In the Matter of

RODRIGO AYALA OCHOA and Ochoas' Greens, Inc.

Case No. 142-01

Final Order of Commissioner Jack Roberts

Issued September 6, 2002

SYNOPSIS

Respondents, an individual and his corporation, while acting jointly as a farm labor contractor, failed to file complete and accurate certified true copies of payroll reports on four USFS contracts, in violation of ORS 658.417(3). Respondents also made misrepresentations and willfully concealed information on their joint farm labor contractor license application, in violation of ORS 658.440(3)(a). Respondent Ochoas' Greens, Inc. issued 106 paychecks to 29 of its employees and failed to provide the employees with itemized statements of earnings, in violation of ORS 653.045(1). Respondent Ochoas' Greens, Inc. also failed to make and retain required employment records for its 29 employees, in violation of ORS 653.045(3). The Agency failed to establish that Respondents, while acting jointly in the capacity of farm labor contractor, failed to pay an employee wages when due with money entrusted to Respondents for that purpose, in violation of ORS 658.440(1)(c). The Agency also failed to prove that Respondents, while acting jointly in the capacity of farm labor contractor, failed to comply with lawful contracts, in violation of ORS 658.440(1)(d). The forum ordered Respondents Ochoas' Greens, Inc. and Rodrigo Ayala Ochoa to pay civil penalties of $1000 for each violation of ORS 658.417(3), and $2,000 for the violation of ORS 658.440(3)(a), for a total of $10,000. The forum ordered Respondent Ochoas' Greens, Inc. to pay $150 for each violation of ORS 653.045(1), and $200 for each violation of ORS 653.045(3), for a total of $21,700. The forum further found that Respondents lacked the character, competence and reliability to act as farm labor contractors and denied them a license pursuant to ORS 658.420. ORS 658.417; ORS 658.440; ORS 653.045; ORS 658.453; ORS 653.256; OAR 839-015-0300; OAR 839-015-0508; OAR 839-015-0520; OAR 839-020-1010; and OAR 839-015-0140.

The above-entitled 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 March 26, 2002, in the Bureau of Labor and Industries hearing room located at 800 NE Oregon Street, Portland, Oregon.

David Gerstenfeld, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency").

Richard W. Todd, Attorney at Law, represented Ochoas' Greens, Inc. and Rodrigo Ayala Ochoa. Respondent Ochoa was present throughout the hearing on behalf of himself and Respondent Ochoas' Greens, Inc.

The Agency called as witnesses: Julye Robertson, BOLI Farm Labor Unit Administrative Specialist; Bernadine Murphy, Special Forest Products Coordinator, Timber Department, USDA Deschutes National Forest; Katy Bayless, BOLI Farm Labor Unit Compliance Specialist; and Rodrigo Ayala Ochoa, Respondent.

In addition to Respondent Ochoa, Respondents called Stephanie Wing and Beatrice Boden, Respondent's daughters, as witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-12;

b) Agency exhibits A-1 through A-33 (filed with the Agency's case summary) and A-35 (submitted during the hearing);

c) Respondent exhibits R-1 and R-7 through R-10 (submitted with Respondents' case summary).

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 June 26, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties and Rejection of Farm Labor Contractor License Application ("Notice") to Respondents. The Notice informed Respondents that the Commissioner: a) intended to deny Respondents' farm labor license application, pursuant to ORS 658.425; and b) intended to assess civil penalties against Respondents, jointly and severally, totaling $45,900, pursuant to ORS 653.256 and 658.453. The Notice cited the following bases for the Agency's actions: Respondents' failure to file certified payroll records in accordance with ORS chapter 658 and applicable rules (8 violations); Respondents' failure to pay wages when due (2 violations); Respondents' failure to comply with a lawful contract (2 violations); Respondents' failure to provide pay stubs to employees (106 violations); Respondents' failure to make and retain required records (30 violations); and Respondents' intentional misrepresentations, false certifications, and willful concealment of information on a farm labor license application (one violation). The Notice was served on Respondents on July 2, 2001.

2) On August 17, 2001, Respondents, through counsel, filed a timely answer to the Notice and requested a hearing.

3) On September 12, 2001, the Agency requested a hearing and on October 25, 2001, the

Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on March 19, 2002. With the Notice of Hearing, the forum included a copy of the Notice of Intent to Assess Civil Penalties, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

4) On January 8, 2002, the forum issued a case summary order requiring the Agency and Respondents to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondents only); a statement of any agreed or stipulated facts; and any penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by March 8, 2002, and advised them of the possible sanctions for failure to comply with the case summary order. The Agency and Respondents filed timely case summaries.

5) On January 15, 2002, the Agency moved for a discovery order requiring Respondents to produce eight categories of documents. Respondents did not file a response to the Agency's motion and on January 24, 2002, the forum granted the Agency's motion.

6) On February 6, 2002, the Agency moved to amend its Notice to correct a typographical error. Respondents did not file a response to the Agency's motion and the forum granted the Agency's motion to amend the Notice.

7) On February 20, 2002, Respondents moved for a postponement of the hearing date. The Agency advised the Hearings Unit that it did not intend to file a response to the motion. On February 26, 2002, the forum granted Respondents' motion and the hearing was rescheduled to commence on March 26, 2002. The case summary due date was changed to March 15, 2002.

