency. He alleged that he had been employed by ICI, and that ICI had failed to pay wages earned and due to him. At the same time that he filed his wage claim,

Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from ICI.

7) On July 2, 1998, Claimant Diaricou C. Doucoure filed a wage claim with the Agency. He alleged that he had been employed by ICI, and that ICI had failed to pay wages earned and due to him. At the same time that he filed his wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from ICI.

8) On July 14, 1998, Claimant Anna M. Hults filed a wage claim with the Agency. She alleged that she had been employed by ICI, and that ICI had failed to pay wages earned and due to her. At the same time that she filed her wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from ICI.

9) On July 13, 1998, the Agency issued an Order of Determination based upon the wage claims filed by 13 of the Claimants and Agency Compliance Specialist Sheppard's investigation. The Order named Catalogfinder, Inc., an Oregon corporation, as Respondent. Specifically, Catalogfinder was named as Claimants' successor employer and successor in interest to ICI. On July 14, 1998, the Agency served Russell Bevans, Respondent's registered agent, with the Order of Determination. The Order of Determination alleged that Respondent owed a total of $75,548.54 in unpaid wages to the 13 Claimants listed in Table 1[1] based on work Claimants had performed for ICI and $22,962 to the Commissioner based on sums paid to the Claimants from the Wage Security Fund, pursuant to the provisions of ORS 652.414. 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.

10) On August 3, 1998, Respondent, through counsel, filed an answer to the Order of Determination and requested a hearing. In the answer, Respondent raised the following affirmative defenses: (a) That ICI was financially unable to pay the wages at the time they accrued to the Claimants, in part due to acts of sabotage, conversion of ICI assets and other wrongful activity of the Claimants; (b) That the Final Order on Default against ICI based on the same wage claims should be set aside for good cause; and (c) That Respondent was not a successor in interest to ICI.

11) On October 8, 1998, 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 839-050-0000 to 839-050-0440.

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[1]Ed. Note: In the final order as initially published, Table 1 was located in this footnote. For ease of formatting, the table has been relocated to the next page of this document.

TABLE 1

NAME	Dates Worked	Wage Rate	Amt. Earned	Amt. Paid by ICI	Amt. Owed	Amt. Paid by Wage Security Fund
L.M. Ehalt	2/2/98-3/30/98	$30,000/yr.	$5,140.36 incl. $525 commissions	$550	$4,590.36	$2,000
A. Foster	1/2/98-3/30/98	$2,400/mo	$9,526.17 (includes one month vac.)	$600	$8,926.17	$2,000
J. Gallagher	2/1/98-3/30/98	$2,500/mo	$9,423.07 incl. $2,000 commissions)	$1,300	$8,123.07	$2,000
C. Higgins	1/6/98-3/30/98	$2,000/mo	$5,323.09	$350	$4,973.09	$2,000
S. Kilger	2/1/98-3/30/98	$1,500/mo	$2,953.83	$500	$2,453.83	$2,000
E. Mertz	1/1/98-3/30/98	$2,300/mo	$8,529.23 (incl. one month vac.)	$600	$8,529.23	$2,000
M. Miner	2/1/98-3/31/98	$3,000/mo	$6,000	$800	$5,200	$2,000
B. Moseley	1/1/98-3/31/98	$2,300/mo	$6,900	$500	$6,400	$2,000
I. Potts	1/12/98-3/31/98	$1,500/mo	$3,830.76	$0	$3,830.76	$2,000
J. Procopio	2/2/98-3/31/98	$2,000/mo	$3,753.86	$550	$3,203.86	$2,000
K. Stapleton	1/2/98-3/20/98	$6.00/hr.	$432	$200	$232	$232
L.Swartz	1/1/98-3/27/98	$6.00/hr.	$840	$100	$740	$740
A. Vos	1/2/98-3/30/98	$5,000/mo	$19,846.17 (incl. one month vac.)	$1,500	$18,346.17	$2,000

TABLE 2

NAME	Dates Worked	Wage Rate	Amt. Earned	Amt. Paid by ICI	Amt. Owed	Amt. Paid by Wage Security Fund
D. Doucoure	1/1/98 – 3/31/98	$5,000/mo.	$15,000	$0	15,000	$2,000
A. Hults	10/1/97 – 1/5/98	1 mo. @ $1,200; 2 mos., 3 days @ $27,500/yr	$6,100.63	$3,700	$2,400.63	$0

12) On October 29, 1998, the Agency filed a motion to amend the Order of Determination. The motion sought to change two dates from "on" to "on or about" those specific dates, add the two new wage claimants listed in Table 2,[1] increase the amount of unpaid wages sought to $92,949.17, increase the amount of reimbursement sought to the Wage Security Fund to $24,081, and request a 25% penalty of $6,020.25 on the sum of $24,081 pursuant to ORS 652.414(2). It also amended the amount paid out by the Wage Security Fund to Claimants Kilger (reduced from $2,000 to $1,730), Potts (reduced from $2,000 to $1,799), Stapleton (reduced from $232 to $144), and Swartz (reduced from $740 to $408). The ALJ gave Respondent until November 9, 1998, to respond to the motion. Respondent did not file a response to the Agency's motion, and on November 16, 1998, the ALJ granted the Agency's motion to amend in its entirety.

13) On November 16, 1998, the Agency filed a motion to strike Respondent's first two affirmative defenses of financial inability to pay and that the Final Order of Default against ICI should be set aside. In the alternative, the Agency sought summary judgment on those issues. The ALJ gave Respondent until November 23, 1998, to respond to the motion. Respondent did not file a response to the Agency's motion, and on December 7, 1998, the ALJ granted the Agency's motion to strike in its entirety.

14) On November 16, 1998, the ALJ issued a discovery order directing each participant 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 839-050-0210(1). The summaries were due by January 15, 1999. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary.

15) On November 19, 1998, Nick Rauch, Respondent's counsel, provided the forum with a document entitled "Substitution of Attorneys" in which he formally withdrew as attorney of record and substituted Gary Williams as attorney of record. Rauch signed the document, but Williams did not.

[1] In the original final order, Table 2 was located here. For ease of formatting, the table has been inserted in the prior page.

16) On November 25, 1998, the Agency filed a motion for a discovery order requesting documents relevant to the Agency's allegation that Respondent was a successor in interest to ICI. On December 3, 1998, the ALJ ruled that Respondent had until December 10, 1998 to respond to the motion. Respondent did not file a response to the Agency's motion, and on December 15, 1998, the ALJ issued a discovery order requiring Respondent to provide all requested documents no later than December 29, 1998.

17) On December 7, 1998, the ALJ sent a letter to all participants stating that the forum had received Mr. Rauch's "Substitution of Attorneys" form, that Mr. Williams had not yet made an appearance before the forum, and that a corporation was required to be represented by counsel at all stages during the proceeding. The forum asked that Mr. Williams contact the forum as soon as possible if he was in fact Respondent's attorney of record. The forum received no further communications from either Mr. Rauch or Mr. Williams.

18) On January 15, 1999, the Agency submitted its Case Summary. The Agency also served its Case Summary on Bevans, Respondent's registered agent.

19) At the start of the hearing, Respondent did not appear and had not announced that it would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not appear or contact the hearings unit by telephone, the ALJ declared Respondent in default at 9:32 a.m. and commenced the hearing.

20) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

21) On February 22, 1999, the ALJ issued a proposed order. Included in the proposed order was an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. The Agency timely filed exceptions on February 26, 1999. Respondent did not file exceptions. The forum has addressed the Agency's exceptions in the Findings of Fact -- The Merits and Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, ICI was a corporate employer that engaged the personal services of one or more persons.

2) During all times material herein, Deborah Marlow was the corporate president of ICI and was in charge of ICI's daily operations.

3) Claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Hults, Kilger, Mertz, Miner, Moseley, Potts, Procopio, Stapleton, Swartz, and Vos were all employed by ICI.

4) ICI's business involved operating an interactive internet website related to the online catalog industry. Specifically, ICI contracted with catalog companies to develop and place on its website their entire online catalogs. ICI also provided "the largest, verifiable, online, yellow-page style catalog directory in the world" and sold display listings in its directory for an annual fee of $650.

5) ICI commenced operations in September 1997, when it launched its first internet website. The data base architecture for ICI's website was designed by Vos. ICI's website location was "http:\\www.CatalogFinder.com". ICI was physically located in an office building at 392 East Third Avenue, Eugene, Oregon.

6) Claimant Gallagher was employed by ICI between 2/1/98 and 3/30/98 as a senior sales executive. Gallagher and ICI had a written employment contract in which ICI agreed to pay her an annual salary of $30,000, with commissions of 5% for each online catalog sold and 10% for each annual listing sold. Commissions were due and payable following receipt of customer's payment. Gallagher was expected to work "40+" hours per week for her salary. She worked 60-65 hours per week for ICI during her employment. She voluntarily quit on 3/30/98. During her employment, she earned $4923.07 in wages and earned $2,000 in commissions for which ICI had received customer payment. ICI paid her a total of $1300.

7) Claimant Moseley was employed by ICI between 1/1/98 and 3/30/98 as a financial assistant to Doucoure. Moseley and ICI had an employment contract in which ICI agreed to pay Moseley a salary of $2,300/mo. Moseley was expected to work "40" hours per week for his salary. He worked at least 40 hours a week for ICI until he voluntarily quit on 3/30/98. During his employment, he earned $6,776.16 in wages. ICI paid him a total of $500.

8) Claimant Higgins was employed by ICI between 1/6/98 and 3/30/98 as receptionist/office manager. Higgins and ICI agreed that Higgins would be paid a salary of $2,000/mo. Higgins was expected to work "40" hours per week for her salary. She worked at least 40 hours a week for ICI until she voluntarily quit on 3/30/98. During her employment, she earned $5,323.09 in wages. ICI paid her a total of $350.

9) Claimant Vos was employed by ICI between 1/2/98 and 3/30/98 as director of technology. Vos and ICI had a written employment agreement (entitled "Employment Offer") in which ICI agreed to pay Vos a salary of $60,000/yr. Pursuant to the written employment agreement, Vos was entitled to one month of vacation pay, effective 1/2/98. He was expected to work "over 40" hours per week for his salary. He worked 50-70 hours a week for ICI until he voluntarily quit on 3/30/98. He did not take any vacation between 1/2/98 and 3/30/98. During this time period,[2] he earned $14,846.17 in wages and accrued $5,000 in unused vacation benefits. ICI paid him a total of $1500.

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[2]Vos began working for ICI at the end of July 1997, but is only claiming unpaid wages for 1/2/98-3/30/98.

10) At the time Claimants Gallagher, Higgins, Moseley, and Vos quit, Respondent owed them the following amounts in unpaid wages: Gallagher: $5,623.07;[3] Higgins: $4,973.09; Moseley: $6,276.16; and Vos: $18,346.17.[4]

11) During the hearing, Sheppard testified that she had sent notices of claims to Respondent and that she had spoken to Deborah Marlow, ICI's corporate president, Rene Vishney, ICI's corporate secretary, and Russell Bevans, ICI's attorney, about the wage claims during her investigation. Sheppard testified that Marlow, Vishney, and Bevans acknowledged that wages hadn't been paid to the claimants and they did not contest the amount of wages earned by the employees.[5]

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[3]Gallagher's claim includes $2,000 in earned, unpaid commissions. It does not include $2500 in vacation benefits because of a defect in the pleadings. Specifically, the basis for that sum is not specifically pleaded in the original or Amended Orders of Determination, although the sum of $2500 appears to have been added to the wages and commission to arrive at the gross total of $9,423.07 and is mentioned in her wage claim.

[4]Vos' claim includes $5,000 in accrued, unused vacation benefits.

[5]Sheppard's testimony, in pertinent part, was as follows:

> Q. "When you were speaking to Deborah Marlow, Rene Vishney, or Russell Bevans, did you discuss the merits of the wage claims?"
>
> A. "Yes. I discussed whether the people had worked for them and whether they were owed the wages. There was acknowledgment that these people had worked for ICI. There was acknowledgment that there were probably wages owed. * * * "
>
> " * * * "
>
> Q. "Did any of them ever contest the amount of wages that were earned by the employees?"
>
> A. "Never."
>
> Q. "Did any of them ever contest that the wages had not been paid to these employees?"
>
> A. "No, they acknowledged the wages hadn't been paid. They described to me that they had reduced their wages or not had not been able to pay wages during the first three months of 1998."
>
> " * * * "
>
> Q. "You talked about interviewing the claimants. Did you interview all the claimants?"
>
> A. "Yes, I made at least telephone contact, telephone interviews with all the claimants."
>
> Q. "Did you have their wage claims when you contacted them?"
>
> A. "Yes."
>
> Q. "Did you speak with them individually?"
>
> A. "Yes."
>
> Q. "When you spoke with them, did you go over all the information on the wage claims as far as the periods of time they had worked and how much they were saying their salary or wage per hour was, to verify that was in fact correct?"

12) Claimants Doucoure, Ehalt, Foster, Kilger, Mertz, Miner, Potts, and Procopio all voluntarily quit working for ICI on or about March 30, 1998.[6]

13) The only evidence in the record showing the last dates of employment of claimants Swartz, Stapleton, and Hults are unsworn written statements submitted by these claimants in conjunction with their wage claims and the testimony of Sheppard.

14) The only evidence in the record showing the initial dates of employment of claimants Doucoure, Ehalt, Foster, Kilger, Miner, Potts, Procopio, Swartz, Stapleton, and Hults are unsworn written statements submitted by these claimants in conjunction with their wage claims and the testimony of Sheppard.

15) The only evidence in the record showing the initial date of employment of Claimant Mertz is his unsworn written statement submitted in conjunction with his wage claim, an employment agreement[7] with ICI dated "1/1/98," and the testimony of Sheppard.

16) The only evidence in the record showing the wage agreements between claimants Doucoure, Ehalt, Foster, Kilger, Miner, Potts, Procopio, Swartz, Stapleton and ICI are unsworn written statements submitted by these claimants in conjunction with their wage claims and the testimony of Sheppard.

A. "I don't recall that I did that kind of detailed questioning with each one, to say 'I've got your wage claim. It says here you made $577 a week.' I don't recall that I did exactly that detailed; no."

Q. "How did you get that information as far as the days that they worked and the specific hours they worked?"

A. "I got that from their wage claims. They submitted calendars with their wage claims with that information on it."

[6]Some claimants state 3/30/98 and others 3/31/98 on their wage claim forms as their last day of employment. However, credible testimony by Higgins indicates that everyone walked off the job on 3/30/98 as part of a "planned walkout." For this reason, the forum has concluded that 3/30/98 was the last day of employment for all claimants except those who claimed an earlier last date of employment on their wage claim forms.

[7]Although the agreement was admitted as evidence, no one identified the signature of the individual who signed as "Director of Engineering" and the ALJ cannot decipher the handwriting. Also, the signatures are dated "1-1-98," but there is no language in the agreement specifically stating when Mertz would start work under the terms of the agreement.

17) The only evidence in the record showing the wage agreements between claimants Mertz and Hults and ICI are unsworn written statements submitted by these claimants in conjunction with their wage claims, Mertz' employment agreement cited in Finding of Facts--The Merits #14 that calls for an annual salary of $27,600, an employment agreement between ICI and Hults that calls for an annual salary of $27,500,[8] and the testimony of Sheppard.

18) The only evidence in the record showing the dates and hours worked by claimants Doucoure, Ehalt, Foster, Kilger, Mertz, Miner, Potts, Procopio, Swartz, Stapleton, and Hults are unsworn handwritten calendars filled out by these claimants at the time they submitted their wage claims and the testimony of Sheppard.

19) The testimony of Sheppard, Gallagher, Higgins, Moseley, and Vos was credible.

20) ICI ceased doing business on or about May 1, 1998, and Respondent continued operating the same business without interruption at the same physical location.

21) Sheppard investigated the wage claims of all 15 wage claimants and made a determination that their wage claims were valid, pursuant to ORS 652.414(1). As a result, BOLI issued checks on August 1, 1998, from the Wage Security Fund, also pursuant to ORS 652.414(1), in the following amounts to 14 of the 15 claimants:

a) D.C. Doucoure: $2,000

b) Lynn M. Ehalt: $2,000

c) Aaron Foster: $2,000

d) Janetta Gallagher: $2,000

e) Carolyn Higgins: $2,000

f) Anna M. Hults: $0[9]

g) Shawn S. Kilger: $1,730.75

h) Eathan Mertz: $2,000

i) Mark Miner: $2,000

j) Benjamin Moseley: $2,000

k) Ian Potts: $1,799.98

m) Kerry Stapleton: $144

l) John Procopio: $2,000

n) Lowell Swartz: $408

o) Anthony Vos: $2,000

TOTAL AMOUNT

$24,082.73

22) Deborah Marlow was the corporate president of Catalogfinder, Inc. and was in charge of daily operations.

23) Respondent engaged in the same type of business as ICI, previously described in Finding of Fact--The Merits #4.

24) Respondent used "http:\\ www.CatalogFinder.com" as its website location. This was the same website location that ICI used.

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[8]Mertz' employment agreement entitles him to "4 weeks paid vacation per year * * * effective after [Mertz] * * * completed 30 day probationary period." Hults' employment agreement is unsigned and undated.

[9]Hults was excluded because all her wages were earned prior to 60 days before ICI ceased doing business. *See* ORS 652.414(1).

25) Respondent kept the same customers as ICI and added new customers.

26) The customer catalog agreements used by ICI and Respondent contain identical language in a number of sections and is substantially similar in others.

27) Respondent used the data base architecture Vos designed for ICI in operating its website. After taking over ICI's operations, Respondent made only minor alterations to that website.

28) Respondent used the same furniture, computers, and equipment as ICI. Respondent assumed ICI's leases for a FAX machine, phone system, computers, desks, modems, keyboards, and furniture.

29) Respondent paid ICI's outstanding bills to U.S. West, Sprint, and for the lease on the office space used by ICI and Respondent. Respondent had the names on these accounts switched over from ICI to Catalogfinder, Inc.

30) 1-541-687-9507 had been a primary telephone line for ICI. Respondent kept this number as a nonpublished number and adopted 1-541-687-2990, ICI's former "line 2," as its primary number.

31) Respondent did not have the same employees as ICI, as ICI's employees walked off the job on March 30, 1998, in protest over not being paid.

32) There was no interruption in business operations of the website used by ICI when Catalogfinder, Inc. commenced operations.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, ICI was a corporation doing business in the state of Oregon that engaged the personal services of one or more employees in the State of Oregon.

2) The Commissioner of BOLI, through Compliance Specialist Sheppard, investigated all 15 wage claims and made a determination that the 15 wage claims were valid.

3) ICI employed claimant Gallagher from 2/1/98 until 3/30/98. Gallagher earned $6,923.07 in wages and commissions during her employment with ICI and was paid $1,300 in wages and nothing for commissions.

4) ICI employed claimant Higgins from 1/6/98 until 3/30/98. Higgins earned $5,323.09 in wages during her employment with ICI and was paid $350 in wages.

5) ICI employed claimant Moseley from 1/1/98 until 3/30/98. Moseley earned $6,776.16 in wages during his employment with ICI and was paid $500 in wages.