8) On February 28, 2002, the forum issued a notice that advised Respondents of changes in the contested case hearing rules, which took effect February 15, 2002. The notice included a summary of the changes, a copy of the administrative rules, and a revised copy of the Summary of Contested Case Rights and Procedures.

9) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally 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) At the start of the hearing, the Agency and Respondents orally stipulated to the following facts:

a) One bushel is the equivalent of approximately 9.31 gallons.

b) Respondents did not provide paystubs with any of the 106 payments they made to people who gathered pine cones for them in May through August 2000.

c) Respondents did not make nor retain records regarding the number of hours worked each day, week and pay period for the 30 persons who gathered pine cones in approximately May through August 2000.

11) At the start of the hearing, Respondents withdrew their "Third Affirmative Defense" that alleged "[o]n numerous of the allegations contained in the [Notice] the State of Oregon lacks jurisdiction to oversee the alleged activities."

12) At the start of and during the hearing, the ALJ made rulings on certain motions of the participants that are set out in a separate section of this order.

13) On July 23, 2002 the ALJ issued a proposed order and notified the participants they were entitled to file exceptions to the proposed order. The Agency did not file exceptions. Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

RULINGS ON MOTIONS

AGENCY'S MOTIONS TO AMEND CHARGING DOCUMENT

1) At the start of hearing, the Agency moved to amend the Notice to correct a typographical error, changing the reference in paragraph 10, page 4, from ORS chapter 659 to ORS chapter 658. Over Respondents' objection, and finding the interest of justice so required, the forum granted the Agency's motion. That ruling is hereby confirmed.

2) At the close of hearing, the Agency moved to amend the Notice to include five additional violations of ORS 653.045(1) which requires employers to "make and keep available to the Commissioner * * * for not less than two years, a record or records containing * * * [t]he actual hours worked each week and each pay period by each employee." The Agency based its motion on Respondent Ochoas' daughter's testimony that she had "shredded" her copies of employees' hours worked after she filled out the certified payroll records in her charge. Respondent objected on the ground that the witness testimony alone did not support the allegation that Respondents failed to make and keep available records of hours worked by each employee. The forum denied the Agency's motion. That ruling is hereby confirmed.

RESPONDENT'S MOTION TO AMEND ANSWER

During their closing argument, Respondents moved to amend their answer to conform to evidence Respondents contend was presented during the hearing showing that in May 2000 Respondent corporation engaged "independent contractors," rather than employed workers, to harvest cones on federal and private land. The Agency objected to the motion based on Respondents' failure to raise the defense in its initial pleading and asserted that there was no evidence introduced in support of the proposed amended pleading. The forum deferred ruling on the motion until issuance of the proposed order. The forum finds no evidence to support Respondents' proposed amendment. Other than Respondents' bare assertion that its workers were hired as independent contractors in May 2000, there are no facts in the record that raise such an inference. The forum therefore denies Respondents' motion to amend its pleading to include an additional affirmative defense.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Rodrigo Ayala Ochoa was corporate president of Respondent Ochoas' Greens, Inc. Respondent Ochoa started a family landscape nursery business in 1985. The business incorporated in 1994 as Ochoas' Greens, Inc. Respondent Ochoas' wife is the corporate secretary. Respondent Ochoa and his wife have been the only shareholders since incorporation. The Ochoas have four children and at least three of them work for the business.

2) As part of its nursery business, OGI cultivates plants such as rhododendrons, blooming forsythia, and several kinds of willows. OGI employs workers to work in the nursery and to assemble wreaths during the winter. The workers are paid hourly or sometimes on a piece rate basis.

3) Rather than lay off workers during the nursery's slow season, OGI offers the nursery crew the opportunity to harvest cones in Central Oregon when cones are abundant. OGI uses most of the cones for making wreaths and some of the cones are "boxed" for sale during the winter. Some workers go home to Mexico or Guatemala during the slow season and others choose to earn extra money by harvesting cones for OGI.

4) OGI harvests cones on federal and private land. The business is required to obtain a "special use permit" and pay a fee to harvest cones on federal land. OGI does not have to pay a fee to harvest cones on private land, but it always obtains oral or written permission from landowners before collecting cones from private property.

5) The U.S. Forest Service ("USFS") permits cone harvesting on federal land subject to certain terms and conditions. Anyone can obtain a special use permit

but some form of identification is required before a permit is issued. Persons seeking a permit decide how many bushels they want to purchase and that number is recorded on the "Forest Product Contract and Cash Receipt" that the "purchasers" sign after they have paid a fee. The number of bushels "purchased" determines the fee. The USFS designates the cone harvest area covered by the permit and provides a "Sale Area" map to the purchaser. The location of the "Sale Area" and the estimated acreage are indicated on the face of the permit. The purchaser agrees to record on the permit the dates and quantity of cones removed. The purchaser also agrees to harvest only those cones that are on the ground; climbing trees for cones is prohibited. Purchasers are not guaranteed the number of cones purchased and the designated harvest area is open to other permit holders subject to the same conditions. The Ranger District's "field officers" regularly patrol the forest and randomly inspect permits if cone harvesters are present in the patrolled area.