6) ICI employed claimant Vos from 1/2/98 until 3/30/98. Vos earned $14,846.17 in wages during his employment with ICI and $5,000 in accrued, unused vacation benefits and was paid $1500 in wages.

7) ICI employed claimants Doucoure, Ehalt, Foster, Hults, Kilger, Mertz, Miner, Potts, Procopio, Stapleton, and Swartz. There was insufficient reliable evidence to establish the agreed upon wage rate between these claimants and ICI, the specific dates, and total number of hours worked by these claimants.

8) Claimants Gallagher, Higgins, Moseley, and Vos quit ICI's employment without notice on March 30, 1998.

9) When claimants Gallagher, Higgins, Moseley, and Vos quit, ICI owed them the following amounts in unpaid wages: Gallagher: $5,623.07; Higgins: $4,973.09; Moseley: $6,276.16; and Vos: $18,346.17.

9) On or about May 1, 1998, ICI ceased business operations. That same day, Respondent substantially continued ICI's business operations. Respondent used the same daily operations manager as ICI, the same website, the same physical location, some of the same telephone lines, the same furniture, the same equipment, and provided the same services to customers that ICI had provided. Respondent assumed ICI's leases for a FAX machine, phone system, computers, desks, modems, keyboards, and furniture. Respondent paid ICI's outstanding bills to U.S. West, Sprint, and for the lease on the office space used by ICI and Respondent. Respondent had the names on these accounts switched over from ICI to Catalogfinder, Inc.

10) On August 1, 1998, BOLI issued $24,081 in checks from the Wage Security Fund to 14 of the 15 wage claimants based on Agency Compliance Specialist Sheppard's determination that the claims were valid. Claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Mertz, Miner, Moseley, Procopio, and Vos each received $2,000. Claimant Potts received $1,799.98. Claimant Kilger received $1,730.75. Claimant Swartz received $408. Claimant Stapleton received $144.

CONCLUSIONS OF LAW

1) During all times material herein, ICI was an employer and claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Hults, Kilger, Mertz, Miner, Moseley, Potts, Stapleton, Procopio, Swartz, and Vos were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414. During all times material herein, ICI employed claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Hults, Kilger, Mertz, Miner, Moseley, Potts, Stapleton, Procopio, Swartz, and Vos.

2) Respondent is a "successor to the business * * * of [ICI]" and a "lessee * * * of [ICI's] business property for the continuance of the same business" within the meaning of ORS 652.310(1), and, as an employer, is subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.414.

4) 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."

ICI violated ORS 652.140(2) by failing to pay claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Hults, Kilger, Mertz, Miner, Moseley, Potts, Stapleton, Procopio, Swartz, and Vos all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after these claimants quit employment without notice.

5) Respondent, as a successor employer and a lessee of ICI's business property for the continuance of the same business pursuant to ORS 652.310(1), is liable for ICI's failure to pay Claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Hults, Kilger, Mertz, Miner, Moseley, Potts, Stapleton, Procopio, Swartz, and Vos all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimants quit employment without notice. ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants Gallagher, Higgins, Moseley, and Vos the earned, unpaid, due, and payable wages plead for in the Amended Order of Determination, plus interest until paid. ORS 652.332.

7) ORS 652.414 provides, in pertinent part:

"Notwithstanding any other provision of law:

"(1) When an employee files a wage claim pursuant to this chapter for wages earned and unpaid after July 1, 1986, and the Commissioner of the Bureau of Labor and Industries determines that the employer against whom the claim was filed has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid, the commissioner, after determining that the claim is valid, shall pay the claimant the amount earned within 60 days before the date of the cessation of business, and unpaid, but only to the extent of $2,000 from such funds as may be available pursuant to ORS 652.409(2)

"(2) The commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund pursuant to subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or $200, whichever amount is the greater. * * * "

Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of BOLI may recover from Respondent the $24,081 paid to the 14 wage claimants from the Wage

Security Fund and plead for in the Amended Order of Determination, along with a penalty of $6,020.25 assessed on that sum, plus interest until paid. ORS 652.414(2).

8) OAR 839-050-0330(1) and (2) provide, in pertinent part:

> "(1) Default can occur in four ways:
>
> " * * *
>
> "(d) Where a party fails to appear at the scheduled hearing.
>
> "(2) When a party notifies the agency that it will not appear at the specified time and place for the contested case hearing or, without such notification, fails to appear at the specified time and place for the contested case hearing, the hearings referee shall take evidence to establish a prima facie case in support of the charging document and shall then issue a proposed order to the commissioner and all participants pursuant to OAR 839-050-0370. Unless notified by the party, the hearings referee shall wait no longer than thirty (30) minutes from the time set for the hearing in the notice of hearing to commence the hearing."

Respondent did not appear at the hearing and was properly found to be in default when 30 minutes had elapsed after the specified time for the contested case hearing.

OPINION

1. Introduction

The Agency alleged in its Order of Determination, as amended, that claimants were employed by Respondent's predecessor, ICI; that Respondent is a successor employer to ICI and is liable for wages unpaid by ICI; and that Respondent is also liable as a successor employer for the sum paid out by BOLI from the Wage Security Fund and a 25% penalty on that sum.

2. Default

Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. OAR 839-050-0330(1) and (2). 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 Amended Order of Determination has been made on the record. *In the Matter of Tina Davidson,* 16 BOLI 141, 148 (1997); *see also* OAR 839-050-0330(2).

3. Was Respondent an "employer" as defined by ORS 652.310(1)?

To be liable for unpaid wages owed by ICI or the money paid out by the Wage Security Fund to ICI's former employees, Respondent must be an "employer" as defined by ORS 652.310(1). ORS 652.310(1) defines "Employer," in pertinent part, as:

> "any person who * * * engages personal services of one or more employees and includes * * * any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full."

As the language of the statute shows, liability for unpaid wages may attach to "any successor to the business of any employer," *or* "any lessee or purchaser of any employer's busi-

ness property for the continuation of the same business." *In the Matter of Tire Liquidators,* 10 BOLI 84, 93 (1991).

Looking at the "lessee or purchaser" definition first, the evidence is clear that Respondent assumed ICI's leases for a FAX machine, phone system, computers, desks, modems, keyboards, office space, and furniture. This equipment represented the guts of ICI's business, without which it would have been unable to do business. It is also clear that Respondent continued ICI's business virtually unchanged. Consequently, the forum concludes that Respondent was a "lessee" of ICI's business property for the continuation of the same business, and an "employer" under the "lessee or purchaser" definition in ORS 652.310(1).

The "successor" test is more complex. To decide whether an employer is a "successor," the test is whether it conducts essentially the same business as the predecessor did. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. *Tire Liquidators, supra, citing In the Matter of Anita's Flowers,* 6 BOLI 258, 267-68 (1987) and *N.L.R.B. v. Jefferies Lithograph Co.,* 752 F2d 459 (9th Cir 1985).

In this case, the evidence established that Respondent conducted essentially the same business as ICI. Although the corporate name changed, the website identity[10] and physical location of the business remained the same. There was no lapse in time between ICI's cessation of doing business and Respondent's beginning of operations.[11] The corporation president and person in charge of daily operations remained the same; however, the workforce changed due to the en masse resignation of ICI's employees on March 30, 1998. Finally, the evidence is crystal clear that ICI and Respondent offered the same service and used the same equipment and methods for offering that service.

In conclusion, a preponderance of credible evidence indicates that Respondent was an "employer," both as a "lessee" and a "successor" as defined in ORS 652.310(1) and, as such, is liable for any unpaid wages the forum determines is owed by ICI.

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[10]In this case, the website, or "virtual" location of the business, was given significant weight in comparing the location and identity of ICI and Respondent due to the nature of the business. Respondent's only product was displayed on its electronic website; the physical location of the business was incidental.

[11]Based on the evidence presented, there was no clear line of demarcation as to when ICI ceased operation and Respondent commenced operation. Rather, there seemed to be an invisible seam between the two in the continuity of the operation.

4. Claim and Issue Preclusion

The Agency asserted in its closing argument that the judgment against ICI should be preclusive against Respondent as to the wage claims encompassed in that judgment.[12] Preclusion by former adjudication is a doctrine of rules and principles governing the binding effect on a subsequent proceeding of a final judgment previously entered in a claim. It encompasses two doctrines, claim preclusion and issue preclusion. *Drews v. EBI Companies*, 310 Or 134, 139, 495 P2d 531, 534 (1989). Both claim and issue preclusion apply to administrative proceedings, "provided that the tribunal's decision-making processes include certain requisite characteristics," and both have been applied in the past by this forum. *Id.* at 142. *See also In the Matter of Efrain Corona*, 11 BOLI 44, 57 (1992), *aff'd without opinion*, 124 Or App 211, 861 P2d 1046 (1993).

a. Claim preclusion.

In this forum, claim preclusion bars the Agency and claimants from obtaining a final judgment against a Respondent, then issuing charges in a subsequent proceeding against the same Respondent where the subsequent charges are based on the same factual transaction that was at issue in the first proceeding, seek a remedy additional or alternative to the one sought earlier, and are of such a nature as could have been joined in the first proceeding. Claim preclusion also bars the Respondent, in an action upon the judgment, from using the defenses he or she might have interposed, or did interpose, in the first proceeding. *Drews*, at 140, citing *Rennie v. Freeway Transport*, 294 Or 319, 323, 656 P2d 919 (1982). *See also Restatement (Second) of Judgments § 18.*

Respondent is not bound by the judgment against ICI for two reasons. First, ICI, not Respondent, was the party in the first action. With limited exceptions, under the doctrine of claim preclusion, Respondent cannot be bound by the results of a prior adjudication in which it was not a party. *Restatement (Second) of Judgments § 34. See also In the Matter of Staff, Inc.*, 16 BOLI 97, 122 (1997). Second, this is not "an action upon the judgment," but a proceeding in which the Agency seeks to establish the successorship liability of Respondent to liabilities incurred by ICI.

Likewise, the Agency is not barred from prosecuting the same wage claims in this proceeding that it brought against ICI because Respondent was not a party in the original case.

b. Issue preclusion.

Issue preclusion bars future litigation on an issue of fact or law where that issue has been " 'actually litigated and determined' in a setting where 'its determination was essential to' the final decision reached." *Drews*, at 140, *citing North Clackamas School Dist. v. White*, 305 Or 48, 53, 750 P2d 485, *modified* 305 Or 468, 752 P2d 1210 9188); *Restate-*

[12]The judgment referred to is the Final Order on Default entered by BOLI against ICI after ICI's failure to file a timely answer and request for hearing. It encompasses the full amount of the wage claims by Claimants Ehalt, Foster, Gallagher, Higgins, Kilger, Mertz, Miner, Potts, Procopio, Stapleton, Swartz, and Vos.

ment (Second) of Judgments § 17(3). Five requirements must be met for issue preclusion to apply. *In the Matter of Scott Nelson*, 15 BOLI 168, 178 (1996). One of the five requirements is that "[t]he issue was actually litigated and was essential to a final decision on the merits in the prior proceeding." *Id. at 177-78; See also Heller v. Ebb Auto Co.*, 308 Or 1, 5, 774 P2d 1089 (1989). In the Agency's prior proceeding against ICI, the final decision was a Final Order on Default, based on ICI's failure to file a timely answer and request for hearing. As a result, no actual litigation over the merits of the wage claims occurred. Consequently, the individual merits of each of the 15 wage claims must be determined based on the evidence actually presented at the hearing.

5. Respondent's Liability for Sums Paid out from the Wage Security Fund and Statutory Penalty

ORS 652.414(2) provides, in pertinent part:

> "The Commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund pursuant to subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or $200, whichever amount is greater. * * * "

In this case, a total of $24,081 was paid from the Wage Security Fund to 14 of the 15 claimants. Twenty-five percent of that sum is $6,020.25. The Agency seeks to recover these sums from Respondent.

a. Is this proceeding an "action, suit or proceeding" under ORS 652.414?

The forum must initially determine if this proceeding is an "action, suit or proceeding" contemplated by the language of ORS 652.414(2) before determining how much money, if any, Respondent must reimburse the Wage Security Fund. In questions of statutory interpretation, this forum follows the template set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). In *PGE*, the court set out three levels of analysis for discerning the intent of the legislature, the second and third levels to be utilized only if the intent of the legislature was not clear from the prior level of inquiry. The court stated, in relevant part:

> "In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. Some of those rules are mandated by statute, including, for example, the statutory enjoinder 'not to insert what has been omitted, or to omit what has been inserted.' ORS 174.010. Others are found in the case law, including, for example, the rule that words of common usage typically should be given their plain, natural, and ordinary meaning.

> "Also at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes. Just as with the court's consideration of the text of a statute, the court utilizes rules of construction that bear directly on the interpretation of the statutory provision in context. * * *" *Id.* at 611. (citations omitted)

ORS 652.414 specifically authorizes the Commissioner to commence "an appropriate action, suit or proceeding" to recover the sums sought. Based on common usage and statutory context,[13] this proceeding is clearly not a "suit" or an "action." "Proceeding," on the other hand, is a more generic term, and the forum looks at related statutes to determine its meaning. ORS 652.332, which sets out the procedures available to the Commissioner for collecting wage claims, is entitled "**Administrative proceeding for wage claim collection; court enforcement and review**" (*original in bold*) and refers to a procedure before this forum as "administrative proceedings" and a "wage claim proceeding," contrasting those terms to "court action." ORS 183.470, which is entitled "**Orders in contested cases**," (*original in bold*) and is one of the forum's enabling statutes,[14] significantly, refers to a contested case as a "proceeding." Based on these references, the forum concludes that the present proceeding is a "proceeding" under ORS 652.414 and that the Commissioner, through this proceeding, has the authority to order Respondent to repay wages paid out by the Wage Security Fund, as well as a 25 percent penalty on those wages.[15]

b. What portion, if any, of the Wage Security Fund sums paid out to the 14 claimants must Respondent repay?

ORS 652.409 authorizes the commissioner to administer the Wage Security Fund. In doing so, the commissioner is required to pay wage claimants up to $2,000 of their unpaid wages earned within 60 days of the date of the cessation of their employer's business when the commissioner determines "that the claim is valid." ORS 652.414(2) provides that recovery may be accomplished "from the employer, or other persons or property liable for the unpaid wages." In this case, Agency Compliance Specialist Sheppard testified credibly that she made a determination that the claims were valid, the means by which she made her determination, and that $24,081 was paid out of the Wage Security Fund to the wage claimants based on her determination that their claims were valid.

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[13]ORS 652.200, 652.230, and 652.330 all contain references to "rights of action" that take place in courts of law.

[14]ORS 183.413 to ORS 183.470 is commonly referred to as Oregon's Administrative Procedures Act and sets out basic requirements that must be followed in all contested case hearings before state agencies. OAR 839-050-000(1) states, in pertinent part: "The purpose of OAR 8939-050-0000 to 839-050-0440 is to carry out the statutory policies contained in ORS 183.413 to 183.470 * * *."

[15]*See also Microtan Smart Cable*, *supra*, where the forum came to the same conclusion but did not explain its reasoning.

In cases involving payouts from the Wage Security Fund, where (1) there is credible evidence that a determination on the validity of the claim was made, (2) there is credible evidence as to the means by which that determination was made, and (3) BOLI has paid out money from the Fund and seeks to recover that money, a rebuttable presumption exists that the Agency's determination is valid for the sums actually paid out. The presumption may be rebutted by credible evidence to the contrary.[16]

In this case, Respondent presented no evidence whatsoever. The forum has made an independent determination that Respondent was "the employer" for purposes of ORS 659.414(2).[17] Consequently, Respondent is liable to repay the Wage Security Fund the sum of $24,081, the amount actually paid out, plus a 25 percent penalty on that sum, or $6,020.25.

6. Respondent's Liability for Additional Unpaid Wages Owed by ICI.

The rebuttable presumption of claim validity that applies to sums actually paid out by the Wage Security Fund does not apply to wages sought by the Agency on behalf of all 15 claimants that are in excess of the amount paid out by the Wage Security Fund. Consequently, the forum must make an independent determination of the validity of the claims with regard to those wages. *ORS 652.330(1)(d)*.

To establish a prima facie case for wage claims, the Agency must establish the following elements for each claimant: (1) Respondent employed claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which he/she was not properly compensated; and (4) The amount and extent of work performed by Claimant.

The Agency has established a prima facie case for claimants Gallagher, Higgins, Moseley, and Vos through reliable evidence consisting of their sworn, credible testimony and supplemental documentation. That evidence established that they were employed by ICI, their agreed wage rates, that they performed work for which they were not properly compensated, and the amount and extent of their work, i.e. dates and hours worked, type of work performed, and the amount paid to them by ICI. As a successor employer, Respondent is liable for their unpaid wages.[18]

The situation is different with the remaining 11 wage claimants. Although it is undisputed that they all worked for ICI, they did not appear to

[16]This conclusion is bolstered by ORS 40.135(1)(j) [OEC 311(j)] (establishes a presumption that "Official duty has been regularly performed") and ORS 40.120 [OEC 308] ("In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.")

[17]*See* discussion establishing that Respondent is a successor employer, *supra.*

[18]*See* discussion establishing that Respondent is a successor employer, *supra.*

testify, and there was no testimony, either in affidavit form or elicited from an Agency witness, that established their agreed wage rate or the amount and extent of their work.[19] The only evidence supporting their claims was the fact that each was clearly employed by ICI, the information each wrote on their wage claim forms stating their tenure of employment and salary or wage rate, the calendar of hours worked each completed at the time they filed their wage claims, and Compliance Specialist Sheppard's testimony.

In the proposed order, the forum concluded that this was insufficient evidence to establish a prima facie case for these 11 wage claimants.

In its exceptions, the Agency contends that the 11 wage claimants who did not testify should be awarded all back wages plead for in the Amended Order of Determination. The Agency argues that this conclusion is justified based on Respondent's failure to present evidence controverting statements submitted in each of these 11 claimants' wage claims as to dates of work, rates of pay, and amount of unpaid wages, Sheppard's testimony, and the Agency's previous determination that all 15 wage claims were valid.

It is unusual in this forum for wage claims to be pursued without the wage claimant's testimony. Because of that fact, the forum has conducted an extensive review of Final Orders in all wage claims litigated before the forum since 1992[20] to determine what types of evidence the forum has relied on in awarding back wages to claimants.

By way of introduction, in wage claim cases, the employee has the burden of proving that he performed work for which he was not properly compensated. *In the Matter of Graciela Vargas*, 16 BOLI 246, 253-54 (1998), *citing Anderson v. Mt. Clemens Pottery Co*, 328 U.S. 680 (1946). 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. *Id.* The forum has previously accepted the credible 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. *Id.*

Of the cases reviewed, in the vast majority the forum has relied on the credible testimony of the wage claimant and contemporaneous time records maintained by the claimant and/or employer to show the amount and extent of work performed by the claimant.[21] In two cases, the forum

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[19]This analysis only applies to back wages sought over and above the amounts paid out by the Wage Security Fund, as previously explained in "5. Respondent's Liability for Sums Paid out from the Wage Security Fund and Statutory Penalty."

[20]Beginning with *In the Matter of William Sarna*, 11 BOLI 20 (1992).

[21]See *In the Matter of Diran Barber*, 16 BOLI 190 (1997); *In the Matter of Staff, Inc.*, 16 BOLI 97 (1997); I*n the Matter of Frances Bristow*, 16 BOLI 28 (1997); *In the Matter of Burrito Boy*, 16 BOLI 1 (1997); *In the Matter of Jewel Schmidt*, 15 BOLI 236 (1997); *In the Matter of Jack Crum Ranches, Inc*., 14 BOLI 258 (1995); *In the Matter of Samuel Loshbaugh*, 14 BOLI 224 (1995); *In the Matter of Mario Pedroza*, 13 BOLI 220 (1994); *In the Matter of Martin's Mercantile,* 12 BOLI 262

relied on the credible testimony of the wage claimant and time records created by the claimants to show the amount and extent of work performed by the claimants.[22] In one case, the forum relied on the credible testimony of the wage claimant and the employer's written admission contained in the answer and request for hearing that the specific amount of wages sought was owed.[23] In another case, the forum relied solely on the credible testimony of the claimants to show the amount and extent of work performed by the claimants.[24] In the remaining case where all wage claimants testified, the forum relied on the credible testimony of claimants and business records of the employer.[25]

The forum has previously wrestled with the problem of wage claimants who did not appear to testify at the hearing. *In the Matter of R.L. Chapman,* 17 BOLI 277 (1999); *In the Matter of Anna Pache*, 13 BOLI 249 (1994); *In the Matter of La Estrellita*, 12 BOLI 232 (1994)*; In the Matter of Blue Ribbon Christmas Trees*, 12 BOLI 209 (1994).

In *Chapman*, the forum awarded unpaid wages to two claimants, one who testified at the hearing as to her rate of pay and dates and hours worked, and one who did not testify. However, in Findings of Fact--The Merits ##7-11, the Final Order makes specific findings that a former Respondent employee testified credibly as to the non-testifying claimant's dates of employment, rate of pay, and dates and hours worked.[26] The Final Order also notes that the non-testifying claimant recorded her hours on time cards provided by Respondent, and that these time cards were received into evidence and formed the basis for the computation of the claimant's total hours worked.

In *Anna Pache*, there were 57 wage claimants who were employed by Respondent as berry pickers. The Agency's only witnesses were the Agency compliance specialist who investigated the case and three of the wage claimants. The Agency and Respondent entered into a stipulation

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(1994); *In the Matter of Box Office Delivery*, 12 BOLI 141 (1994); *In the Matter of Crystal Heart Books*, 12 BOLI 33 (1993); *In the Matter of John Mathioudakis*, 12 BOLI 11 (1993); *In the Matter of Ken Taylor*, 11 BOLI 139 (1992); *In the Matter of Mark Vetter*, 11 BOLI 25 (1992).

[22]See *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998); *In the Matter of Sylvia Montes*, 11 BOLI 268 (1993).

[23]*In the Matter of William Sarna*, 11 BOLI 20 (1992).

[24]*In the Matter of Flavors Northwest*, 11 BOLI 215 (1993).

[25]*In the Matter of Microtan Smart Cable*, 11 BOLI 128 (1992).

[26]The Final Order, as published in 17 BOLI, does not specifically indicate the source of testimony relied on by the forum to establish the non-testifying claimant's dates of employment, rate of pay, and dates and hours worked. However, the forum notes that all final orders, when originally published, contain a parenthetical reference after each finding of fact indicating the specific evidence used by the forum to establish each finding of fact. Findings ##7-11 in the original Final Order in *Chapman* are each followed by a parenthetical reference that includes "Testimony of Simmons," and the order states that Simmons was a "former Respondent employee."

that, if called as witnesses, the non-testifying claimants would testify in accordance with the contents of their respective wage claims.[27] *Id.* at 249. Based on the "preponderance of the credible evidence on the whole record," the forum concluded that 51 of the 57 claimants had been employed by Respondent during the wage claim period. The forum then proceeded to an analysis of whether the Agency had met its "its burden of proving that [the claimants] performed work for which [they were] not properly compensated," concluding that the claimants' credible testimony was sufficient evidence to prove the work alleged was performed and the extent of that work. *Id.* at 269-71.

La Estrellita involved wage claims by two claimants, only one of whom appeared to testify at the hearing. The testifying claimant was awarded $5,468.86 of the $9,060.20 in unpaid wages sought by the Agency in the Order of Determination. In support of the non-testifying claimant's wage claim, the Agency offered claim calendar forms filled out by the Agency compliance specialist in consultation with the claimant and the claimant's wage claim form. *Id.* at 233, 240. Respondent denied any wages were owed to the claimant and offered a computer printout listing gross wages, net wages, and deductions for claimant in rebuttal. *Id.* at 240. The forum denied the non-testifying claimant's claim because "Unlike the situation of Claimant Lopez [who appeared and testified], there were no witnesses to confirm Claimant Bermudez's presence or work efforts." *Id.* at 245.

In *Blue Ribbon*, also a default case, the forum awarded unpaid wages to 20 wage claimants. All 20 filed wage claims and executed an assignment of wages. Ten claimants appeared to testify, and the testimony of all ten was determined to be credible. Some of the claimants were paid by the hour, and others by piece rate based on the number of Christmas trees they sheared, topped, and staked. Where payment was by piece rate, several claimants who testified kept a record of the number of trees completed for co-workers on the same crew who did not appear to testify. *Id.* at 215, 217. In one instance, a record of hours worked was created and maintained on behalf on a non-testifying claimant by a claimant on the same crew who testified concerning that record. *Id.* at 214. Although the final order is not specific as to which claimants were awarded wages based on hours worked or piece rate, it appears that the awards were based on the calculations of the Agency compliance specialist, who calculated wages due and owing by using hours worked, if known, and by piece rate if the number of hours worked could not be determined. *Id.* at 217.

In conclusion, this forum has universally relied on credible testimony and documentation[28] from claimants

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[27]The effect of this stipulation was to convert all statements contained in documents submitted with the wage claims of the non-testifying claimants into sworn testimony by each claimant.

[28]See *In the Matter of Flavors Northwest*, supra, for the lone case since 1992 where back wages were awarded based solely on claimants' credible testimony .

or witnesses to the claimants' employment to establish the nature and extent of work performed by claimants in wage claim cases. In this case, there is neither for claimants Doucoure, Ehalt, Foster, Hults, Kilger, Mertz, Miner, Potts, Procopio, Stapleton, and Swartz.[29] Consequently, the Agency has failed to establish a prima facie case for these 11 claimants and their wage claims for the amounts exceeding the sums paid out by the Wage Security Fund must fail.

4. Is the Agency entitled to a presumption under OEC 311(1)(c)?

The Agency contends that it should be entitled to a presumption, presumably for the purpose of showing the amount and extent of work performed by the wage claimants, under ORS 40.135(1)(c) (OEC 311(1)(c)) based on Respondent's failure to produce all records showing pay agreements and hours worked by the 15 claimants as required by the ALJ's discovery order.[30] This argument fails. Although the forum may rely on the Oregon Evidence Code for guidance,[31] there is no evidence on the record to prove that the required evidence was "willfully suppressed." Consequently, the forum declines to apply the requested presumption.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and ORS 652.414, and as payment of damages and penalties for INTELLIGENT CATALOG, INC.'S violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent CATALOGFINDER, INC. to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

> (1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Janetta Gallagher in the amount of THREE THOUSAND SIX HUNDRED TWENTY THREE DOLLARS AND SEVEN CENTS ($3,623.07), less appropriate lawful deductions, representing $3,623.07 in gross earned, unpaid, due, and payable wages; PLUS

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[29]This is not to say that the Agency can never prevail in a wage claim without calling the wage claimant as a witness. See *In the Matter of R.L. Chapman,* 17 BOLI 277 (1999); *In the Matter of Anna Pache*, 13 BOLI 249 (1994); *In the Matter of Blue Ribbon Christmas Trees*, 12 BOLI 209 (1994). An example of evidence that might have tipped the scales in the Agency's favor with regard to one or more of the non-testifying wage claimants is credible and persuasive testimony from one or more of the testifying wage claimants regarding his or her personal knowledge of the amount and extent of work performed by the non-testifying wage claimant(s).

[30]ORS 40.135(1)(c) establishes a presumption that "Evidence willfully suppressed would be adverse to the party suppressing it."

[31]*See In the Matter of United Grocers, 7 BOLI 1, 2 (1987). See also In the Matter of Dan Cyr Enterprises, Inc.*, 11 BOLI 172, 179 (1993), *In the Matter of Marvin Clancy*, 11 BOLI 205, 211 (1993), and *In the Matter of Harry Markwell*, 8 BOLI 80, 91 (1989).

a) Interest at the legal rate on the sum of $3,623.07 from May 1, 1998, until paid.

(2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Carolyn Higgins in the amount of TWO THOUSAND NINE HUNDRED SEVENTY THREE DOLLARS AND NINE CENTS ($2,973.09), less appropriate lawful deductions, representing $2,973.09 in gross earned, unpaid, due, and payable wages; PLUS

a) Interest at the legal rate on the sum of $2,973.09 from May 1, 1998, until paid.

(3) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Benjamin G. Moseley in the amount of FOUR THOUSAND TWO HUNDRED SEVENTY SIX DOLLARS AND SIXTEEN CENTS ($4,276.16), less appropriate lawful deductions, representing $4,276.16 in gross earned, unpaid, due, and payable wages; PLUS

a) Interest at the legal rate on the sum of $4,276.16 from May 1, 1998, until paid.

(4) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Anthony Vos in the amount of SIXTEEN THOUSAND THREE HUNDRED FORTY SIX DOLLARS AND SEVENTEEN CENTS ($16,346.17), less appropriate lawful deductions, representing $16,346.17 in gross earned, unpaid, due, and payable wages; PLUS

a) Interest at the legal rate on the sum of $16,346.17 from May 1, 1998, until paid.

(5) A certified check payable to the Bureau of Labor and Industries in the amount of THIRTY THOUSAND ONE HUNDRED AND ONE DOLLARS AND TWENTY FIVE CENTS ($30,101.25), representing $24,081.00 paid out of the Wage Security Fund to Claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Kilger, Mertz, Miner, Moseley, Potts, Procopio, Stapleton, Swartz, and Vos and $6,020.25 as a 25 percent penalty on the sum of $24,081.00; PLUS

a) Interest at the legal rate on the sum of $10,000 from August 1, 1998, until paid.

In the Matter of

CHARLES HURT AND KAREN CHESNEY, dba DIAMOND H

Case Number 18-99

Final Order of Commissioner Jack Roberts

Issued May 7, 1999.

SYNOPSIS

Where two Respondents acted as farm labor contractors without a farm labor contractor license or forestation indorsement with regard to one BLM contract, failed to carry workers' compensation insurance for persons engaged in manual labor, and the BLM terminated their right to proceed

on the contract based on their failure to complete the work in a timely manner and failure to obtain a farm labor contractor's license from BOLI, the Commissioner assessed civil penalties of $1,000 against each Respondent for each violation, for a total of $6,000 in civil penalties. ORS 658.410(1), 658.415(1), 658.417(1), 658.417(4), 658.440(1)(d), 658.453.

The above-entitled contested case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries (BOLI) for the State of Oregon. The hearing was held on March 9, 1999, 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 David Gerstenfeld, an employee of the Agency. Respondents Charles Hurt and Karen Chesney appeared by telephone and were present throughout the hearing. Respondents were not represented by counsel at the hearing.

The Agency called the following witnesses: Charles Hurt and Karen Chesney, Respondents, and Madeline Small, BLM Contracting Officer.

Administrative exhibits X-1 to X-12 and Agency exhibits A-1 through A-4 were offered and received into evidence. The record closed on March 9, 1999.

Having fully considered the entire record in this matter, I, Jack 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 27, 1998, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondents. The Agency alleged that (1) Respondents each acted as a farm/forest labor contractor in Oregon without having a farm labor contractor license issued by BOLI; (2) Respondents each acted as a farm/forest labor contractor in Oregon without having a forestation indorsement issued by BOLI; (3) Respondents each acted as a farm/forest labor contractor in Oregon without maintaining workers compensation insurance for each individual who performed manual labor; and (4) Respondents, while acting as farm labor contractors in Oregon, failed to comply with the terms and provisions of all legal and valid agreements or contracts entered into in Respondents' capacity as farm labor contractors. The Agency sought civil penalties of $1,000 from each Respondent for each violation.

2) On October 30, 1998, the Agency served Respondent Chesney with the Notice of Intent. On November 2, 1998, the Agency served Respondent Hurt with the Notice of Intent.

3) On November 24, 1998, the Agency issued a "Notice of Intent To Issue Final Order By Default" to Respondents Hurt and Chesney.

4) On December 4, 1998, Respondents, through counsel, filed an

answer to the Notice of Intent and requested a hearing.

5) On December 7, 1998, the Agency sent the Hearings Unit a Request for Hearing. The Hearings Unit issued a Notice of Hearing to the Respondents and the Agency 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 839-050-0000 to 839-050-0440.

6) On January 4, 1999, the ALJ issued a discovery order directing each participant 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 839-050-0210(1). The summaries were due by February 26, 1999. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary.

7) On February 18, 1999, Respondents, through counsel, submitted their Case Summary.

8) On February 26, 1999, the Agency submitted its Case Summary.

9) On February 26, 1999, Respondents submitted an addendum to their Case Summary.

10) On March 5, 1999, the ALJ conducted a pre-hearing conference with the Agency case presenter and Respondents' counsel. During the conference, Respondents' counsel stated that he would not be representing Respondents at the hearing and moved for a telephonic hearing, based on the fact that Respondents live in Las Vegas, Nevada, and desired to testify by telephone. Based on a representation by Respondents' counsel that Respondent had been sent copies of the Case Summaries, the Agency did not object to the motion and the motion was granted by the ALJ. The hearing was reset to begin at 10 a.m. on March 9 in Portland, instead of 9 a.m. on March 9 in Coos Bay.

11) At 10 a.m. on March 9, the ALJ telephoned Respondent Chesney and was told that Respondent Hurt was not available, but was on his way to appear at the hearing. The ALJ informed Respondent Chesney that he would call back at 10:30 a.m., and that Respondent Hurt would be in default if he was not available by telephone at 10:30 a.m.

12) At 10:30 a.m., the ALJ telephoned Respondent Chesney again. Respondent Hurt was present and the ALJ started the hearing.

13) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

14) On March 25, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The Forum received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At all times material herein, Respondents, who reside in Las Vegas, Nevada, both had a financial interest in and were partners in a business with an assumed business name of Diamond H. Respondents are not related by blood or marriage. At the time of the hearing, they were engaged to be married.

2) In July 1998, Respondents bid on or submitted a price on a contract offer on Contract #1422H952- P98-1020 with the Bureau of Land Management (hereinafter "the BLM contract") for clearing and hand piling 41 acres of brush and slash and covering the piles with plastic in the BLM's Coos Bay District in Oregon. Neither Respondent had an Oregon farm labor contractor's license at that time. Respondents planned to share in the financial profits from the contract.

3) Respondents were counseled by Small, who was the BLM's contracting officer on the BLM contract, that it involved work on difficult terrain, and that they should consider revising their bid, which was substantially lower than the next lowest bid. In response, Respondents increased their bid from $8,487 to $21,115, which was still substantially lower than the next lowest bid, as well as substantially lower than Small's original estimate of $37,500.

4) On August 3, 1998, Respondents' bid was accepted. Respondents entered into a contract with the BLM that included terms and conditions requiring Respondents to obtain and maintain, during the term of the BLM contract, an Oregon "Farm/Forest Labor Contractor's License" and to complete work on the contract within 30 days after being issued a Notice to Proceed.

5) At the time their bid was accepted, Respondents anticipated that they would be commencing work on the BLM contract on or about September 1, 1998.

6) On or about August 7, 1998, Respondent Hurt contacted BOLI's Farm Labor Unit about obtaining a farm labor contractor's license and an application packet was sent to him on or about that same day.

7) On August 17, 1998, BOLI's Farm Labor Unit received Respondents' license application packet, which had been completed by Respondent Chesney. About that same time, Respondent Hurt telephoned Julye Robertson, an administrative specialist in BOLI's Farm Labor Unit responsible for processing applications for farm/forest labor contractor licenses,[1] and requested that she expedite the licensing procedure.

8) The application submitted by Respondents was incomplete in that it did not have certifications of compliance with the Internal Revenue Service and Oregon Department of Revenue, did not show proof of having workers compensation insurance coverage, did not show registration with the Corporation Division of the Oregon Secretary of State, and did

[1]This order uses the term "farm/forest labor contractor" to refer to a person engaged in activities related to the forestation or reforestation of lands that requires the person to obtain both a farm labor contractor's license pursuant to ORS 658.405(1) and ORS 658.410 and a forestation/reforestation indorsement pursuant to ORS 658.417(1).

not show that Respondents had obtained a federal taxpayer or Oregon business identification numbers. In response, Robertson returned the application to Respondent Chesney, along with a standard form letter stating that Respondents' application could not be processed until the aforementioned documentation was provided.

9) On August 21, 1998, the BLM issued a Notice to Proceed to Respondents, effective August 22, 1998.

10) Respondent Hurt and Richard Chesney,[2] Respondent Chesney's brother, then began performing manual labor on the BLM contract. Subsequently, Respondent Hurt called a crew, consisting of Hurt's stepson and a friend of his stepson, to drive from Las Vegas to the worksite to deliver visqueen plastic

needed on the job, with the intent that they would remain and work with Hurt and Chesney on the BLM contract. The stepson and his friend delivered the plastic, saw the type of work involved, and left the worksite without performing any work. Respondents did not employ anyone else to work on the BLM contract.

11) By September 3, 1998, Respondents had fallen behind on the work schedule and Respondent Hurt, acting on behalf of Diamond H, entered into a subcontract on that date with Antonio Osorio to slash and pile a minimum of 20 acres on the BLM contract. Osorio's 10-man crew slashed approximately 20 acres from September 5-7, 1998, but failed to return to complete the work and performed substandard work on the 20 acres that they slashed.

12) Sometime before September 29, 1998, Robertson received Respondents' original application, along with some of the previously missing documentation. The additional documents provided showed proof of business registration with the Oregon Secretary of State, filed August 24, 1998;[3] a federal taxpayer employer identification number; an Oregon Employment Department tax compliance certificate; and an Oregon Department of Revenue tax compliance certification, certified August 31, 1998.

13) On September 18, 1998, Small issued a letter of termination for default on the BLM contract, which terminated Respondents' right to proceed under the contract. The termination document was issued because Respondents had failed to complete the work within the required 30 days and because Respondents had not obtained an Oregon farm/forest labor contractor's license.

14) On September 29, 1998, Robertson sent Respondent Chesney a second form letter indicating her application had been received, but it could not be processed until Respondents submitted a certificate of insurance issued by Respondents'

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[2]Respondent Hurt testified that Richard Chesney was also a part owner of Diamond H. However, this fact is of limited significance, as Richard Chesney was not named as a Respondent and the Agency did not move to amend the Notice of Intent during the hearing to name him as a Respondent.