6) In May 2000, OGI obtained two special use permits for cone harvesting in the Bend Fort Rock Ranger District. The permits were issued on May 5, 2000, to Respondent Ochoa and Raul Barrera Barrera, OGI's employee, and permitted cone harvesting in a designated area outside of Bend covering 125,000 acres. The permits were valid until July 31, 2000. The total fee for both permits was $2,500, assessed at .25 per bushel for 10,000 bushels of cones. OGI paid the fee for both permits.

7) In May 2000, OGI agreed to pay workers $1.55 per "bag" of cones collected during the harvest season. OGI's nursery crew comprised about half of the workers and the rest were either friends of the nursery workers or workers in labor camps in Central Oregon who wanted to make extra money before the berry-picking season started. After the cone harvest, OGI's regular workers went back into the nursery to work and others either went to work elsewhere or went back to Mexico or Guatemala. Some workers harvested cones the full season and others harvested for awhile and then left for other work or went home.

8) During the 2000 harvest, OGI used at least three vans, owned by either OGI or its president, Respondent Ochoa, to transport workers who lived outside the Bend area to the cone harvest site. OGI also provided two or three camping trailers for workers to live in during the harvest season. OGI provided the workers with 33-gallon plastic bags, approximately 16.5" in diameter and 16.5" high, to collect the cones. The workers brought full bags of cones to a site in the forest where the cones were loaded in a truck for transport back to OGI's nursery business. Respondent Ochoa, on behalf of OGI, rejected cones that were broken, sun bleached or otherwise not suitable for OGI's use.

9) Respondent Ochoa was not present during most of the cone harvest season, but at least one foreman employed by OGI was on site monitoring the cone harvest. The workers did not harvest cones on rainy days due to the effects of water on the quality of the cones. The workers harvested cones on federal and private land.

10) OGI issued a total of 106 checks on May 15, May 25, June 2, June 6-7, June 14, June 20, June 29-30, and August 4, 2000, to a total of 29 workers for cones collected during that period. Individual checks ranged from a minimum of $117.80 for 76 bags to $1,295.80 for 836 bags of cones. Some workers received several checks and others received one check.

11) Workers collected approximately 75,000 bushels and OGI paid $59,785.95 to its workers for all of the cones collected during the May-August 2000 season.

12) The USFS did not cite OGI or terminate OGI's permits for breach of terms and conditions, nor did it ever determine that OGI collected more cones than permitted under the special use permits.

13) OGI did not provide any of the 29 workers with an itemized statement of earnings with the checks that were handed out May-August 2000.

14) The only record OGI maintained for the 29 workers between May and August 2000, was an "Ochoas' Greens, Inc. Account Quick Report" for the "cost of goods" that listed the payment method (check), the date the check issued, the check number, the workers' names, the number of bags collected and the rate per bag per worker, and the total amount paid each worker. OGI did not make and maintain a record of the number of hours each worker worked between May and August 2000.

15) In June 2000, in response to a verbal complaint made by OGI employee Jacobo Ramirez-Escobar to compliance specialist Katy Bayless, the Agency requested that Respondents produce Ramirez-Escobar's pay stub for the pay period April 28 to June 11, 2000, for inspection. The pay stub that was provided shows OGI issued a paycheck to Ramirez-Escobar on May 12, 2000, and that he worked 21 hours at $6.50 per hour for a total of $136.50 for the pay period April 28 to June 11, 2000. The itemized deductions include required withholdings and $55 for rain gear. The year to date ("YTD") column reflects two deductions for rain gear for a total of $110. Respondents did not provide the Agency with a written authorization for the deductions. The pay stub does not include information about the nature of the work performed during the pay period or whether OGI paid the employee from monies entrusted by another to OGI for the purpose of paying employees.

16) Before 1994, Respondent Ochoa held an Oregon farm labor contractor license. OGI and

its president, Respondent Ochoa, jointly held a farm labor contractor license after Respondent Ochoa incorporated sometime in 1994.

17) In 1992, Respondent Ochoa signed a "Settlement of Claims" document wherein Respondent Ochoa agreed to pay - and did pay - $8,000 to seven workers for wage claims arising out of:

> "a) work for the 1991 Christmas tree season for which the workers were recruited, employed or supplied by Rodrigo Ochoa in his capacity as a farm labor contractor; and
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> "b) work performed by the workers from December 1991 until March 1992 at the nursery owned by Rodrigo Ochoa, Rodrigo Ochoa Greens."

Respondent Ochoa acknowledged that the claims arose "from his alleged violations of the [Fair Labor Standards Act, the Migrant and Seasonal Worker Protection Act, ORS 658.405, *et. seq*., and Oregon's wage and hour laws], and he agree[d] that hereinafter he [would] abide by these laws."

18) In December 1994, Oregon Legal Services obtained a Consent Judgment against "Rodrigo Ochoa, Patricia Ochoa dba Rodrigo Ochoa Greens, Defendants" wherein the defendants were ordered by a federal judge to comply with the requirements of the Migrant and Seasonal Agricultural Worker Protection Act, ORS 658.705, et. seq., and Oregon wage and hour statutes, including "to provide itemized written statements at each payday with the information required by [former ORS 658.440(1)(h)]" and "to pay applicable minimum wage and overtime wage for every hour worked, as required by [former ORS 653.025(2) and 653.261]." The amount Respondents agreed to pay under the consent judgment was described as "confidential."