[3]The document is stamped "Filed August 24, 1998, Oregon Secretary of State."

worker's compensation carrier and an Oregon address.

15) Respondents did not have worker's compensation insurance during the performance of the BLM contract.

16) The BLM contract was the first forestation/reforestation job Respondents had ever attempted to perform.

17) As of the date of the hearing, BOLI had never issued a farm/forest labor contractor's license to Respondents.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondents Charles Hurt and Karen Chesney both had a financial interest in and were partners in a business with an assumed business name of Diamond H.

2) At all times material herein, Respondents did not possess a valid Oregon farm labor contractor's license and did not have a special indorsement authorizing them to act as a farm labor contractor with regard to the forestation or reforestation of lands.

3) In July 1998, Respondents bid on or submitted a price on a contract offer for the clearing and hand piling of 41 acres of brush and slash and covering the piles with plastic for the BLM's Coos Bay District in Oregon.

4) On August 3, 1998, Respondents were awarded the BLM contract.

5) Between August 22, 1998, and September 18, 1998, Respondent Hurt and Richard Chesney performed manual labor on the BLM contract on behalf of Diamond H.

6) Between August 22, 1998, and September 18, 1998, Respondent Hurt, on behalf of Diamond H, recruited workers to work on the BLM contract.

7) On September 3, 1998, Respondent Hurt, on behalf of Diamond H, entered into a subcontract with Antonio Osorio to perform work on the BLM contract. Osorio began work on the subcontract, but did not complete the work he subcontracted to perform.

8) On September 18, 1998, Respondents' right to proceed on the BLM contract was terminated based on Respondents' failure to complete the work within the required 30 days and because Respondents had not obtained an Oregon farm/forest labor contractor's license.

9) Respondents did not have worker's compensation insurance during the performance of the BLM contract.

CONCLUSIONS OF LAW

1) At all times material herein, ORS 658.407 provided in pertinent part:

> "The Commissioner of the Bureau of Labor and Industries shall administer and enforce ORS 658.405 to 658.503 and 658.803, and in doing so shall:
>
> " * * * * *
>
> "(3) Adopt appropriate rules to administer ORS 658.405 to 658.503 and 658.830."

At all times material herein, ORS 658.501 provided:

> "ORS 658.405 to 658.503 and 658.830 apply to all transactions, acts and omissions of farm labor

contractors and users of farm labor contractors that are within the constitutional power of the state to regulate, and not preempted by federal law, including but not limited to * * * the recruitment of workers outside of this state to perform work in whole or in part within this state, * * *."

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

2) At all times material herein, ORS 658.405 provided in pertinent part:

"As used in ORS 658.405 to 648.503 * * *, unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who * * * in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities or the production or harvesting of farm products; recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; or who bids or submits prices on contract offers for those activities; or who enters into a subcontract with another for any of those activities."

At all times material herein, OAR 839-15-004 provided in pertinent part:

"(14) 'Worker' means an individual performing labor in the forestation or reforestation of lands * * * or any person who is recruited, solicited * * * to perform such labor, notwithstanding whether or not a contract of employment is formed or the labor is actually performed.

"(15) 'Person' means any individual, sole proprietorship, partnership * * *."

At all times material herein, ORS 658.410 provided in pertinent part:

"(1) * * * 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 license with the indorsement required by ORS 658.417 (1)."

At all times material herein, ORS 658.415 provided in pertinent part:

"(1) No person shall act as a farm labor contractor unless the person has first been licensed by the Commissioner of the Bureau of Labor and Industries pursuant to ORS 658.405 to 658.503 and 658.830."

At all times material herein, ORS 658.417 provided in pertinent part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to 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."

At all times material herein, OAR 839-15-004 provided in pertinent part:

> "As used in these rules, unless the context requires otherwise;
>
> "(8) 'Forestation or reforestation of lands' includes, but is not limited to:
>
> " * * *
>
> "(b) The clearing, piling and disposal of brush and slash * * * [.]"

Between July and September 1998, clearing and hand piling of brush and slash was an activity related to the forestation or reforestation of lands, and was within the statutory definition of forestation or reforestation of lands. Respondents, in July 1998, bid or submitted prices on contract offers for clearing and hand piling of brush in Oregon. Respondents, during the time period encompassed by July, August, and September 1998, recruited and solicited at least two workers in Las Vegas, Nevada, to work in Oregon to perform labor for another clearing and hand piling brush and slash on the BLM contract. During the same time period, Respondents entered into a subcontract with another for those activities. Respondent did not have a farm labor contractor's license or special forestation/reforestation indorsement during this time period. As a result, Respondents' acts of recruiting, soliciting, and subcontracting violated ORS 658.410(1), ORS 658.415(1), and 658.417(1).[4]

3) At all times material herein, ORS 658.417 provided in pertinent part:

> "In addition to the regulation otherwise imposed upon farm labor contractors pursuant to 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 regardless of the business form of the contractor and regardless of any contractual relationship which may be alleged to exist between the contractor and the workers notwithstanding any provision of ORS chapter 656, unless workers' compensation insurance is otherwise provided."

Respondent Hurt and Richard Chesney, Respondent Chesney's brother, performed manual labor on the BLM contract between August 22, 1998, and September 18, 1998. During this time, Respondents did not carry workers' compensation insurance. By failing to carry provide workers' compensation insurance to individuals who performed manual labor on the BLM contract, Respondents violated ORS 658.417(4).

4) At all times material herein, ORS 658.440(1)(d) provided in pertinent part:

> "(1) Each person acting as a farm labor contractor shall:
>
> " * * *
>
> "(d) Comply with the terms and provisions of all legal and valid agreements or contracts en-

[4]See discussion in Proposed Opinion, *infra*, concerning bidding and submitting prices on contract offers.

tered into in the contractor's capacity as a farm labor contractor."

The BLM contract was a legal and valid contract entered into in Respondents' capacity as a farm labor contractor. By failing to complete performance on the contract within the required 30 days and by failing to obtain and maintain an Oregon farm labor contractor's license and forestation indorsement during the term of the BLM contract, Respondents failed to comply with the terms and provisions of a legal and valid contract entered into in Respondents' capacity as a farm labor contractor and violated ORS 658.440(1)(d).

5) At all times material herein, ORS 658.453 provided 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.

" * * * * *

"(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(1), (3) or (4)."

OAR 839-15-510 provides in pertinent 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:

" * * *

"(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."

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 mitigating and aggravating circumstances."

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for the violations found herein, and the penalties assessed in the Order below are a proper exercise of that authority.

OPINION

Respondents are each charged with four violations of Oregon's laws regulating farm labor contractors. The Agency seeks $1,000 in civil penalties for each violation.

1. Acting as a farm labor contractor with regard to the forestation or reforestation of lands without a farm labor contractor's license or the special indorsement required by ORS 658.417(1).

Undisputed evidence established that Respondents have never had a farm labor contractor's license or forestation indorsement, that Respondents bid on or submitted a price on the BLM's contract offer for a reforestation or forestation activity, the clearing and piling of slash and brush, and that Respondents entered into a subcontract with another for the clearing and piling of slash and brush. Respondent Hurt testified that he called two workers from Las Vegas to come and assist him on the contract, and that these workers drove all the way from Las Vegas to the southern Oregon coast. From this testimony, the forum infers that Respondents "recruited" and "solicited" two workers to perform labor on the BLM contract.[5] All of these activities, when conducted without a license and indorsement, constitute violations of ORS 658.410(1) and 658.417(1) and subject Respondents to the assessment of a civil penalty.

The Agency also alleges that Respondents acted as farm labor contractors without a license or indorsement by bidding or submitting a price on a contract offer. ORS 658.410(1) includes in its definition of farm labor contractors "any person * * * who bids or submits prices on contract offers for those activities." Although Respondents clearly engaged in this behavior, the forum must consider an Agency policy statement before concluding that Respondents violated the statute by engaging in this behavior.

The policy statement, effective April 4, 1994,[6] states, in relevant part:

"Taken together, ORS 658.410(1), 658.417(1) and 658.405(1) prohibit bidding upon forestation/reforestation contracts to be performed on land within this state, without first being licensed in Oregon as a farm labor contractor with a forestation indorsement. When, however, the contract solicitation is for forestation or reforestation work on federally owned land (i.e.., BLM, USFS), the Bureau will not require pesons [*sic*] to obtain a license or temporary permit until such time as the contract is awarded. The mere act of bidding on such contracts does not require a permit or a license. * * * "

The Oregon Supreme Court has held that an agency policy that meets the definition of a "rule" under ORS 183.310(8) but is not in the form of a written rule or has not been promulgated according to the APA is, nevertheless, binding on the agency until it is declared invalid by a court or until it is amended or repealed by the agency in accordance with proper rulemaking procedures. *Burke v. Children's Services Div.*, 288 Or 533, 537-38 (1980). A "rule" includes "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency." *ORS 183.310(8)*. The Agency's policy statement clearly falls under this definition. Consequently, the Agency is bound by its policy statement. As a matter of law, the fo-

[5]See *In the Matter of Leonard Williams*, 8 BOLI 57, 73 (1989), where the forum specifically defined the terms "recruit" and "solicit" within the context of the statute.

[6]Wage and Hour Division Field Operations Manual, Vol. IV (Farm/Forest Labor Contractor), Policy Section, at p.309.

rum cannot conclude that Respondent acted unlawfully as an unlicensed farm labor contractor in bidding or submitting a price on the BLM's contract offer.

ORS 658.453(1)(a) allows the commissioner to assess a civil penalty against a farm labor contractor who recruits or solicits a worker without a license. ORS 658.453(1)(e) allows the commissioner, in addition, to assess a civil penalty against a farm labor contractor who fails to comply with ORS 658.417(1), which requires a forestation indorsement. The Agency seeks separate civil penalties of $1,000 each for Respondents' activity as a farm labor contractor without a license *or* forestation indorsement. The forum previously addressed this issue in the case of *In the Matter of Victor Ovchinnikov*, 13 BOLI 123, 156 (1994). In *Ovchinnikov*, the forum concluded that a Respondent's failure to obtain a farm labor contractor license *and* special indorsement should be treated as one simultaneous violation, reasoning that the basic license and indorsement form one license, the license needed to engage in forestation activities. Consequently, the forum finds one violation against each Respondent based on Respondents' failure to obtain a farm labor contractor license and forestation/reforestation indorsement.

In mitigation, Respondents testified that they would have had their license and indorsement if the BLM had issued the notice to proceed on September 1, 1998, the date Respondents anticipated. Given the fact that Respondents did not have all the certificates necessary for a farm labor contractor's license or workers' compensation insurance by September 1, this argument is simply not credible and is given no weight by the forum.

Since licensure is at the heart of the state's effort to regulate farm labor contractors, the forum always regards acting as a farm labor contractor without a license to be a serious violation. *In the Matter of Alejandro Lumbreras*, 12 BOLI 117, 127 (1993). In recent cases, the forum has assessed a civil penalty of $2,000 against each Respondent for this violation. *In the Matter of Manuel Galan,* 16 BOLI 51, 69 (1997), *aff'd without opinion, Galan v. Bureau of Labor and Industries*, 155 Or App __, 963 P2d 755, *rev den* __ Or __, __ P2d __ (1998); *In the Matter of Odon Salinas,* 16 BOLI 42, 51 (1997)*; In the Matter of Manuel Galan*, 15 BOLI 106, 138 (1996), *aff'd without opinion*, *Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997). There are no mitigating circumstances. The forum concludes that $1,000 is an appropriate civil penalty against each Respondent under the facts of this case.

2. Failing to carry provide workers' compensation insurance to individuals who performed manual labor on the BLM contract.

The evidence was undisputed that manual labor was performed on the BLM contract by Respondent Hurt and Richard Chesney, and that Respondents did not carry workers' compensation insurance during the performance of the contract. The requirement that farm labor contractors carry workers' compensation insurance is a critical component of the statutory scheme regulating farm labor contractors. In the past, the forum has regarded this type of viola-

tion as "particularly serious because it frustrates the commissioner's ability to implement the law's requirements, and the requirement of providing workers' compensation insurance is fundamental for the protection of this state's workers." *In the Matter of Tolya Meneyev*, 14 BOLI 6, 14 (1995). The serious nature of this violation is further illustrated by the fact that failure to carry workers' compensation insurance is sufficient grounds for denying a license application or revoking an existing license. *OAR 839-15-520(3)(j)*. Respondents' testimony that they were told they didn't have to have workers' compensation insurance because they weren't hiring anyone does not mitigate the failure to carry insurance.[7]

In *Meneyev*, the forum assessed a $2,000 civil penalty against a respondent with a farm labor contractor's license and forestation indorsement who failed to provide workers' compensation insurance for almost a month for his crew after his insurance policy was canceled. In this case, a civil penalty of $1,000 against each Respondent is appropriate.

3. Failure to comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor.

ORS 658.440(1)(d) requires a person acting as a farm labor contractor to "comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor." In this case, the "legal and valid * * * contract[s]" alleged to have been violated was Respondents' contract with the BLM for the clearing and piling of slash and brush. The forum has previously concluded that forestation contracts with government agencies are "legal and valid * * * contracts" within the meaning of the statute. *In the Matter of Bill Martinez*, 14 BOLI 214, 221 (1995); *In the Matter of Jose Carmona*, 14 BOLI 196, 212-13 (1995); *Meneyev, supra*, at 14.

Undisputed evidence shows demonstrates that Respondents' right to proceed on the BLM contract was terminated based on Respondents' failure to complete the work within the required 30 days and because Respondents had not obtained an Oregon farm/forest labor contractor's license.

In mitigation, Respondents testified concerning their inexperience as farm labor contractors, and their lack of readiness to begin work on the contract at the time the notice to proceed was issued based on misinformation from the BLM. Respondents further asserted that their lowball bid should have put the BLM on notice of their inexperience. However, testimony from the BLM contracting officer established that Respondents were warned about the

[7]First, Respondents did not testify who told them this. Second, Respondents were made aware by BOLI that workers' compensation insurance was required as a condition of obtaining a farm labor contractor's license. Third, Respondents did intend to hire two workers. *See also In the Matter of Francis Kau*, 7 BOLI 45, 54-55 (1987), where the forum held that a contractor's confusion about his duty to provide workers' compensation insurance did not mitigate violations of the law.

difficulties of the project. By bidding on and accepting the award of the BLM contract, Respondents represented that they had the ability to perform the contract. It was not the responsibility of the BLM to protect Respondents from themselves. Under the circumstances, the forum will not consider Respondents' inexperience as a mitigating factor. Likewise, their lack of readiness to proceed, which encompasses failure to obtain an Oregon farm labor contractor's license and forestation indorsement, is not a mitigating factor.

Respondents' failure to comply with the terms of the contract is aggravated by the fact that the work on the BLM contract was not completed, either by Respondents or their subcontractor, and the fact that the subcontractor's work was substandard.

Under the circumstances of this case, the forum finds that the civil penalty of $1,000 sought against each Respondent by the agency is appropriate.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the civil penalties owed as a result of violations of ORS 658.410(1), ORS 658.415(1), ORS 658.417(1), ORS 658.417(4), and ORS 658.440(1)(d), the Commissioner of the Bureau of Labor and Industries hereby orders **Charles Hurt and Karen Chesney, each dba Diamond H**, to each deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of THREE THOUSAND DOLLARS ($3,000), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondents comply with the Final Order. This assessment is the sum of the following civil penalties against Respondents: $1,000 each for one violation of ORS 658.410(1), ORS 658.415(1), and ORS 658.417(1); $1,000 each for one violation of ORS 658.417(4); and $1,000 each for one violation of ORS 658.440(1)(d).

In the Matter of

LAMBERTUS SANDKER, dba BLUE RIVER REFORESTATION

Case Number 15-99

Final Order of Commissioner

Jack Roberts

Issued May 7, 1999

SYNOPSIS

Respondent, a licensed farm/forest labor contractor, had been granted "exempt" status on his license based, in part, on his representation that he would not employ more than two persons. Where Respondent failed to inform BOLI that he employed three persons, failed to file certified payroll records while he employed three persons, failed to post a notice of compliance with ORS 658.415(3), and failed to post the summaries re-

quired by ORS 653.050 at the job site, the Commissioner assessed civil penalties of $2250. ORS 658.417(3), 658.415(15), 658.440(1)(e), 658.453, 653.050.

The above-entitled contested case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries (BOLI) for the State of Oregon. The hearing was held on March 23, 1999, in a conference room in the State Office Building, 165 East Seventh, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Respondent Lambertus Sandker (Respondent) was present and represented himself throughout the hearing.

The Agency called Respondent Lambertus Sandker as its only witness. Respondent called himself as his only witness.

Administrative exhibits X-1 to X-12, Agency exhibits A-1, A-4 and A-5, and Respondent exhibits R-1 through R-6 were offered and received into evidence. The record closed on March 23, 1999.

Having fully considered the entire record in this matter, I, Jack 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 27, 1998, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondents. The Agency's allegations can be summarized as follows:

(a) Respondent failed to file with BOLI information concerning changes in the circumstances under which his license was issued, specifically, that he employed more than two individuals, in violation of ORS 658.440(1)(e);

(b) Respondent failed to timely file certified payroll records with the Commissioner for forestation work performed on USFS Contract #43-04R4-8-0068 in the State of Oregon on or about June 1998, in violation of ORS 658.417(3) and OAR 839-015-0300;

(c) On or about June 5, 1998, Respondent failed to post the notice required by ORS 658.415(15) regarding compliance with bond requirements on the work site of USFS Contract #43-04R4-8-0068;

(d) Respondent failed to post summaries of ORS 653.010 to 653.261 and rules adopted thereunder by the Commissioner and all rules promulgated by the Wage and Hour Commission in a conspicuous and accessible place in or about the work site of USFS Contract #43-04R4-8-0068, in violation of ORS 653.050.

The Agency sought civil penalties of $1,000 from Respondent for alleged violations (a) and (b) and civil penalties of $500 each for the alleged violations of (c) and (d).

2) On October 28, 1998, the Agency served Respondent with the Notice of Intent.

3) On November 9, 1998, Respondent filed an answer to the Notice of Intent and requested a hearing. Respondent admitted the allegations, but cited mitigating evidence concerning his attempts to obtain a $10,000 performance bond and his posting of summaries of ORS 653.010 to 653.261.

4) On November 18, 1998, the Agency sent the Hearings Unit a Request for Hearing. The Hearings Unit issued a Notice of Hearing to the Respondents and the Agency indicating the time and place of the hearing. The hearing was set to commence on February 17, 1999. 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 839-050-0000 to 839-050-0440.

5) On December 23, 1998, the Agency filed a Motion for Postponement on the basis that the Agency employee who investigated the case and was anticipated to be the Agency's primary witness was scheduled to be out of the country on active military service from February 10 until March 2, 1999, and would be unavailable to testify at the hearing. The Agency's motion indicated that Respondent did not oppose the motion.

6) On January 5, 1999, the Agency filed a motion for a discovery order seeking documents containing any mitigating evidence Respondent planned to introduce at hearing.