19) In February 1999, as a result of the Agency's Notice of Intent to Assess Civil Penalties issued December 31, 1998, Respondents Ochoa and Ochoas' Greens, Inc. signed a "Stipulation and Consent Final Order" that stated, in pertinent part:

> "(3) Respondents admit, and the Commissioner finds, that Respondents failed to file certified true copies of payroll records with the Bureau of Labor and Industries until August 24, 1998, for work their employees performed on the Contract between approximately August 16 and September 12, 1997. This is in violation of ORS 658.417(3) and OAR 839-015-0300.
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> "(4) Respondents admit, and the Commissioner finds, that the payroll report for the Contract Respondents submitted to the Bureau of Labor and Industries for the time period August 5 through August 19, 1998, was incomplete in not listing the wage rate paid to employees, the contract number and location, the owner of the land where the work was being performed and not being certified.

This is in violation of ORS 658.417(3) and OAR 839-015-0300."

In accordance with the Stipulation and Consent Final Order, Respondents were assessed and paid to the Agency $4,000 in civil penalties.

20) Between June 21 and July 22, 2000, Respondents employed workers to plant trees on USFS contract number 43-05K3-0-0073 ("0073"). On August 7, 2000,[1] Respondents submitted a payroll report to the Agency for the payroll period, June 21, 2000. The payroll report was not certified, but included an hourly rate of pay per employee and the number of hours worked by each employee. On March 20, 2001, Respondents resubmitted the report and Stephanie Wing, Respondent Ochoas' daughter and Respondents' secretary, certified that the report was "correct and complete," that the wage rates paid met the applicable minimum wage standards, and that each employee had been paid all wages earned.[2]

21) On August 21, 2000, Respondents submitted a second payroll report to the Agency pertaining to contract number 0073 for the payroll period, July 14–22, 2000. The payroll report was not certified, but included an hourly rate of pay per employee and the number of hours worked by each employee. On March 20, 2001, Respondents resubmitted the report and Wing certified that the report was "correct and complete," that the wage rates paid met the applicable minimum wage standards, and that each employee had been paid all wages earned.

22) Between July 24 and July 28, 2000, Respondents employed workers to thin trees on USFS contract number 43-05K3-9-0078. Respondents submitted a payroll report to the Agency that was date stamped August 21, 2000, indicating Respondents' employees had been paid $30 per acre for the payroll period July 24-28, 2000. The report did not include the number of hours worked by each employee and it was not certified. Respondents resubmitted the report, which was date stamped by the Agency on October 19, 2000, and Wing included and certified the number of hours each employee worked, including overtime hours. The resubmitted report did not include an hourly rate of pay for each employee. Respondents submitted an additional payroll report that was date stamped by the Agency on November 1, 2000, and identical to that which was filed on October 19, except that it showed different

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[1] In its charging document, the Agency alleged the payroll report was filed on August 4, 2000, but the document submitted shows the Agency date stamped the payroll report "Aug 7, 2000."

[2] Although OGI employed the workers, both OGI and Respondent Ochoa are jointly responsible for the filing the requisite payroll reports.

hours than those previously reported and it was not certified.

23) Between August 1 and August 14, 2000, Respondents employed workers to thin trees on USFS contract number 43-05K3-9-0092. On August 21, 2000, Respondents submitted a payroll report to the Agency indicating Respondents' employees had been paid $50 per acre for the payroll period August 1-7, 2000. The report did not include the number of hours worked by each employee. On November 1, 2000, Respondents resubmitted the report, which included the number of hours each employee worked and Wing's certification. In March 2001, Respondents filed an additional report pertaining to the same contract purporting to cover the time period of August 1–14, 2000. Wing certified that the report was "correct and complete," that the wage rates paid met the applicable minimum wage standards, and that each employee had been paid all wages earned.

24) Between November 12 and November 17, 2000, Respondents provided workers to thin and prune trees on USFS contract number 43-05K3-9-0078. Respondents submitted a certified payroll report to the Agency for the payroll period November 12-13, 2000, indicating Respondents' employees had been paid $50 per acre for pruning. The Agency date stamped the report January 3, 2001. Wing certified that the report was "correct and complete," that the wage rates paid met the applicable minimum wage standards, and that each employee had been paid all wages owed. The report included the number of hours worked by each employee.

25) Respondents submitted a payroll report to the Agency for the payroll period November 17, 2000, indicating Respondents' employees had been paid at varying rates per acre for thinning and pruning trees on USFS contract number 43-05K3-9-0078. The Agency date stamped the report January 3, 2001. The report did not include the number of hours worked and was not dated or certified.

26) Respondents submitted a payroll report to the Agency that was date stamped January 3, 2001, indicating Respondents' employees had been paid $32 per acre for thinning trees on a USFS contract located in "St. Helens." The payroll period was for December 6, 2000. The report did not include the contract number or the number of hours worked by each employee and was not certified. On March 20, 2001, Respondents resubmitted the payroll report, which certified Respondents' workers had each worked 3.4 hours on December 6, 2000. Wing also certified that the report was "correct and complete," that the wage rates paid met the applicable minimum wage standards, and that each employee had been paid all wages owed.