7) On January 12, 1999, the ALJ granted the Agency's motion for postponement on the basis that there was no reasonable alternative to postponement, given the unavailability of the Agency's key witness. The ALJ issued an Amended Notice of Hearing resetting the hearing to commence on March 23, 1999.

8) On January 13, 1999, Respondent provided the forum and the Agency with the documents requested in the Agency's motion for discovery order.

9) On January 27, 1999, the ALJ issued a discovery order directing each participant 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 839-050-0210(1). The summaries were due by March 11, 1999. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary.

10) On March 10, 1999, the Agency submitted its Case Summary.

11) On March 5, 1999, Respondent submitted his Case Summary.

12) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) At the commencement of the hearing, the Agency moved to amend the Notice of Intent to substitute contract number "53-04R4-8-

0068" for contract number "43-04R4-8-0068" wherever it appeared in the Notice of Intent to conform to the contract number on Respondent's Exhibit R-1, the daily diaries from the contract referenced in the Notice of Intent. Respondent did not object and the motion was granted.

14) At the commencement of the hearing, the Agency and Respondent stipulated to the following facts:

> "(a) Respondent acted as a farm/forest labor contractor on United States Forest Service (USFS) Contract Number 53-04R4-8-0068 in Oregon on or about June, 1998, performing forestation activities thereon;
>
> "(b) Respondent failed to post summaries of ORS 653.010 to 653.261 and rules adopted thereunder by the Commissioner and all rules promulgated by the Wage and Hour Commission in a conspicuous and accessible place in or about the work site of USFS Contract #53-04R4-8-0068;
>
> "(c) Respondent failed to post the notice required by ORS 658.415(15) regarding compliance with bond requirements on the work site of USFS Contract #53-04R4-8-0068; and
>
> "(d) Respondent did not file certified payroll records with the Commissioner for forestation work performed on USFS Contract #53-04R4-8-0068."

15) During the hearing, the Agency moved to amend the Notice of Intent to conform to testimony by Respondent that he had employed three or more persons on a BLM forestation contract (pruning) in 1998 without obtaining a bond, without posting notice of a bond, and without filing certified payroll reports for that contract. The Agency sought the amendment based on its relevance to assessment of civil penalties, but did not move to increase civil penalties sought, indicating that civil penalties were only sought for the violations originally alleged in the Notice of Intent. Respondent did not object. The ALJ granted the Agency's motion to amend.[1]

16) During the hearing, the Agency and Respondent stipulated that Respondent provided the Agency with photographs of his office which showed that the postings required by ORS 653.050 were posted in Respondent's office. There was no stipulation that the postings were in Respondent's office during the performance of USFS Contract #53-04R4-8-0068 or the BLM pruning contract.

17) On April 16, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The forum received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At the time of the hearing, Respondent had been a licensed

[1]Although granted, the amendment was unnecessary for the purpose for which it was sought. The forum would have considered evidence of similar violations on the BLM contract as potentially aggravating circumstances in determining the appropriate civil penalty, even without the amendment.

farm/forest labor contractor[2] in the State of Oregon for four or five years.

2) As one of the requirements for obtaining his license, Respondent had to take and pass a test related to the laws regulating farm/forest labor contractors that was administered by BOLI. In preparation for taking that test, Respondent read information provided by BOLI summarizing Oregon laws regulating farm/forest labor contractors.

3) On February 20, 1998, Respondent submitted a written application to Contractors Bonding and Insurance Company ("CBIC") for a $10,000 performance bond for farm/forest labor contracting he intended to perform under the company name of Blue River Reforestation. Respondent's application was based on his anticipation that he would be employing four to five individuals during the performance of USFS Contract #53-04R4-8-0068, a pre-commercial thinning contract in Oregon that involved the forestation or reforestation of lands. On February 26, 1998, CBIC rejected Respondent's application, stating that CBIC required a co-indemnitor based on Respondent's "lack of working capital and net worth as well as the lack of equity in real estate."

4) On February 26, 1998, BOLI received a completed "Application for Exemption from Financial Responsibility and Payroll Submission Requirements for Contractors Engaged in Reforestation Activities" from Respondent. In that application, Respondent stated:

> "A. That I will operate my business of a Farm/Forest Labor Contractor as a sole proprietor only;
>
> "B. That I will engage in forestation or reforestation activities pursuant to contracts for less than $25,000 only;
>
> "C. That I will employ two or less individuals to perform work on all forestation or reforestation contracts performed in the license year;
>
> "D. That I will immediately notify the Bureau of Labor and Industries and comply with ORS 658.415(3) and ORS 658.417(3) in the event that I begin to operate my business of a Farm/Forest Labor Contractor as a partnership or corporation, obtain a contract for forestation or reforestation activities of more than $25,000, or employ more than two individuals;
>
> "E. That the information I have supplied on this application is true and correct to the best of my knowledge; and that I realize that the Commissioner of the Bureau of Labor and Industries will rely on my answers and these statement as being true and correct."

5) Respondent completed identical applications on May 31, 1994; September 28, 1995; and January 7, 1997 and submitted them to BOLI.

6) On March 5, 1998, Respondent submitted a supplementary "co-

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[2]This order uses the term "farm/forest labor contractor" to refer to a person engaged in activities related to the forestation or reforestation of lands that requires the person to obtain both a farm labor contractor's license pursuant to ORS 658.405(1) and ORS 658.410 and a forestation/reforestation indorsement pursuant to ORS 658.417(1).

indemnitor" written application to CBIC for a $10,000 performance bond, using his friend Richard Miron as a co-indemnitor. On March 23, 1998, CBIC again rejected Respondent's application on the basis that his co-indemnitor did not have "an acceptable capital position at this time."

7) Based on Respondent's February 26, 1998 application, BOLI issued Respondent an exemption on his farm/forest labor contractor license pursuant to ORS 658.418, effective May 22, 1998, that exempted Respondent from the necessity of complying with the requirements of ORS 658.415(3) and 658.417(3).[3]

8) In 1998, sometime prior to May 26, Respondent employed three individuals during the performance of a BLM pruning contract in Oregon that involved the forestation or reforestation of lands. On at least one day, Respondent and all three individuals worked together on the contract. Respondent did not maintain a $10,000 bond or cash deposit pursuant to ORS 658.415(3) during the performance of this contract and did not post the notice required by ORS 658.415(15) regarding compliance with bond requirements on the worksite of that contract. Respondent did not tell BOLI that he employed more than two persons on this contract because he was in the process of trying to obtain a $10,000 bond at that time.

9) On May 26, 1998, Respondent commenced work on USFS Contract #53-04R4-8-0068. Respondent employed the same three individuals during the performance of this contract that he had employed during the performance of the BLM contract. All three individuals worked together with Respondent on the USFS contract on two separate days. On one of those days, an Agency compliance specialist visited Respondent's work site. On the other days, Respondent worked together with one or two of the individuals. Respondent did not inform BOLI that he employed more than two individuals during the performance of USFS Contract #53-04R4-8-0068.

10) Respondent did not have a performance bond during the performance of USFS Contract #53-04R4- 8-0068 and did not post the notice required by ORS 658.415(15) regarding compliance with bond requirements on the worksite of this contract.

11) During the performance of the aforementioned BLM and USFS contracts (hereinafter "the subject BLM and USFS contracts"), Respondent believed the exemption on his farm/forest labor contractor's license relieving him from the requirement of obtaining and maintaining a $10,000 performance bond was valid so long as he did not have more than two individuals working for him on any particular day.

12) Respondent did not file certified true copies of all payroll records with BOLI for work performed on the subject BLM and USFS contracts. Respondent was aware of the statu-

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[3]ORS 658.415(3) requires farm labor contractors to maintain proof of financial ability to promptly pay the wages of employees and other obligations. ORS 658.417(3) requires persons who act as farm labor contractors with regard to the forestation or reforestation of lands to provide certified payroll records when the contractor pays employees directly.

tory requirement to file certified payroll records.

13) Respondent posted summaries of ORS 653.010 to 653.261 and rules adopted thereunder by the Commissioner of BOLI and the Wage and Hour Commission in his office, located in Blue River, Oregon. Respondent's employees reported to work each morning at his office prior to Respondent driving them to the work site. Respondent did not post these summaries in the vehicle he used to transport his employees to the work site or in or about the work site.

14) Respondent has not had three individual employees working together on the same day since completing USFS Contract #53-04R4-8-0068.

15) At the time of the hearing, Respondent was posting summaries of ORS 653.010 to 653.261 and rules adopted thereunder by the Commissioner of BOLI and the Wage and Hour Commission at his work sites.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent possessed a valid Oregon farm labor contractor's license ("license") with a special indorsement authorizing him to act as a farm labor contractor with regard to the forestation or reforestation of lands.

2) During all times material herein, Respondent was a person who employed other persons in the state of Oregon.

3) On May 22, 1998, Respondent obtained an exemption to his license pursuant to ORS 658.418 that exempted him from the necessity of filing certified true copies of payroll records and maintaining a bond or cash deposit in the amount of $10,000.

4) Respondent's exemption was granted, in part, based on his representations that he would employ two or less individuals to perform work on all forestation or reforestation contracts performed in the license year and that he would immediately notify the Bureau of Labor and Industries and comply with ORS 658.415(3) and ORS 658.417(3) in the event that he employed more than two individuals.

5) In 1998, sometime prior to May 26, Respondent employed and paid directly three individuals during the performance of a BLM pruning contract in Oregon that involved the forestation or reforestation of lands. Respondent did not tell BOLI that he employed more than two individuals during the performance of this BLM contract and did not maintain a $10,000 bond or cash deposit pursuant to ORS 658.415(3) during the performance of this contract.

6) In May and June 1998, Respondent employed and paid directly the same three individuals during the performance of USFS Contract #53-04R4-8-0068, a contract in Oregon that involved the forestation or reforestation of lands. Respondent did not tell BOLI that he employed more than two individuals during the performance of this contract and did not maintain a $10,000 bond or cash deposit pursuant to ORS 658.415(3) during the performance of this contract.

7) Respondent did not file certified true copies of all payroll records with BOLI for work performed on the subject BLM or USFS contracts.

8) Respondent did not post the notice required by ORS 658.415(15) regarding compliance with the bond requirements of ORS 658.415(3) on the subject BLM or USFS contracts.

9) Respondent posted summaries of ORS 653.010 to 653.261 and rules promulgated by the Commissioner of BOLI and the Wage and Hour Commission in his office, but not at the work site of the subject USFS contract.

CONCLUSIONS OF LAW

1) At all times material herein, ORS 658.407 provided in pertinent part:

> "The Commissioner of the Bureau of Labor and Industries shall administer and enforce ORS 658.405 to 658.503 and 658.803, and in doing so shall:
>
> " * * * * *
>
> "(3) Adopt appropriate rules to administer ORS 658.405 to 658.503 and 658.830."

At all times material herein, ORS 658.501 provided:

> "ORS 658.405 to 658.503 and 658.830 apply to all transactions, acts and omissions of farm labor contractors and users of farm labor contractors that are within the constitutional power of the state to regulate, and not preempted by federal law, including but not limited to * * * the recruitment of workers outside of this state to perform work in whole or in part within this state, * * * ."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein related to Respondent's violations of ORS Ch. 658.

2) At all times material herein, ORS 658.405 provided in pertinent part:

> "As used in ORS 658.405 to 648.503 * * *, unless the context requires otherwise:
>
> "(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, * * * employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities or the production or harvesting of farm products * * *."

At all times material herein, OAR 839-15-004 provided in pertinent part:

> "(14) 'Worker' means an individual performing labor in the forestation or reforestation of lands * * * or any person who is * * * employed to perform such labor * * *.
>
> "(15) 'Person' means any individual, sole proprietorship * * *."

In 1998, Respondent was a farm labor contractor who employed workers to perform labor for another to work in forestation or reforestation of lands on the subject BLM and USFS contracts.

3) At all times material herein, ORS 658.418 provided:

> "Upon written application from a farm labor contractor engaged in forestation or reforestation of lands, the Commissioner of the

Bureau of Labor and Industries may exempt the farm labor contractor from the provisions of ORS 658.415(3) and 658.417(3) for the license year if the commissioner finds that the farm labor contractor meets all of the following requirements:

"(1) The farm labor contractor operates as a sole proprietor.

"(2) The farm labor contractor engages in forestation or reforestation activities pursuant to contracts for less than $25,000.

"(3) The farm labor contractor employs two or less individuals in the performance of work on all contracts performed in the license year."

At all times material herein, ORS 658.440(1)(e) provided:

"(1) Each person acting as a farm labor contractor shall:

"(e) File with the Bureau of Labor and Industries * * * information concerning changes in the circumstances under which the license was issued."

Respondent was granted "exempt" status on his farm/forest labor contractor's license based on his representation that he would employ two or less individuals during the license year 1998. By failing to inform the Bureau that he was employing three individuals, Respondent violated ORS 658.440(1)(e).

4) At all times material herein, ORS 658.415(3) provided, in pertinent part:

"Each applicant [for a license to operate as a farm labor contractor] shall submit with the application and shall continually 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 of a company licensed to do such business in Oregon, a cash deposit or a deposit the equivalent of cash. * * * The bond or cash deposit shall be:

"(a) $10,000 if the contractor employs no more than 20 employees * * *."

At all times material herein, ORS 658.415(15) provided:

"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 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."

By employing three individuals, Respondent lost his ORS 658.418 exemption and was required to comply with ORS 658.415(3). Respondent's failure to obtain and maintain the necessary bond or cash deposit required by ORS 658.415(3) made compliance with ORS 658.415(15) impossible, resulting in Respondent's violations of ORS

658.415(15) during the performance of the subject BLM and USFS contracts.

5) At all times material herein, ORS 658.417(3) provided, 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:
>
> "(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."

Respondent employed and directly paid three persons while acting as a farm labor contractor with regard to the forestation or reforestation of lands during the performance of the subject BLM and USFS contracts. By employing three persons, Respondent lost his 658.418 exemption and was required to comply with ORS 658.417(3). Respondent violated ORS 658.417(3) by failing to provide certified true copies of payroll records for work done during the performance of the subject BLM and USFS contracts.

6) At all times material herein, ORS 658.453 provided 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:
>
> " * * * * *
>
> "(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(1), (3) or (4)."

OAR 839-15-510 provides in pertinent 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:
>
> " * * * * *
>
> "(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."
>
> "(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of money or valuables, if any, taken from employees or

subcontractors by the contractor or other person in violation of any statute or rule.

"(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 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 mitigating and aggravating circumstances."

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for the violations of ORS Chapter 658 found herein, and the penalties assessed in the Order below are a proper exercise of that authority.

7) At all times material herein, ORS 653.050 provided, in pertinent part:

"Every employer required by ORS 653.025 or by an rules, orders or permit issued under ORS 653.030 or 653.261 to pay a minimum wage to any of the employer's employees shall keep summaries of ORS 653.010 to 653.261, summaries of all rules promulgated by the Commissioner of the Bureau of Labor and Industries pursuant to ORS 653.010 to 653.261 and summaries of all rules promulgated by the Wage and Hour Commission posted in a conspicuous and accessible place in or about the premises where such employees are employed. * * * "

At all times material herein, ORS 653.010 provided, in pertinent part:

"As used in ORS 653.010 to 653.261, unless the context requires otherwise:

"(3) 'Employ' means to suffer or permit to work * * *."

"(4) 'Employer' means any person who employs another person * * *."

At all times material herein, ORS 653.025 provided, in pertinent part:

"Except as provided by ORS 652.020 and the rules of the Commissioner of the Bureau of Labor and Industries issued under ORS 653.030 and 653.261, 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:

" * * * * *

"(2) For calendar year 1998, $6.00."

Respondent violated ORS 653.050 by failing to post summaries of ORS 653.010 to 653.261, summaries of all rules promulgated by the Commissioner of the Bureau of Labor and Industries pursuant to ORS 653.010 to 653.261, and summaries of all rules promulgated by the Wage and Hour Commission in a conspicuous and accessible place in or about the work site where Respondent's employees were employed.

8) At all times material herein, ORS 653.256 provided, 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 $1,000 against any person who willfully violates * * * ORS 653.050 * * * or any rule adopted pursuant thereto. * * * "

At all times material herein, OAR 839-020-1020 provided, in pertinent 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:

" * * * * *

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

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

"(e) The opportunity and degree of difficulty to comply;

"(f) Whether the employers' action or inaction has resulted in the loss of a substantive right of an employee.

"(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.

"(3) Not withstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the employer for the purpose of reducing the amount of the civil penalty to be assessed."

At all times material herein, OAR 839-020-1030 provided, in pertinent part:

"(1) The civil penalty for any one violation shall not exceed $1,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances referred to in OAR 839-020-1020."

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for the violations found herein, and the penalties assessed in the Order below are a proper exercise of that authority.

OPINION

Respondent is charged with six violations[4] of Oregon's laws regulating farm labor contractors, and one violation of ORS Chapter 653. Under ORS 658.453, the maximum civil penalty for one violation is $2,000. Under ORS 653.256, the maximum civil penalty for one violation is $1,000.

[4]As noted in Finding of Fact--Procedural #15, the forum granted the Agency's motion at hearing to amend the Notice of Intent to add three violations pertinent to the BLM pruning contract; however, the additional three alleged violations were only sought based on their relevance to assessment of civil penalties regarding the original violations alleged in the Notice of Intent.

1. Failure to file with BOLI information concerning changes in the circumstances under which Respondent's license was issued.

a. The alleged violation.

Respondent was granted exempt status on his license predicated, in part, on his representation that he would "employ two or less individuals to perform work on all forestation or reforestation contracts performed in the license year." Respondent testified that he employed three individuals during the performance of subject USFS and BLM contracts in 1998. By not informing BOLI of this fact, Respondent violated ORS 658.440(1)(e).

b. Civil penalty.

By virtue of his exempt status, Respondent was not required to comply with three requirements -- obtaining and maintaining a bond, posting a notice of bond, and filing certified payroll records -- that are at the heart of Oregon's farm labor contractor regulatory scheme for protecting workers. By failing to notify BOLI that he employed three individuals, he was able to perform two contracts without having to meet these requirements, requirements that every non-exempt contractor must meet before they can obtain a license. Respondent's testimony indicates he knew he was required to tell BOLI was employing three individuals. His unsuccessful attempt to obtain a bond is not a mitigating circumstance, given that he continued to employ three individuals even after two unsuccessful attempts to obtain a bond. Likewise, Respondent's statement that he can only afford to pay $700 in civil penalties is not a mitigating circumstance with regard to this or the other alleged violations. The Agency seeks $1,000 as a civil penalty for this violation. Given the seriousness of the violation and Respondent's knowledge that he was violating the statute, the forum concludes that $1,000 is an appropriate civil penalty.

2. Failure to timely file certified payroll records with the Commissioner for forestation or reforestation work performed on USFS and BLM contracts.

a. The alleged violation.