27) During times material, the Agency's practice was to return defective payroll record submissions to the farm labor contractor licensee with a cover letter

and checklist indicating the areas in which the payroll record needed correction. On October 17, 2000, the Agency returned Respondents' payroll record submission with the customary checklist and cover letter stating, in pertinent part:

> "The enclosed certified payroll report(s) you filed with the Bureau are not in compliance because they are incomplete in the areas checked below. OAR 8339-15-300(2) [*sic*] requires you to submit certified payroll reports **at least once every thirty five (35) days** if payroll is generated as a result of reforestation work performed by Oregon workers. You must **complete and resubmit** the enclosed reports to the **Portland office** no later than 5 p.m. **October 30, 2000**.
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> " * * * * *
>
> "**Your reports must contain all the elements listed above**, as shown on Certified Payroll Report (WH-14) form, enclosed for your convenience. * * *."

The letter included a checkmark next to a statement indicating that Respondents omitted the "total hours worked during [the applicable] pay period" from the payroll records they submitted.[3]

28) The Agency presented no evidence to show the applicable minimum wage rate for tree planting, thinning, or pruning as determined by the U.S. Forest Service.

29) On May 14, 2001, Respondents applied for a farm labor contractor license. At the time he filled out the application, Respondent Ochoa believed he owned 50 percent of OGI and he stated that on the application. When asked to list the names of those who have a financial interest in the business, Respondent Ochoa responded "N.A." and indicated that "no other persons have a financial interest" based on his assumption that the question referred to persons other than family members. Respondent Ochoa also certified that there were "no judgments or administrative orders of record against [Respondents]." Respondent Ochoa certified that all of the information provided in the application was true and correct.

30) In June 2001, in response to the Agency's request for additional information, Respondent Ochoa provided a letter to the Agency that stated, in pertinent part:

> "Ochoas Greens, Inc. does not have 20 or more employees at any one given time. When Ochoas does forestry work for the state of Washington we bring our employees that we have working for us at that time. We have not done any Reforestation work for the past three years in Oregon.

[3] There is no evidence in the record showing the payroll records subject to the October 2000 letter.

"And I, Rodrigo Ochoa am 51% owner of Ochoas Greens, Inc."

31) Respondent Ochoa's testimony was not entirely credible. His memory was unreliable and selective. On several disputed issues of fact, his testimony was inconsistent with statements he made previously to the Agency. For instance, he reported on a previous farm labor license application that his wife held a 25 percent interest in the corporation they jointly own. On his pending application, he stated he and his wife share "50/50" ownership of the corporation and his testimony at hearing was that he always thought that division to be true. However, he also acknowledged that he later told his daughter and the Agency that he was the majority shareholder, owning 51 percent of the shares, only after he found out that the "50/50" division imposed liabilities upon his wife. Respondent Ochoa's testimony was believed only when it was logically credible, was a statement against interest, or when other credible evidence supported it.

32) Wing's testimony was not wholly credible. She had a poor memory and her bias as Respondent Ochoa's daughter was reflected in her demeanor and her statements minimizing her role as the corporation's payroll person. Despite her signature on every payroll record submitted to the Agency, Wing blamed a payroll company hired by Respondents for the certified payroll problems. Wing's testimony was believed only when corroborated by other credible evidence.

33) Robertson, Boden and Bayless were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, OGI did business in Oregon and engaged the personal services of one or more employees in Oregon. Respondent Ochoa was a majority shareholder and president of OGI.

2) Between August 1-7, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-9-0092. OGI paid its employees directly and submitted to the Commissioner deficient payroll records on three separate occasions.

3) Between July 24-28, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-9-0078. OGI paid its employees directly and submitted to the Commissioner deficient payroll records on two separate occasions. Respondents filed a third payroll record that contradicted the number of hours reported in the first and second submission.

4) Between November 12-13, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-9-0078. OGI paid its employees directly and did not timely provide

the Commissioner with certified copies of all payroll records.

5) On November 17, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-9-0078. OGI paid its employees directly and submitted to the Commissioner two sets of payroll records that were not timely filed, did not include the number of hours each employee worked, and were not properly certified.

6) On June 21, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-0-0073. OGI paid its employees directly and submitted to the Commissioner payroll records that were not timely filed and were not properly certified.

7) Between July 14-22, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-0-0073. OGI paid its employees directly and submitted to the Commissioner payroll records that were not timely filed and were not properly certified.

8) On December 6, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on a USFS contract in St. Helens. OGI paid its employees directly and submitted to the Commissioner payroll records that did not include the number of hours each employee worked and were not properly certified.

9) Respondents knew or should have known that they were legally required to file timely, complete, and accurate certified true copies of all payroll reports. Respondents' failure to do so was willful.

10) The Agency did not waive or renounce its authority to bring an action against Respondents for violations of ORS 658.417(3) by returning deficient payroll records to Respondents for correction.

11) In or about April and May 2000, Respondents were not acting jointly as a farm labor contractor when they deducted money from an employee's paycheck without his written authorization, and were not entrusted with money by a third party for the purpose of paying said employee or employees.

12) In May 2000, Ochoas' Greens, Inc. did not fail to comply with lawful contracts in its capacity as a farm labor contractor. OGI purchased special use permits from the USFS to harvest cones on federal land, but did not purchase the permits in its capacity as a farm labor contractor. The USFS did not cite OGI or terminate its permits for breach of the terms and conditions of the permits.

13) OGI employed workers to gather cones for Respondent's business from May through August 2000. During that time, OGI issued 106 checks to 29 of its

employees and failed to supply each employee with itemized statements that showed the amounts and purposes of deductions as required by statute.

14) OGI did not make or keep available to the Commissioner of the Bureau of Labor and Industries a record containing the actual hours worked by 29 employees who worked from May until August 2000.

15) In May 2001, Respondents applied for a farm labor contractor license and made an assertion that no other person, other than Respondent Ochoa, had a financial interest in OGI. That assertion was not in accord with the facts and Respondents knew or should have known that Respondent Ochoa's wife, who owned shares in OGI, was a person with a financial interest in the corporation. Respondents did not make the assertion with the intent to mislead or deceive the Agency.

16) Information about whether other persons have a financial interest in a license applicant's business is a substantive matter that is influential in the Commissioner's decision to grant or deny a license.

17) In May 2001, Respondents applied for a farm labor contractor license and withheld the name, address, and phone number of Respondent Ochoa's wife, who had a financial interest in Respondents' business. Respondents knew Respondent Ochoa's wife had a financial interest in the business and had a duty to reveal her identity.

18) Failure to disclose the identity of persons with a financial interest in a license applicant's business is a substantive matter that is influential in the Commissioner's decision to grant or deny a license.

19) There is no evidence showing Respondents' assertion that Respondent Ochoa's wife owns 50 percent of the corporation is incorrect as it is stated on the farm labor contractor license application.

20) There is no evidence showing Respondent's assertion that Respondents have no judgments against them is incorrect as stated on the farm labor contractor license application.

21) In May 2001, Respondents applied for a farm labor contractor license and certified that the information contained therein was true and correct. Respondents knew or should have known that they were not giving correct information when responding to questions about the financial composition of their business.

22) A farm labor contractor's truthfulness is a substantive matter that is influential in the Commissioner's decision to grant or deny a license.

23) Respondents' character, competence and reliability make them unfit to act as farm labor contractors.

CONCLUSIONS OF LAW

1) The Commissioner of the Oregon Bureau of Labor and Industries has jurisdiction over the subject matter and of the Respondents herein. ORS 658.405 to 658.503 and ORS 653.305 to 653.370.

2) ORS 658.405 provides in pertinent part:

> "As used in ORS 658.405 to 658.503 * * * unless the context requires otherwise:
>
> "(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands * * *."

OAR 839-015-0004 provides, in pertinent part:

> "(13) '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; * * *
>
> "(14) 'Forestation or reforestation of lands' includes, but is not limited to:
>
> "(a) The planting, transplanting, tubing, pre-commercial thinning, and thinning of trees and seedlings; * * *."

As a person acting as a farm labor contractor in Oregon with regard to the forestation or reforestation of lands, Respondent Ochoas' Greens, Inc. was and is subject to the provisions of ORS 658.405 to 658.503. As a majority shareholder of a corporation so acting, Respondent Ochoa was and is subject to the provisions of ORS 658.405 to 658.503.

3) ORS 653.010 provides, in pertinent part:

> "As used in ORS 653.010 to 653.261, unless the context requires otherwise:
>
> " * * * * *
>
> "(3) 'Employ' includes to suffer or permit to work; however, 'employ' does not include voluntary or donated services performed for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer * * * or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws.
>
> "(4) 'Employer' means any person who employs another person * * *."

At all times material herein, Respondent Ochoas' Greens, Inc. was an employer and employed workers in Oregon. As an Oregon employer, Respondent Ochoas' Greens, Inc. was subject to the provisions of ORS 653.305 to 653.370 and the administrative rules adopted thereunder.

4) The actions, inaction, and statements of Respondent Ochoa, Respondent Ochoas' Greens, Inc.'s president and a majority shareholder, are properly imputed to Respondent Ochoas' Greens, Inc.

5) 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, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:
>
> " * * * * *
>
> "(3) Provide to the commissioner 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."

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;
>
> "(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.
>
> "(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."

Respondents violated ORS 658.417(3) and OAR 839-015-0300 by failing to submit timely,

complete and accurate certified true copies of payroll reports for eight separate payroll periods on four USFS contracts.

6) ORS 658.440(1) provides:

"Each person acting as a farm labor contractor shall:

" * * * * *

"(c) Pay or distribute promptly, when due, to the individuals entitled thereto all money or other things of value entrusted to the labor contractor by any person for that purpose.

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

Respondents did not violate ORS 658.440(1)(c) or (d).

7) ORS 658.440(3) provides in pertinent part:

"No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

"(a) Make any misrepresentation, false statement or willful concealment in the application for a license."

Respondents violated ORS 658.440(3)(a) by making misrepresentations and willfully concealing information on their farm labor contractor's license application.

8) ORS 653.045 provides, in pertinent part:

"(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:

"(a) The name, address and occupation of each of the employer's employees.

"(b) The actual hours worked each week and each pay period by each employee.

"(c) Such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder.

"(2) Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time."