Respondent lost his ORS 658.418 exemption at the time he hired his third employee. At that point, he was required to comply with the provisions of ORS 658.417(3) and timely file certified payroll records for work done as a farm/forest labor contractor when he paid employees directly.[5] There was no testimony or documentary evidence offered to establish that Respondent paid his employees "directly." However, the forum infers from Respondent's admission of "neglect in proper payroll filing,"[6] the undisputed fact that the workers were in fact Respondent's employees, and the nonexistence of any evidence to the contrary, that Respondent paid his employees directly. Consequently, Respondent was required to file certified payroll records for the subject USFS and BLM contracts and failed to do so.

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[5] *See In the Matter of Francis Kau*, 7 BOLI 45, 52 (1987).

[6] This admission is contained in Respondent's answer and request for hearing.

b. Civil penalty.

Respondent knew he was required to file certified payroll records on the subject BLM and USFS contracts and failed to do so, admitting that his reason was "neglect." Respondent's violation is aggravated by his prior violation stemming from the 1998 BLM contract and his knowledge of the violation. It is mitigated by the fact that there was no evidence that Respondent's workers had problems with him paying them appropriately. Respondent incorrectly believed he would violate the law only if he had three individual employees actually working on the same day. Respondent's misunderstanding of the law does not mitigate his actions, however, as he had three individual employees actually working on the same day on the subject BLM and USFS contracts and still did not file certified payroll records. The Agency seeks a civil penalty of $1,000 for Respondent's violation stemming from the USFS contract. Having considered the aggravating and mitigating factors, and having reviewed recent final orders discussing violations of ORS 658.417(3), the forum assesses a civil penalty of $500.[7]

3. Failure to conspicuously post the notice required by ORS 658.415(15) regarding compliance with bond requirements on the premises where Respondent's employees were employed on USFS and BLM contracts.

a. The alleged violation.

There is no dispute that Respondent violated ORS 658.415(15) with regard to the performance of USFS Contract #53-04R4-8-0068. Because Respondent was not in compliance with the bond requirements of ORS 658.415(3), it was impossible for him to post the notice required by ORS 658.415(15), a fact he freely admitted.

b. Civil penalty.

This violation is aggravated by Respondent's failure to comply with the bond requirements of ORS 658.415(3) and Respondent's prior violation of the same statute with regard to the subject BLM contract. It is mitigated by the fact that there was

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[7] *See In the Matter of Tolya Meneyev*, 14 BOLI 6, 15-16 (1995)($500 for the first violation, consisting of late submission of certified payroll records ["CPRs"], and $1,000 for the second violation, consisting of failure to submit CPRs, where Respondent knew of his obligation to submit CPRs and was twice reminded by the Agency to submit them; *In the Matter of Jefty Bolden*, 13 BOLI 292, 300-301(1994)($300 for the first violation and $500 for the second violation, where Respondent failed to submit CPRs, but Respondent hired an accountant after receiving the Notice of Intent, who actively began working with the Agency's CPRs office to bring Respondent into compliance); *In the Matter of Robert Gonzalez*, 12 BOLI 181, 197-98, 201(1994)($500 each for four separate CPRs that were submitted untimely where no mitigating evidence was presented); *In the Matter of Andres Ivanov*, 11 BOLI 253, 265 (1993)($250 for one late submission of CPRs, aggravated by Respondent's failure to submit timely CPRs in 1990); *In the Matter of Cristobal Lumbreras*, 11 BOLI 167, 171-72 (1993)($250 for one late submission of CPRs, no aggravating or mitigating circumstances); *In the Matter of Iona Pozdeev*, 11 BOLI 146, (1993)($500 each for two late submissions of CPRs on the same contract where no other aggravating or mitigating evidence was presented).

no evidence that Respondent's workers had problems with him paying them appropriately. Under the circumstances, a civil penalty of $500 as sought by the Agency is appropriate.

4. Failure to post summaries of ORS 653.010 to 653.261 and rules adopted thereunder by the Commissioner and all rules promulgated by the Wage and Hour Commission in a conspicuous and accessible place in or about the premises where Respondent's employees were employed during the performance of USFS Contract #53-04R4-8-0068.

a. The alleged violation.

Respondent posted the required summaries in his office, where his employees reported for work before being transported to the actual job site by Respondent. Respondent did not have the summaries posted in the vehicle he used to transport the workers or at the actual site where the work was performed. There was no evidence that Respondent's employees performed any work for which they received wages at Respondent's office. Likewise, there was no evidence that Respondent's office was located in close proximity to where his employees performed their work.

In 1997, the legislature enacted ORS 653.256 and subjected employers who failed to comply with the provisions of ORS 653.050 to civil penalties of up to $1,000. This is the first case where the forum has interpreted the provisions of ORS 653.050. Respondent argues that having the required notice posted in his office, where his employees reported to work each morning, met the requirements of ORS 653.050 because it was their place of employment. Consequently, the forum must determine the specific meaning of the statutory phrase "where such employees are employed."

In this case, "employ" is specifically defined in ORS 653.010(3) as "to suffer or permit to work." ORS 653.025, which requires employers to pay minimum wage, states that employers must pay employees minimum wage for every hour of work time that the employee is "gainfully employed." In other words, employees are "employed" and must be paid minimum wage whenever they are "suffer[ed] or permit[ted] to work." Along the same line of reasoning, "*where* employees are employed" (*emphasis added*) is the location where they are "suffer[ed] or permit[ted] to work and the employer must pay them minimum wage. In this case, that would be the USFS job site. This conclusion is bolstered by the forum's interpretation of ORS 658.415(15), an analogous statute.[8]

ORS 658.415(15) contains language almost identical to ORS 653.050 regarding where a required notice must be posted.[9] The forum has interpreted that language to mean that the notice must be posted at the "worksite," i.e. where the work is actually performed. *In the Matter of Andres Ivanov*, 11 BOLI 253, 264

[8]The purpose of both statutes is to ensure that workers are paid for work performed.

[9]ORS 658.415(15) reads, in pertinent part, "upon the premises where employees working under the contractor are employed." ORS 653.050 reads, in pertinent part, "in or about the premises where such employees are employed."

(1993). Again, the work was actually performed at the USFS job site.

All of the above leads to the conclusion that "where" Respondent's employees were "employed" was at the USFS job site, not at Respondent's office. As a result, the forum concludes that Respondent violated ORS 653.050 by failing to post the required summaries at the USFS job site.

b. Civil penalty.

This violation is aggravated by the fact that Respondent should have known of the violation. Although Respondent testified that he was ignorant of the provision, citing the fact that BOLI's licensing packet and test contained no reference to ORS 653.050, this is not credible, based on the fact that he did have the required summaries posted in his office. It is also aggravated by the fact that it would have been extremely easy for Respondent to comply with the statute by posting the summary at his job site. However, the fact that he did have the summaries posted, albeit in his office, must be considered a mitigating factor inasmuch as his employees did report to his office each morning and had at least a potential opportunity to read them before being transported to work. A second mitigating factor is that no substantive rights of any of his employees were lost as a result of his failure to post the summaries in the correct location. Having considered the aggravating and mitigating factors, the forum assesses a civil penalty of $250.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the civil penalties owed as a result of violations of ORS 658.415(15), ORS 658.417(3), ORS 658.440(1)(e), and ORS 653.050, the Commissioner of the Bureau of Labor and Industries hereby orders **Lambertus Sandker, dba Blue River Reforestation**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of TWO THOUSAND TWO HUNDRED AND FIFTY DOLLARS ($2,250), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondent complies with the Final Order. This assessment is the sum of the following civil penalties against Respondents: $1,000 for one violation of ORS 658.440(1)(e); $500 for one violation of ORS 658.417(3); $500 for one violation of ORS 658.415(15); and $250 for one violation of ORS 653.050.

In the Matter of
MURRAYHILL THRIFTWAY, INC.

Case Number 57-98
Final Order of Commissioner
Jack Roberts
Issued May 12, 1999.

SYNOPSIS

Where Complainant, an African American male, was subjected to repeated racial insults from his white immediate supervisor, the forum relieved Respondent of liability based on its exercise of reasonable care to

prevent and correct promptly any harassing behavior and Complainant's unreasonable failure to take advantage of any preventive or corrective opportunities provided by Respondent. Respondent was not liable for racial insults made to Complainant by a customer because the Agency did not prove that Respondent knew or should have known of the insults. Complainant's discharge was not due to his race or in retaliation for his opposition to the racial harassment. Accordingly, the commissioner dismissed the complaint and specific charges. ORS 659.030(1)(a)(b)(f).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 12, 13, and 14, 1997, 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 Linda Lohr, an employee of the Agency. Anthony Burks (Complainant) was present throughout the hearing and was not represented by counsel. Respondent Murrayhill Thriftway, Inc. was represented by Craig R. Berne, Attorney at Law. Thomas Calcagno was present as Respondent Murrayhill's representative on November 12th and 13th. Matthew Marcott, Respondent Murrayhill's president, was present as Respondent Murrayhill's representative on November 14th. Respondent George Canfield failed to appear in person or through a representative.

The Agency called as witnesses, in addition to Complainant, Respondent Murrayhill's former employees Dora Sweet, Keith Glackin, Robert Hesla, Tiffany Cardwell (by telephone), Tony Pittman (by telephone), and Caroline Majchrzak; Respondent Murrayhill's current employees Charles Sweet, Hollie Prescott, and Thomas Calcagno; Respondent Murrayhill's customer Timothy Repp; and Agency Senior Investigator Jane MacNeill.

Respondent Murrayhill called as witnesses current employees Alexandra Maughan and Barbara Rosenberger (by telephone); former employees Jennifer Maughan, Michael Bushey, Katherine McGregor, and Douglas Bryant; and Murrayhill's corporate president, Matthew Marcott.

Administrative exhibits X-1 to X-15 and Agency exhibits A-1, A-3, A-7 through A-17, A-20 and A-21, A-23 through A-26, and A-30 through A-32 were offered and received into evidence. Respondent exhibits RM-1 through RM-10, and RM-12 through RM-15 were offered and received into evidence. The record closed on May 15, 1998. Before the record closed, administrative exhibits X-16 through X-30 were received into evidence.

Having fully considered the entire record in this matter, I, Jack 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 March 27,1996, Complainant, an African American,[1] filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondent Murrayhill Thriftway, Inc. (hereinafter "Murrayhill") in terms and conditions and termination from employment. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations regarding terms and conditions of employment.

2) On July 16, 1997, the Agency prepared for service on Respondents Specific Charges alleging that Murrayhill discriminated against Complainant in his employment based on his race in terms and conditions of employment in violation of ORS 659.030(1)(b) and that George Canfield, an employee of Murrayhill, had aided and abetted Murrayhill in the commission of the alleged unlawful employment practice. Both Murrayhill and Canfield were named as Respondents.

3) 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.

4) On August 4, 1997, counsel for Murrayhill filed an answer in which it denied the allegation mentioned above in the Specific Charges, and stated numerous affirmative defenses.

5) On August 7, 1997, the Agency moved to amend the Specific Charges. The amendment was based on "newly acquired evidence." Specifically, the Agency sought to add new allegations that Complainant had been subject to discriminatory terms and conditions of employment based on his race in violation of ORS 659.030(1)(b) and that Complainant had been terminated in violation of ORS 659.030(1)(a) based on his race and in violation of ORS 659.030(1)(f) in retaliation for Complainant's opposition to unlawful employment practices. The Agency also sought to increase the damages sought to $40,000 for mental suffering and $7,000 for back pay.

6) On August 11, 1997, counsel for Murrayhill moved that the Agency's motion to amend be denied based on the Agency's failure to identify the newly acquired evidence or explain why such evidence could not have been found before.

7) On August 26, 1997, the ALJ granted the Agency's motion to amend based on OAR 839-050-0140. The ALJ postponed the hearing date from September 16, 1997, to a later date to be agreed upon by the participants based on the anticipated need for additional discovery. In the same Order, the ALJ issued a Discovery Order requiring Respondents and the Agency to submit a case summary pursuant to OAR 839-050-0200 and

[1]Complainant identified himself on the administrative complaint as "Afro-American."

839-050-0210 ten days prior to the new hearing date.

8) On September 3, 1997, the ALJ issued an Amended Notice of hearing resetting the hearing date to November 12, 1997.

9) On September 18, 1997, counsel for Murrayhill filed an answer to the Amended Specific Charges in which it denied the allegations mentioned above in the Amended Specific Charges and added a new affirmative defense.

10) On October 31 and November 3, 1997, respectively, Murrayhill and the Agency timely filed case summaries.

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

12) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Murrayhill of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) At the commencement of the hearing, on November 12, the Agency moved for an order finding Canfield in default on the grounds that he had been avoiding service but had apparently been served with the Specific Charges and had not filed an answer, and that he was not present at the hearing.

14) In response to the Agency's motion, the ALJ ruled Canfield provisionally in default, subject to proof by the Agency that he had been served with the Specific Charges and proof from Canfield concerning the reason for his alleged default.

15) On November 14, 1997, the ALJ withdrew the provisional order of default against Canfield on the basis that he had not been served with the Specific Charges until November 12, 1997.

16) On November 17, 1997, the ALJ received a telephone call from a person identifying himself as George Canfield who inquired what to do regarding the hearing notice he had apparently received. The ALJ advised Canfield he must file a written answer within 20 days of receiving the notice and notified the other participants, in writing, of the ex parte contact.

17) On December 1, 1997, Canfield filed a written answer responding to the Amended Specific Charges.

18) On January 7, 1998, the ALJ issued an interim order stating that the hearing would be reconvened on May 20, 1998, to allow Canfield to present his defense, and that supplementary case summaries were due on May 10, 1998.

19) On February 17, 1998, the Hearings Unit received a letter from attorney David J. Hollander stating that he had been retained by Canfield with regard to this case. Hollander enclosed an answer to the Amended Specific Charges. The answer denied that Canfield had engaged in or aided and abetted any unlawful employment practices as alleged and raised two affirmative defenses.

20) On March 4, 1998, the ALJ, on his own motion, allowed substitution of the answer filed by Hollander for the *pro se* answer filed on December 1, 1997, by Canfield.

21) On May 8, 1998, counsel for Canfield filed a pre-hearing statement of proof as a case summary.

22) On May 13, 1998, counsel for Canfield filed a motion to dismiss the charges against Canfield based on the Agency's failure to state a claim within the applicable statute of limitations.

23) On May 8, 1998, counsel for Murrayhill filed a supplementary case summary.

24) On May 12, 1998, the Agency moved to delete Canfield as a Respondent and to dismiss the allegations pertaining to Canfield's aiding and abetting Murrayhill.

25) On May 13, 1998, the ALJ issued an order deleting Canfield as a Respondent, dismissing the allegations pertaining to Canfield's aiding and abetting Murrayhill, and canceling further hearing.

26) The proposed order, which contained an exceptions notice, was issued on November 23, 1998. Under a timely requested extension of time, Respondent filed exceptions on January 11, 1999. Respondent's exceptions are dealt with in the Opinion section of this Order.

FINDINGS OF FACT -- THE MERITS

1) Complainant is an African American male.

2) At all times material herein, Respondent Murrayhill Thriftway, Inc. was an Oregon corporation engaged in the operation of a grocery store in Beaverton, Oregon, and was an employer in Oregon utilizing the personal services of one or more persons. The Marcott family controlled Murrayhill and several other grocery stores in the Portland area.

3) George Canfield was employed by Murrayhill as a grocery manager from March 1995 until shortly after a robbery that occurred on or about October 27, 1995. He was Complainant's immediate supervisor during Canfield's employment.

4) Complainant was hired by Respondent Murrayhill on or about October 10, 1993 and worked until March 1995 on the night crew.

5) On October 10, 1993, Complainant signed Respondent Murrayhill's two page "Harassment Policy" as an acknowledgment of having read and understood it. In relevant part, the Policy read as follows:

> " * * * Decisions involving every aspect of the employment relationship will be made without regard to an employee's race, color, creed, sex, * * *. Discrimination or harassment based upon these or any other factors is totally inconsistent with our philosophy and will NOT be tolerated.
>
> "Any employee who believes that they have been the subject of harassment should report the alleged conduct immediately to the store manager and/or store owner. A Harassment Complaint Form is available for this purpose. A confidential investigation of any complaint will be undertaken immediately.
>
> "Retaliating or discriminating against an employee for complaining about harassment is against the policies of this company and prohibited by law. Employees are encouraged to come forward with information pertaining to this type of behavior with the assurance

that there will be NO RETALIATION PERMITTED.

"The Company recognizes that the issue of whether harassment has occurred requires a factual determination based on all the evidence received. The Company further recognizes that false accusations of harassment can have serious effects on innocent people. We trust that all employees will act in a responsible and professional manner to establish a pleasant working environment free of harassment and/or discrimination.

"SEXUAL HARASSMENT

"Sexual harassment is illegal and against the policies of this company.

"Sexual harassment is defined by OAR 839-07-550[2] as:

> '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 of and (*sic*) 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 an individual, or
>
> (3) Such conduct is of such frequency and/or severity that it has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.'

"The following are examples of sexual harassment:

"**VERBAL**

"Sexual innuendo, suggestive comments, insults, threats, jokes about gender-specific traits or sexual propositions

"**NONVERBAL**

"Suggestive or insulting noises, leering, whistling or making obscene gestures

"**PHYSICAL**

"Touching, pinching, brushing the body, coercing sexual activities or assault"

6) Walt Souther was Respondent Murrayhill's store manager from the date of Complainant's hire until the second week in July, 1995, when Tom Calcagno replaced Souther.

7) In March 1995 Complainant was promoted to daytime grocery clerk. His immediate supervisor was Canfield.

8) During his employment at Murrayhill, Canfield's supervisory responsibilities included instructing Complainant and others as to their duties, as well as general responsibility for the operation of the store when all other supervisors ranked above him were gone. When he was re-

[2]OAR 839-07-550 is a Bureau of Labor and Industries rule on sexual harassment, here quoted in part as it appeared in Oregon Administrative Rules at times material. The current rule is OAR 839-007-0550.

sponsible for the operation of the store, Canfield was called a person in charge (PIC). There was no evidence placed in the record to establish that Canfield had the authority to hire, fire, discipline or promote, or participate in or recommend such actions.

9) Shortly after Complainant's promotion to daytime grocery clerk, Canfield, in Complainant's presence, made a remark about "how awful" a black man and a white woman who were together in the store appeared to him. In response, Complainant told Canfield that he has a daughter who is of mixed race and that he found Canfield's remarks offensive.

10) A week later, Complainant told Canfield that he was going to be married to a Caucasian woman and showed him a picture of his fiancee. Canfield asked Complainant how he thought people would "perceive" Complainant "married to a white woman." Complainant told Canfield skin color shouldn't matter.

11) Complainant then took ten days off work to get married and honeymoon in the Caribbean Islands. When he returned, Canfield asked him how people felt about him "being married to a white woman on a cruise ship with predominately Caucasian people?"

12) Canfield's remarks intimidated Complainant and caused him to believe that Canfield, his superior, was a racist and had some kind of hatred towards mixed race couples.

13) Complainant did not complain to any other supervisor at Murrayhill about the remarks cited in Findings 9-11.