OAR 839-020-0080 provides, in pertinent part:

"(1) Every employer regulated under ORS 653.010 to 653.261 must maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom the law applies:

"(a) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;

"(b) Home address, including zip code;

"(c) Date of birth, if under 19;

"(d) Sex and occupation in which employed. (Sex may be indicated by use of the prefixes Mr., Mrs., Miss, or Ms.);

"(e) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole work force or establishment will suffice;

"(f) Regular hourly rate of pay for any workweek in which overtime compensation is due, and an explanation of the basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and the amount and nature of each payment which, pursuant to ORS 653.261(1) is excluded from the "regular rate of pay". (These records may be in the form of vouchers or other payment data.);

"(g) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of seven consecutive workdays);

"(h) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation;

"(i) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under subsection (h) of this section;

"(j) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions;

"(k) Total wages paid each pay period;

"(l) Date of payment and the pay period covered by payment."

Respondent Ochoas' Greens, Inc. violated ORS 653.045(1) and OAR 839-020-0080 by failing to make and keep available records of the number of hours worked by 29 of its employees.

9) ORS 653.045(3) provides:

> "Every employer of one or more employees covered by ORS 653.010 to 653.261 shall supply each of the employer's employees with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610."

OAR 839-020-0012 provides in pertinent part:

> "(1) Except for employees who are otherwise specifically exempt under ORS 653.020, employers must furnish each employee, each time the employee receives a compensation payment from the employer, a written itemized statement of earnings. The written itemized statement must include:
>
> "(a) The total gross payment being made;
>
> "(b) The amount and a brief description of each and every deduction from the gross payment;
>
> "(c) The total number of hours worked during the time covered by the gross payment;
>
> "(d) The rate of pay;
>
> "(e) If the worker is paid on a piece rate, the number of pieces done and the rate of pay per piece done;
>
> "(f) The net amount paid after any deductions;
>
> "(g) The employer's name, address and telephone number;
>
> "(h) The pay period for which the payment is made.
>
> "(2) When a compensation payment is a draw or advance against future earnings, and no deductions are being made from the payment, the written itemized statement must include the information required in section (1)(a), (g) and (h) of this rule. The employee must be provided with a statement containing all of the information required by section (1) of this rule at the employee's next regular payday, even if the employee is not entitled to payment of any further wages at that time."

Respondent Ochoas' Greens, Inc. violated ORS 653.045(3) and OAR 839-020-0012(1) 106 times by failing to provide itemized statements of deductions to 29 workers.

10) ORS 658.420 provides in pertinent part:

> "(1) The Commissioner of the Bureau of Labor and Industries shall conduct an investigation of each applicant's character, competence and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor.
>
> "(2) The commissioner shall issue a license * * * if the commissioner is satisfied as to the applicant's character, competence and reliability."

OAR 839-015-0145 provides:

> "The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules not limited to, consideration of:
>
> "(1) A person's record of conduct in relations with workers, farmers and others with whom the person conducts business.
>
> " * * * * *
>
> "(3) A person's timeliness in paying all debts owed, including advances and wages.
>
> " * * * * *
>
> "(7) Whether a person has violated any provision of ORS 658.405 to 658.503 or these rules.
>
> " * * * * *
>
> "(10) Whether a person has failed to comply with federal, state or local laws or ordinances relating to the payment of wages, income taxes, social security taxes, unemployment compensation tax, or any tax, fee or assessment of any sort.
>
> " * * * * *
>
> "(12) Whether a person has repeatedly failed to file or furnish all forms and other information required by ORS 658.405 to 658.503 and these rules.
>
> "(13) Whether a person has made a willful misrepresentation, false statement or concealment in the application for a license."

OAR 839-015-0520 provides in pertinent part:

> "(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny * * * a license:
>
> "(a) Making a misrepresentation, false statement or certification or willfully concealing information on the license application;
>
> " * * * * *
>
> "(2) When the applicant for a license * * * demonstrates that the applicant's * * * character, reliability or competence makes the applicant * * * unfit to act as a farm or forest labor contractor, the Wage and Hour Division shall propose that the license application be denied * * *.
>
> "(3) The following actions of a farm or forest labor contractor license applicant * * * demonstrate that the applicant's * * * character, reliability or competence make the applicant * * * unfit to act as a farm or forest labor contractor:
>
> "(a) Violations of any section of ORS 658.405 to 658.485;
>
> " * * * * *
>
> "(d) Failure to comply with federal, state or local laws or ordinances relating to the payment of wages, income taxes, social security taxes, unemployment compensation tax or any tax, fee or assessment of any sort;

"(f) Repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.503 or these rules;

"(h) Willful misrepresentation, false statement or concealment in the application for a license;

"(m) A course of misconduct in relations with workers, farmers and others with whom the person conducts business;

"(n) Failure to pay all debts owed, including advances and wages, in a timely manner[.]"

Respondents' violations of ORS 658.417(3) and 658.440(3) demonstrate that Respondents' character, competence, and reliability makes them unfit to act as farm labor contractors.

11) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess against Respondent Ochoas' Greens, Inc. a civil penalty for each violation of ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder. The civil penalties assessed in the Order herein are a proper exercise of that authority. ORS 653.370.

12) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess civil penalties against Respondents Ochoa and Ochoas' Greens, Inc. ORS 658.453(1)(c) and (e). With regard to the magnitude of the penalties, OAR 839-015-0510 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:

"(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

The Agency established by a preponderance of the evidence that Respondents Ochoas' Greens, Inc. and Rodrigo Ayala Ochoa acted jointly as a farm labor contractor between June and December 2000. The Agency seeks both civil penalties for alleged violations that occurred while Respondents acted as a farm labor contractor and to deny Respondents' pending license application based on Respondents' lack of character, competence and reliability to act as a farm labor contractor.