14) Shortly after Complainant's honeymoon, Canfield began addressed Complainant as "Toby." Complainant told Canfield that his name was "Tony" and that he objected to being called "Toby" because "Toby" was a character in "Roots." Canfield then told Complainant "Come here, boy." After that, Canfield called Complainant "Toby" and "boy" one or two times a week until Canfield left Murrayhill. Canfield often called Complainant these names at the front end of the store by the checkstands.

15) Canfield's racial remarks and name calling intimidated Complainant because he believed Canfield, his superior, was a racist. Complainant felt nervous when Canfield called him "Toby" and told him "Come here, boy." He felt "chained and whipped," like his "ancestors felt sometime years ago."

16) During the summer of 1995, Keith Glackin heard Canfield refer to Complainant as "Toby" and understood it as a reference to Complainant's race based on a remark Complainant made to Canfield. Glackin observed that Complainant did not like being called "Toby." There was no evidence placed on the record that Glackin ever brought these remarks to the attention of any other supervisors, managers, or owners of Murrayhill.

17) Glackin started work at Murrayhill sometime between March and May 1995. Glackin worked as a supervisor/ person-in-charge (PIC) in the grocery section. Glackin's duties were similar to those of Canfield. There was no evidence placed in the record to establish that Glackin had the authority to hire, fire, discipline or promote.

18) Complainant did not complain to anyone except Canfield about Canfield calling him "Toby" and "boy."

19) Complainant did not file a Harassment Complaint Form regarding Canfield's racial remarks and name calling.

20) In later October or early November 1995, Canfield resigned from Murrayhill following an incident in which Murrayhill was allegedly robbed by a male African American.

21) Canfield's departure from Murrayhill's employ left the store in need of another supervisor, and Glackin "initially suggested" that Complainant be promoted. Complainant was subsequently promoted to a supervisory/PIC position and given a raise to $13.25/hr. Complainant's new responsibilities were essentially the same ones that Canfield had. There was no evidence placed in the record to establish that Complainant had the authority to hire, fire, discipline or promote, or participate in or recommend such actions.

22) During the first week of January, 1996, a woman came into Respondent Murrayhill's store with her dog. Complainant approached her and stated it was against a city health ordinance for her dog to be in the store. At the checkout stand, she swore at Complainant and told him "niggers don't belong in Oregon" and that she would "have your [Complainant's] job." The customer and Complainant then went outside the store, where she told Complainant "Niggers don't belong in Beaverton; I'm going to have your job, you motherfucker."

23) After the customer left, Complainant went back inside the store and described the incident in detail to Robert Hesla, a cashier, who advised him to talk to the store manager. The next day, Complainant described the incident in detail to Doug Bryant, Murrayhill's grocery manager. Bryant advised Complainant to point out the customer the next time she came into the store.

24) Within two days, the woman returned to the store with her dog inside her coat. She glared at Complainant, but did not speak to him. Bryant was not in the store, so Complainant went to Calcagno and told him that the woman who had brought the dog inside the store and who had "made these complaints" and was "saying these things" was in the store again. Complainant told Calcagno this because he believed Murrayhill should make sure a similar incident didn't happen again and because he feared the woman's threats about his job.

25) Calcagno did not talk to the woman.

26) The woman came into Murrayhill's store after that, but did not speak to Complainant or make any more racial remarks.

27) Complainant felt "devastated" that Bryant and Calcagno took no action after he complained about the woman. He believed that Canfield's previous racial remarks and Bryant's and Calcagno's failure to respond to his complaints about the woman showed that Murrayhill "tolerates this type of harassment."

28) On January 12, 1996, Tom Calcagno met with Complainant and discussed complaints by fellow workers regarding Complainant's management style. Calcagno made a

written record of the meeting, which states as follows:

> "Met with Tony and discussed complaints by fellow workers w/regards to his management style. Complaints from Tiffany, Hollie, Charlie, Tony P., Shannon, Jennifer, Courtney. In General - rudeness, abrasiveness, and lack of respect shown to workers. Recommended changing approach and attitude. Verbal warning about women employees being asked out on dates."

29) On January 22, 1996, Cindy Rose, a courtesy clerk employed by Murrayhill who was under 21 years of age, filed a written complaint with Tom Calcagno alleging that, at work, Complainant had "pinched her butt," put his arms around her, asked her to party with him. Rose told Calcagno that she was afraid of working with Complainant. Earlier, Rose had told Tony Pittman, another PIC/supervisor employed at Murrayhill, that Complainant had inappropriately touched her and Jennifer Maughan, tried to ask them out for dates, and touched their butts.

30) On January 23, 1996, Calcagno met with Complainant and informed him that allegations of sexual harassment had been made against him that generally involved touching, rubbing, and asking individuals out on dates. Complainant asked who had made the allegation, and Calcagno would not disclose their names. Complainant denied sexually harassing anyone at Murrayhill.

31) Calcagno instructed Complainant to take some time off while Calcagno investigated the complaints. Complainant took off January 24th and 25th.

32) Calcagno instructed Complainant to take time off from work because he did not want minor girls working under Complainant another day.

33) When a complaint of harassment is filed, Murrayhill's policy is to conduct a confidential investigation and keep the names of the complaining parties as confidential as possible during the investigation.

34) On January 24, 1996, Jennifer Maughan, a 17-year-old courtesy clerk employed by Murrayhill, filed a written complaint with Calcagno alleging that, at work, Complainant had brushed by her, kissed her, and invited her to go to a dance/bar for persons over 21 years of age. Maughan also reported that she was in fear of working with Complainant because of Complainant's sexual behavior towards her. Earlier in the month, Maughan had verbally complained to Tony Pittman that Complainant intimidated her and had inappropriately touched her.

35) In response to the complaints of Rose and Maughan, Calcagno conducted an investigation by interviewing Mike Bushey, Debbie Gabel, Barbara Rosenberger, and Tiffany Duong (now Tiffany Caldwell).

36) Bushey told Calcagno that he saw Complainant kiss Jennifer Maughan in a way that was unwelcome. Gabel told Calcagno that she had seen Complainant walk around with his arms around the neck of Jennifer Maughan and Courtney, another female employee. Rosenberger told Calcagno that she had seen Complainant touching Jennifer Maughan around her waist and putting his face

into her neck area, "coming on to" a female Oriental customer, and touching and rubbing Rose in an inappropriate manner.

37) Calcagno discussed the sexual harassment allegations against Complainant and his investigation with Matthew Marcott, Murrayhill's president, and Pam Garcia, Marcott's sister. Calcagno recommended that Complainant be terminated because he would not be able to effectively supervise any longer due to the sexual harassment and due to the severity of the harassment, in that it involved minor females and other females who felt they could no longer work with Complainant.

38) On January 26, 1996, Calcagno informed Complainant that he was terminated due to sexual harassment.

39) Complainant earned $13.25/hr. at the time of his termination.

40) Complainant's next employment after his termination from Respondent Murrayhill was at Safeway in March 1996. At Safeway, Complainant earned $14.00/hr..

41) In March 1997, Art Majchrzak brought a letter to Matthew Marcott detailing sexual harassment allegations against John Smolders, the director of baking for the multiple stores owned by the Marcott family. Marcott referred the matter to Calcagno and instructed him to investigate. Majchrzak, Caroline Reid, Dora Sweet, and Linda Evans, all employees of Murrayhill's bakery, completed Harassment Complaint Forms and submitted them to Calcagno. In the Forms, they alleged that Smolders had engaged in sexual harassment consisting of the following: (a) Asking Majchrzak "How does it feel to fuck your own boss?;" (b) Saying that he and his wife only had sex twice a year but he was still happy; and (c) Lifting his apron up and telling Sweet "This will get you five dollars" in response to her joking inquiry about when she would get a raise. There were no allegations that Smolders had touched anyone or that anyone was in fear of him.

42) Calcagno investigated the incident by speaking with Reid, Sweet, Evans, and Majchrzak. He did not speak to Smolders because Smolders was not his employee and was "in some ways above me [Calcagno] as far as his participation in the company." Calcagno reported back to Marcott, who informed Smolders of the allegations without disclosing the identity of the complainants. Smolders denied the allegations, and Marcott warned him that any future remarks of the type alleged would be grounds for disciplinary action up to and including termination. Subsequently, Calcagno followed up by asking Reid and the others on two occasions about Smolders' behavior.

43) Smolders was not terminated because the allegations against Smolders did not involve allegations of touching or harassment of minor females, and the complaining employees did not express that they were intimidated by or in fear of Smolders.

44) In early 1995, Robert Hesla was employed as store manager of Baseline Thriftway, another grocery store in the Portland area owned by the Marcotts. Hesla received a com-

plaint alleging that a white male employee had commented to a cashier "Linda, you shouldn't bend over like that; it really turns me on." Hesla suspended the employee while investigating the complaint. During his investigation, Hesla received a second complaint that the same employee, in front of three witnesses, had lifted his apron and invited a deli clerk to "Take a break on this." Hesla fired the employee after confirming the allegations of the complaints.

45) On December 19, 1995, Alexandra Maughan, a checker at Murrayhill and Jennifer Maughan's mother, completed a Harassment Complaint form alleging that Dennis Normoyle, a supervisor, had told her that he hadn't had sex since his wife left, asked Maughan about her sexual activity, then subsequently suggested that they should "take care of each other's needs" and that Maughan should "come up with a plan." Maughan told Calcagno that she felt she could keep working with Normoyle as long as he did not bother her again. Calcagno questioned Normoyle about the allegations on December 29, 1995, and followed up by asking Maughan a month later if Normoyle had bothered her again. Normoyle, who is about the same age as Maughan, did not bother Maughan again.

46) Normoyle was not terminated because the allegations against him did not involve allegations of touching or harassment of minor females, and the complaining employees did not express that they were intimidated by or in fear of Normoyle.

47) In the spring of 1996, John Atterberry, a male employed in Murrayhill's health and beauty aids department, brought the back of his hand in contact with Dora Sweet. Sweet complained to Caroline Reid (now Majchrzak), head of the bakery department, about this. Two other women also complained to Matthew Marcott about Atterberry invading their personal space. There were no complaints that anyone was afraid of or intimidated by Atterberry. Either Linda Harris or Pam Garcia, Marcott's sisters, talked to Atterberry about this complaint, and no more complaints were received about Atterberry.

48) Atterberry was not terminated because Calcagno and the Marcott family were not aware that he had touched anyone and the complaining employees did not express that they were intimidated by or in fear of Atterberry.

49) In the summer of 1997, Calcagno fired Kyle, a learning disabled white male, after Calcagno observed that Kyle had been touching female employees after Calcagno warned him not to. No one had complained to Calcagno about Kyle's behavior before Calcagno terminated him.

50) Complainant's testimony was not wholly credible. His recollection of dates and time frames was confused, and at times, clearly in error. For example, he testified that he was hired in October 1993, then worked on night crew six months to a year before his promotion to daytime grocery clerk, at which time Canfield became his supervisor for the next seven months. He testified that Canfield made racially harassing comments to him in March and April, 1994, just prior to and after his marriage, whereas his complaint clearly states the harassing comments be-

gan in March 1995. Complainant also testified that he told Calcagno about these comments in March 1995, but the evidence clearly shows that Calcagno did not become the store manager until July 1995. He testified that he was made a supervisor in November 1994 before being reminded that it was actually in 1995. Regarding the woman/dog incident, Complainant testified that he walked out of the store so the woman couldn't see him, whereas another credible witness testified that Complainant followed the woman out of the store. Testimony by a different credible witness established that if Complainant really wanted to avoid the woman, he could have done it by going to the back of the store or upstairs in the store, instead of going outside where he was bound to encounter the woman again when she left the store. Finally, Complainant's blanket denial of all the allegations of sexual harassment is simply not credible, given the number of credible witness statements to the contrary. Accordingly, the forum gave Complainant's testimony less weight whenever it conflicted with other credible evidence on the record.

51) Thomas Calcagno's testimony was not wholly credible. His ability to recall events was suspect, but not selective. For example, he was unable to recall whether or not Complainant complained to him about the woman with the dog. He made statements to a representative of the Employment Department that were at odds with his testimony at the hearing. Based on Calcagno's statements, the Employment Department issued an administrative decision with findings of fact stating that "During the year 1995, employer [Respondent Murrayhill] received verbal complaints from female employees regarding your [Complainant's] sexual behavior" and "On November 11, 1995, your employer [Respondent Murrayhill] held a meeting with you [Complainant] to discuss your behavior regarding female employees and a memo was issued." In contrast, Calcagno stated at the hearing that no one complained about Complainant before January 12, 1996. He testified he thought Tony Pittman told him that he had seen Cindy Rose and Complainant physically touching, but could not explain why he did not write this down. He also wrote down that Shannon Viera stated she had been subject to verbal harassment from Complainant and witnessed him touching others from behind, a statement that was contradicted by his written notes. Accordingly, the forum gave Calcagno's testimony less weight whenever it conflicted with other credible evidence on the record.

52) The testimony of Robert Hesla, Keith Glackin, Hollie Prescott, and Charles Sweet was credible.

53) The testimony of Jennifer Maughan was not entirely credible. Her testimony was inconsistent on several points. She testified on direct that Complainant had intentionally brushed against her "maybe 10 times," then on cross examination testified that all the brush-ups except for one were unintentional. She testified on direct that Complainant kissed her on January 23rd, then on cross testified the incident actually occurred a day earlier. She also testified that she signed Murrayhill's sexual harassment policy in October 1995, when she in fact signed it on January 21, 1996. Accordingly, the forum

gave Maughan's testimony less weight whenever it conflicted with other credible evidence on the record.

54) The testimony of Alexandra Maughan was not entirely credible, in that her memory was suspect. Relative to the time in which Complainant was terminated, she testified "Could be right around six months, could be less" as the amount of time that Jennifer, her daughter, reported Complainant's first inappropriate touching to her. In contrast, Jennifer's testimony established that she did not start working for Murrayhill until three months before Complainant was terminated. Accordingly, the forum did not believe her testimony as to specific times and dates and gave her testimony less weight whenever it conflicted with other credible evidence on the record.

55) The testimony of Tiffany Caldwell was not credible. She was biased against Jennifer Maughan because Maughan touched Pittman, Caldwell's boyfriend. In an apparent attempt to help Complainant, she also testified that she heard Jennifer Maughan invite Complainant to a party and that Jennifer and Alexandra Maughan told her they had invited Complainant to their house for dinner. In contrast, Complainant did not mention these incidents, despite the fact that they would have bolstered his case.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Murrayhill was an employer in the state of Oregon utilizing the personal services of one or more persons.

2) Respondent Murrayhill employed Complainant.

3) Complainant is an African American male.

4) Respondent George Canfield was employed by Respondent Murrayhill between March and October 1995 and was Complainant's immediate supervisor in that period of time.

5) Canfield engaged in verbal conduct, consisting of racial remarks referring to mixed racial marriages and addressing Complainant as "Toby" and "boy," directed at Complainant because of his race between March and October 1995.

6) Canfield's racial remarks were unwelcome to Complainant and were sufficiently severe to have created an intimidating, hostile, and offensive working environment for Complainant.

7) Complainant did not complain to Calcagno, Murrayhill's store manager, about any racial remarks made to him by Canfield.

8) At all times material, Respondent Murrayhill had in place a written Harassment Policy that prohibited harassment in the workplace based on race, color, sex, and other protected classes. The Policy specified that employees who believed they had been harassed should report the harassment immediately to the store manager and/or store owner and stated that a confidential investigation would be undertaken immediately, with "NO RETALIATION PERMITTED." (*emphasis in original*)

9) Respondent Murrayhill's Harassment Policy was effectively used by employees to file sexual harassment complaints against Complainant and other males.

10) Complainant was aware of Respondent Murrayhill's Harassment Policy, but unreasonably failed to utilize it to complain about Canfield's racial remarks or the racial remarks directed at him by the woman who came into the Murrayhill store with her dog. Complainant did describe the latter incident to Respondent Murrayhill's grocery manager.

11) Canfield's racial remarks caused Complainant to experience mental suffering.

12) Respondent Murrayhill informed Complainant of the general nature of the sexual harassment allegations made against him, and Complainant denied engaging in any sexual harassment.

13) Prior to Complainant's termination, Respondent Murrayhill reasonably believed that Complainant had sexually harassed minor females employed by Respondent Murrayhill through physical touching and verbal conduct.

14) Complainant was discharged based on Respondent Murrayhill's good faith belief that Complainant had had sexually harassed minor females employed by Respondent Murrayhill through physical touching and verbal conduct.

15) Complainant was not treated differently than non-African American males who were the subject of sexual harassment complaints by Respondent Murrayhill's female employees.

16) Complainant's race was not a factor in his discharge.

17) Complainant's complaints of racial harassment were not a factor in his discharge.

CONCLUSIONS OF LAW

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

2) The actions, statements, and motivations of George Canfield, Thomas Calcagno, Matthew Marcott, and Pam Garcia are properly imputed to Respondent Murrayhill Thriftway, Inc. herein.

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

4) ORS 659.010(1) provides, in part:

> "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 * * * to bar or discharge from employment such individual. * * *

Respondent Murrayhill Thriftway, Inc. did not discharge Complainant due to his race, African American, and did not violate ORS 659.030(1)(a).

5) ORS 659.010(1) provides, in part:

> "For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:
>
> " * * *
>
> "(b) For an employer, because of an individual's race * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Former OAR 839-050-010 provided, in part:

> "(3) Harassment on the basis of protected class is an unlawful employment practice if the employer knew or should have known both of the harassment and that it was unwelcome. Unwelcome conduct of a verbal or physical nature relating to an employee's protected class is unlawful when such conduct is directed toward an individual because of the individual's protected class and
>
> " * * *
>
> "(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.
>
> "(d) The standard for determining harassment will be what a reasonable person would conclude if placed in the circumstances of the person alleging harassment."

Current OAR 839-005-0010[3] provides, in relevant part:

> "(4) Harassment in employment based on an employee's protected class is a type of intentional unlawful discrimination. In cases of unlawful sexual harassment in employment see OAR 839-007-0550.
>
> "(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when:
>
> "(A) Substantial evidence of the four elements of OAR 839-005-0010 (1) is shown; and
>
> "(B) Such conduct is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment, * * *
>
> "(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complainant would so perceive it.
>
> " * * *
>
> "(d) Harassment by Supervisor, No Tangible Employment Action: Where harassment by a supervisor with immediate or successively higher authority over the individual is found to have occurred but no tangible employment action was taken:
>
> "(A) The employer is liable if the employer knew of the harassment unless the employer took immediate and appropriate corrective action.
>
> "(B) The employer is liable if the employer should have known of the harassment. The Civil Rights Division will find that the employer should have known of the harassment unless the employer can demonstrate:
>
> "(i) That the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and

[3]Current OAR 839-005-0010 became effective on October 23, 1998.

"(ii) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

"* * *

"(f) Harassment by Non-Employees: An employer is liable for harassment by non-employees in the workplace, where the employer or its agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases, the Civil Rights Division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees."

Under ORS 659.030(1)(b) and OAR 839-005-0010, Respondent Murrayhill Thriftway, Inc. is not liable for Respondent Canfield's racial remarks about "mixed marriages" and "Toby" and "boy" that were directed at Complainant based on his race/color, African-American.[4] Respondent Murrayhill Thriftway, Inc. did not subject Complainant to discriminatory terms and conditions of employment, in violation of ORS 659.030(1)(b), through a customer who made insulting and demeaning remarks based on Complainant's race, African American. Respondent Murrayhill Thriftway, Inc., did not subject Complainant to disparate terms and conditions of employment in the enforcement of their Harassment Policy in violation of ORS 659.030(1)(b).

6) ORS 659.030(1) provides, in part:

"For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:

" * * *

"(f) For an employer, because of an individual's race * * * to discharge * * * any person because the person has opposed any practices forbidden by this section * * *."

Respondent Murrayhill Thriftway, Inc. did not discharge Complainant because of Complainant's opposition to racial harassment and did not violate ORS 659.030(1)(f)

7) ORS 659.010(1) provides, in part:

"For the purposes of ORS 659.010 to 659.110 * * * 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 659.010 to 659.110 * * * or attempt to do so."

The Specific Charges alleging aiding and abetting on the part of Respondent Canfield have been dismissed.

8) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the specific charges

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[4] A detailed discussion of how this conclusion was reached is contained in the Opinion, *infra*.

and the complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

1. Introduction.

In this case, the Agency charged that Respondent Murrayhill unlawfully discriminated against Complainant in terms and conditions of employment and discharge from employment. The Agency further charged that Respondent George Canfield, an employee of Respondent Murrayhill, aided and abetted Respondent Murrayhill by calling Complainant racially derogatory names.

The charges against Respondent Canfield were dismissed before the record closed and will not be discussed in this Opinion. Accordingly, this Opinion will hereafter refer to Respondent Murrayhill as "Respondent."

2. Respondent's Liability for Canfield's Racial Remarks.

Credible testimony by Complainant, Prescott, Glackin, and Charles Sweet establishes that Canfield was Complainant's supervisor with immediate authority over Complainant, and made racial remarks toward Complainant between March 1995 and October 1995. Specifically, Canfield made three remarks to Complainant concerning "mixed marriages" and Complainant's marriage to a white woman in March and April, then repeatedly addressed Complainant as "Toby" and "boy" from May through October. Under the circumstances, there can be no question that these remarks were directed at Complainant because of his race. Likewise, the history of race relations in this country, common sense, and Complainant's reaction to Canfield's remarks establishes that the remarks were sufficiently severe to create a hostile, intimidating or offensive working environment for a reasonable person in the circumstances of Complainant, and in fact did so for Complainant.[5] *OAR 839-050-0010(4)(a)-(c).*

The evidence did not show, and that Agency did not allege, that Canfield took, or caused to be taken, a tangible employment action against Complainant as a result of these remarks. Where actionable harassment occurs, but no tangible employment action is taken as a result, the forum applies the provisions of *current* OAR 839-005-0010(4)(d)[6]

The first level of analysis under OAR 839-005-0010(4)(d) is to determine whether Respondent "knew" of the harassment. If so, then Respondent's only available defense is that it took "immediate and appropriate corrective action." *OAR 839-005-0010(4)(d)(A).* In this case, the evidence is undisputed that no one but

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[5] *See, e.g. In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 252-53 (1995) (The word "boy," when applied to a black employee, constitutes racial harassment because it "implies an inherent inferiority" because of race. Respondent's posting of a Confederate flag in front of a black employee's work station and requiring him to salute it daily, given the historical significance of race relations in this country, makes it difficult to imagine how anyone could not perceive this action as a racial insult.) Canfield's use of the name "Toby," a black slave from the movie "Roots," carries a similar connotation.

[6] All subsequent references to *OAR 839-005-0010(4)(d)* refer to the current version of the rule.

Canfield and Complainant knew of the "mixed marriage" remarks. A review of the facts also shows that Respondent had no actual knowledge that Canfield called Complainant "Toby" and "boy." Only one supervisory employee, Keith Glackin, a supervisor/PIC on the same level as Canfield, heard Canfield call Complainant "Toby." There is no credible evidence that Calcagno or Bryant, Respondent's manager and assistant manager, or the store owners, were aware of it. Glackin's knowledge, standing alone, does not establish actual knowledge on Respondent's part and trigger an evaluation of employer liability under the standard set out in OAR 839-005-0010(4)(d)(A).[7]

The next level of analysis is set out in OAR 839-005-0010(4)(d)(B), which states that when a supervisor with immediate authority over an individual harasses that individual, but no tangible employment action is taken against the individual as a result of the harassment and there is no evidence that the employer knew of the harassment, the employer is liable if the employer "should have known" of the harassment.[8] There is a presumption that the employer "should have known," unless the employer can prove a two-pronged affirmative defense by a preponderance of the evidence. First, the employer must prove that it "(i) * * * exercised reasonable care to prevent and correct promptly any harassing behavior." Second, that "(ii) * * * [Complainant] unreasonably failed to take advantage of any preventive or corrective opportunities provided by * * * [Respondent] or to avoid harm otherwise."

This is the first case in which the forum has interpreted the provisions of *current* OAR 839-005-0010(4)(d). As Respondent points out in its exceptions, this rule and BOLI's related administrative rules were amended in response to two recent United States Supreme Court decisions in which the Court clarified the standards for determining employer liability in Title VII harassment cases. See *Faragher v. City of Boca Raton*, __ U.S. ___, 118 S.Ct. 2275, 2293 (1998); *Burlington Industries v. Ellerth*, __ U.S. ___, 118 S.Ct. 2257 (1998). Although federal case law interpreting federal statutes and regulations similar to Oregon's laws are not binding on this forum,[9] "federal decisions are instructive and

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[7] *See Faragher v. City of Boca Raton*, __ U.S. ___, 118 S.Ct. 2275, 2282 (1998) , where the Court tacitly accepted the conclusion of the lower court that knowledge of the alleged sexual harassment could not be imputed to the City based solely on the fact that a low level supervisor on the same hierarchical level as the alleged harassers had knowledge of the harassment. The same analysis applies to Canfield, the harasser, who was on the same level in Respondent's management hierarchy as Glackin.

[8] This dovetails with *former* OAR 839-005-0010(3), which made employers liable for harassment on the basis of protected class unlawful "if the employer knew or should have known both of the harassment and that it was unwelcome."

[9] *See In the Matter of Kenneth Williams*, 14 BOLI 16, 25 (1995); *In the Matter of Pioneer Building Specialties Co.*, 3 BOLI 123, 130 (1982, *aff'd without opinion*, 63 Or App 871, 667 P2d 583 (1983). *See also In the Matter of School District Union High 7J,* 1 BOLI 1634, 170 (1979).

entitled to great weight on analogous issues in Oregon law."[10] Oregon's Fair Employment Practices Law contained in ORS 659.010 to 659.110 is analogous to Title VII of the Civil Rights Act of 1964, as amended, which the Supreme Court interpreted in *Faragher* and *Burlington.* OAR 839-005-0010(4)(d)(B)(i) and (ii) contain language identical to that used by the Court in setting out the affirmative defenses available to an employer in sexual harassment cases where an actionable hostile environment is created by a supervisor with immediate or successively higher authority over the employee and no tangible employment action is taken.[11] Consequently, the forum looks at those cases and a recent decision from the Ninth Circuit for guidance in interpreting the provisions of OAR 839-005-0010(4)(d)(B).

In order to prevail on the affirmative defense contained in OAR 839-005-0010(4)(d)(B), Respondent has the burden of proving that it "exercised reasonable care to prevent and correct promptly any harassing behavior" and that Complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." In *Faragher* and *Burlington,* the Supreme Court further explained the requirements of the two necessary elements of the affirmative defense:[12]

> "While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Faragher*, at 2293; *Burlington* at 2270.

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[10] *See In the Matter of Wing Fong*, 16 BOLI 280, 292 (1998).

[11] BOLI also amended its administrative rules covering sexual harassment on October 23, 1998. *OAR 839-007-0550,* like *OAR 839-005-0010(4)(d)(B),* was amended to create a presumption of employer liability where there is actionable sexual harassment by a supervisor with immediate or successively higher authority over an individual but no tangible employment action is taken as a result. An employer has available the same affirmative defenses as contained in OAR 839-005-0010(4)(d)(B).

[12] *See also Burrell v. Star Nursery, No. 97-17370,* slip op. (9th Cir., March 25, 1999) (summary judgment absolving employer from liability in an actionable sex harassment case reversed and remanded, with instructions to apply the *Faragher* and *Burlington* affirmative defense, and quoting the Court's explanation of the requirements of the two necessary elements of the affirmative defense.)

In analyzing whether the City of Boca Raton, the employer in *Faragher,* had presented evidence establishing the affirmative defense, the Court noted that an employer's dissemination of the antiharassment policy, assurances in the antiharassment policy that supervisors could be bypassed in registering complaints, and efforts to keep track of the conduct of its supervisors were all relevant avenues of inquiry. *Id.*

In this case, the first prong of Respondent's defense is established by credible evidence of the existence of an effective written Harassment Policy which provided a viable means for a harassed individual to bring harassment based on race, color, sex, and other protected classes to Respondent's attention. The Policy provided that complaints could be made to the store manager or Respondent's owner, insuring that a harassing supervisor or manager could be bypassed in registering a complaint. Ironically, the effectiveness of the Policy is most clearly shown by the fact that Complainant was discharged as a result of written harassment complaints filed against him.

The second prong turns on whether or not Complainant "unreasonably failed" to utilize Respondent's complaint procedure. Three examples of the type of evidence that would defeat this defense would be Complainant's ignorance of the procedure, credible testimony from Complainant that he was intimidated from filing a complaint based on retaliatory threats or his reasonable belief that Calcagno or Respondent's owners would not take any action on his complaint.[13]

There is no question that Complainant was aware of Respondent's Harassment Policy. He signed it at the time of his hire.[14] Even though an employee is aware of an employer's policy in this regard, there may be circumstances where it would nonetheless not be unreasonable for an employee not to use such a policy. In this case, however, there is no evidence that, during Canfield's employment, Complainant was discouraged or intimidated from filing a complaint by such things as threats of retaliation, personal knowledge that other harassed employees had filed complaints upon which no action was taken, or pervasiveness in the workplace of the type of harassment suffered by the harassed employee. Complainant did testify that he believed Canfield's remarks, coupled with the later incident where the cus-

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[13]Examples of how a victim of actionable harassment could acquire a reasonable belief that an employer would not take any action on his/her complaint include, but are not limited to, personal knowledge that other harassed employees had filed complaints upon which no action was taken, and pervasiveness in the workplace of the type of harassment suffered by the harassed employee, indicating tacit approval of the harassment by the employer. The latter type of evidence could, in some cases, also defeat the first prong of the affirmative defense by demonstrating that the employer had not exercised reasonable care to prevent and promptly correct harassment.

[14]*See, e.g. Broad v. Kelly's Olympian Co.*, 156 Or 216, 229, 66 P2d 485, 490 (1937)(a person is presumed to be familiar with the contents of any document that bears his signature.)

tomer directed racially harassing insults at Complainant, showed the Respondent "tolerated" harassment; however there is no evidence that at the time of Canfield's remarks any other such incidents, or any failure of Respondent to take corrective action, had occurred. Consequently, the forum concludes that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by Respondent to complain of Canfield's remarks and that Respondent has met its burden of proving the affirmative defenses set out in OAR 839-005-0010(4)(d)(B). Therefore, Respondent is not liable for Canfield's racial remarks.[15]

3. Respondent's Failure to Take Action About the Woman and Her Dog.

A different test applies when harassment is from a non-employee. An employer can be held liable for racial harassment by a non-employee, a customer in this case, if the employer knew or should have known[16] of the conduct and fails to take immediate and appropriate corrective action. Unlike the case where an immediate supervisor is the harasser, there is no presumption that the employer "should have known." *OAR 839-001-0010(4)(f); In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 252 (1995); *In the Matter of United Grocers, Inc.*, 7 BOLI 1, 35 (1987).

First, a review of the facts. Credible testimony from Complainant, Hesla, and Repp established that a customer made racially insulting remarks toward Complainant. After consulting Hesla, the next day Complainant complained about the racial insults to Respondent's assistant store manager, Bryant, who told him to point the customer out the next time she came into the store. When the customer came in again a day or two later, Bryant wasn't in the store, so Complainant followed Bryant's instructions and told Calcagno that the customer was in the store. However, Complainant failed to specifically report to Calcagno that the customer had racially harassed him. Calcagno took no action, and the customer did not speak to Complainant or make any more racial remarks during that visit or subsequent visits to the store.

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[15]Employers should not view this order as holding that liability for harassment by low-level supervisors can be avoided by the mere adoption of a harassment policy. Whether or not an employer exercised reasonable care to prevent and correct promptly any harassing behavior and whether a complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer is dependent on the facts in each case.

[16]"Should have known" includes "constructive knowledge" and "constructive notice." These terms were defined by the forum in *In the Matter of Wing Fong*, 16 BOLI 280, 292 (1998). "Constructive knowledge" was defined as "If one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such a fact; e.g. matters of public record." "Constructive notice" was defined as "Such notice as is implied or imputed by law * * *. Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing. That which the law regards as sufficient to give notice and is regarded as a substitute for actual notice."

Under these circumstances, the forum finds that the customer's remarks were directed at Complainant because of his race, that a reasonable person in Complainant's circumstances would have perceived that the remarks were sufficiently severe to create a hostile, intimidating or offensive working environment, and that Complainant had the same perception.

The next question is whether Respondent knew or should have known of the customer's conduct, and if so, whether Respondent took immediate and appropriate corrective action.

Bryant, the assistant store manager, had knowledge of the harassment because Complainant told him. In contrast to Glackin, his position as second in command at Respondent's store justifies imputing knowledge of the customer's harassment to Respondent. However, at the time Complainant reported the incident to him, there was no corrective action he could take, as the incident had occurred the day before and the customer was no longer in the store. Instead, he instructed Complainant to point out the customer the next time she came into the store. When the customer came back two days later, Complainant reported to Calcagno that the woman who had "made these complaints" and was "saying these things" was in the store again, but did not explain that she had racially harassed him. The woman came back to the store after that, but never harassed Complainant again. As a result, there is no evidence Calcagno was made aware the woman had racially harassed Complainant or that it occurred again so that he could correct it. Bryant, having directed Complainant to point the customer out the next time she came in to the store, and not being informed of any further harassment, likewise had no reason to take any further action. Finally, there is no evidence that the harassment became pervasive through the customer or other non-employees making racial remarks again in Complainant's presence.[17]

Under these circumstances, even though the harassment was unarguably hostile, intimidating and offensive, Respondent cannot be held liable for the harassment inflicted upon Complainant by Respondent's customer.

4. Was Complainant's Discharge Based on Retaliation?

In order to prevail on a retaliation claim, the Agency must establish that Calcagno and/or Matthew Marcott and Pam Garcia, the individuals responsible for discharging Complainant, were aware of his opposition to the racial harassment that occurred and that Complainant's opposition motivated them, at least in part, to discharge him. There was no credible evidence presented that established that Calcagno, Marcott, or Garcia had actual knowledge of any racial harassment or that Complainant opposed it. Without actual knowledge by these individuals, the Agency's retaliation claim fails.

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[17] In prior harassment cases before this forum, "should have known" has been equated as having constructive knowledge or notice, which can be shown through evidence of pervasiveness of conduct. *Id., at* 292-94 (1998).

5. Was Complainant Treated Differently in Terms and Conditions of Employment than White Co-Workers Who Were Accused of Sexual Harassment?

The Agency alleged that Complainant was not given notice of the specific sexual harassment allegations made against him, interviewed, or given the opportunity to respond to the allegations prior to his termination, whereas white males accused of sexual harassment were given notice, interviewed, and given an opportunity to respond. The evidence portrays a different story. Although Calcagno did not disclose all the specific allegations to Complainant and did not identify his accusers, Complainant was told that he had been accused of touching and rubbing female employees and asking them out on dates. In response, Complainant denied having sexually harassed anyone at Respondent. When Calcagno investigated, he obtained credible evidence from four more employees describing additional sexual harassment they had observed by Complainant. Since Complainant had already denied sexually harassing any employees, there was little to be gained from asking Complainant to respond to the new allegations.

Evidence was presented of sexual harassment complaints against five white males employed by grocery stores owned and operated by the Marcott family. There was no evidence that any of them were informed of the identities of the individuals filing complaints against them. John Smolders, the Marcott's director of baking, was informed of the allegations and denied them. Dennis Normoyle, a supervisor at Respondent, was questioned by Calcagno about the allegations. John Atterberry was talked to about the allegations. The details in which the allegations were discussed with Smolders, Normoyle, and Atterberry were not brought out in the testimony related to their situations. Kyle, the learning disabled male, was fired before anyone filed a complaint against him based on Calcagno's observations. There was no evidence presented to show whether or not Robert Hesla's employee, referred to in Finding of Fact 43 (The Merits), was talked to at any stage of Hesla's investigation prior to his termination. In conclusion, the Agency did not establish by a preponderance of the evidence that Complainant would have been afforded different procedural treatment had he been white.

6. Was Complainant Treated Differently in His Discharge than White Co-Workers Who Were Accused of Sexual Harassment?

The previous paragraph discussed the procedural aspects surrounding investigations of sexual harassment complaints brought against Complainant and five white males. In this discussion, the forum compares the substantive outcomes of these sexual harassment complaints to determine if Complainant was treated differently and unlawfully discharged based on his race.

The decision makers in Complainant's discharge were Calcagno, Marcott, and Harris. When Complainant was discharged, they had credible evidence that he had inappropriately touched and asked out two minor females, kissed one of them, and touched another female employee, and that the two minor females were afraid of working with

him. Two other white males who touched female employees, Robert Hesla's employee and Kyle, were also discharged. Smolders and Normoyle, who were not discharged, were not alleged to have touched anyone, did not make sexual remarks to minor females, and no one alleged they were afraid of working with them. No more complaints were received against Normoyle and no more against Smolders after the March 1997 complaints. Atterberry was alleged to have touched a female employee's bottom, but this complaint never reached Calcagno or the Marcott family. The complaint against Atterberry that did reach the Marcott family did not involve touching, but "invading personal space," no one alleged they were afraid of working with him, and no more complaints were received against him.

In summary, three of the four males (including Complainant) who touched females were all discharged. The complaint against the fourth, Atterberry, never went beyond a low level manager, and he has not repeated his behavior. The two males who were not alleged to have touched females were not discharged, and have not repeated their behavior. This shows a consistent pattern of discipline, rather than different treatment and unlawful discrimination based on Complainant's race.

7. Respondent's Affirmative Defenses.

Respondent raised a number of affirmative defenses in its Answer that the forum need not address, given its disposition of the case.

8. Respondent's Exceptions

Respondent correctly points out that the only witnesses who testified that they heard Canfield call Complainant "Toby" or "Boy" were Sweet, Prescott, and Glackin. Although this is accurately reflected in Finding of Fact -- The Merits #14, the Opinion included Tony Pittman's name in paragraph 2(b). Accordingly, Pittman's name has been deleted from that section of that Opinion.

Respondent's remaining exceptions to the Proposed Order are addressed in the body of the Opinion.

ORDER

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