ALLEGED VIOLATIONS

A. Failure to File Certified True Copies of Payroll Records in Accordance with ORS Chapter 658 and Applicable Rules

In order to prevail, the Agency is required to prove that (1) Respondents, while acting jointly as a farm labor contractor, (2) engaged in the forestation of lands, and (3) Respondents or Respondents' agent paid employees directly and (4) failed to file certified payroll records that contained all of the information required in the Agency's form WH-141 in accordance with OAR 839-015-0300.

OAR 839-015-0300 provides in pertinent part:

> "(2) The certified true copy of payroll records may be submitted on Form WH-141. * * * Any person may copy this form or use a similar form *provided such form contains all the elements of Form WH-141*." (emphasis added)

In this case, Respondents do not dispute that while jointly acting as a farm labor contractor, they provided Oregon workers to perform forestation or reforestation on four USFS contracts between June and December 2000 and paid the workers directly. Evidence shows Respondents used the Agency's Form WH-141 to file certified payroll reports for eight payroll periods during the contract periods, but repeatedly failed to provide all of the required information. In some cases, the reports were timely filed but were either not certified or lacked required information. In other cases, the reports were not timely filed, not certified, and lacked required information. At no time did Respondents submit timely reports that contained all of the required information.

Respondents argue that the Agency waived "compliance of the actions complained of in the Agency's Notice of Intent" by allowing Respondents the

opportunity to correct deficient payroll records each time they were submitted. That argument has no merit. Waiver is an intentional act that must be plainly and unequivocally manifested either "in terms or by such conduct that clearly indicates an intention to renounce a known privilege or power." *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 252, 293 (2001). There is no evidence that the Agency, explicitly or implicitly, renounced or waived its authority to bring the present action against Respondents for their failure to timely submit accurate and complete payroll records. To support its argument, Respondents rely on a letter dated October 17, 2000, wherein the Agency requests that Respondents submit corrected payroll records "no later than October 30, 2000." First, in that letter the Agency does not extend the statutory deadline for submitting certified true copies of all payroll records, but rather establishes a time limit for providing the Agency with corrected records. Second, the Agency specifically reiterates the rule governing submission deadlines and emphasizes the requirement that the "reports must contain all the elements" listed in the letter, which negates any inference that the Agency intended to waive its authority to pursue violations in a later action. Finally, even if the letter could be construed as implied waiver, and the forum concludes it cannot, there is no evidence in the record that Respondents complied with its provisos. The evidence shows only that Respondents repeatedly submitted deficient payroll records and submitted corrections for most of them either on November 1, 2000, or March 20, 2001, well after the statutory deadline for the particular payroll periods had passed. Respondents provided no evidence that it was the Agency that established those dates as time limits for submitting corrected payroll records. Respondents failed to prove their affirmative defense by a preponderance of the evidence.

Additionally, the Agency alleged that on some of the payroll reports Respondents incorrectly certified that the applicable minimum wage had been paid, but there is no evidence in the record that shows what the applicable minimum wage was at the time of the contracts. Additionally, the Agency alleged that the number of hours shown on one of the payroll reports reflects an underpayment of wages, but there is no evidence in the record that supports the Agency's allegation. The forum concludes Respondents filed deficient payroll reports eight times on four separate contracts, but did not underpay their workers or fail to pay the workers at the proper wage rate.

B. Failure to Pay Wages When Due in Violation of ORS 658.440(1)(c)

The Agency was required to prove that Respondents (1) were acting jointly as a farm labor contractor in or about April and May 2000, (2) were entrusted with money for the purpose of paying

workers, and (3) failed to promptly pay, when due, the money to which workers were entitled. OGI stipulated that $55 was withheld from each of two paychecks issued to one of its employees in May 2000 to pay for raingear purchased by the employee. OGI acknowledged there is no evidence to show the employee signed an authorization for the deduction. The evidence does not establish, however, that Respondents were acting jointly as a farm labor contractor in April or May 2000. In the absence of evidence showing a farm labor contract in effect at that time and that money was entrusted to OGI for the purpose of paying employees, the forum does not find that OGI violated ORS 658.440(1)(c).

C. <u>Failure to Comply with Lawful Contracts in Violation of ORS 658.440(1)(d)</u>

The Agency is required to prove that Respondents, (1) acting jointly as a farm labor contractor, (2) entered into legal and valid contracts with the USFS, (3) entered into the contracts in their capacity as a farm labor contractor, and (4) violated the provisions of the contracts.

The facts establish that in May 2000, OGI obtained two permits to collect cones on federal land that are characterized by a USFS representative as "special use permits" and are issued to holders as a form titled "Forest Product Contract and Cash Receipt." The facts also show that OGI paid workers for cones harvested between April and July 2000 for use in Respondents' nursery business.

ORS 658.405 provides in pertinent part:

> " * * * * *
>
> "(4) 'Farm labor contractor' means any person 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 * * * "

OAR 839-015-0004 provides in pertinent part:

> "(8) 'Farm labor contractor' means:
>
> " * * * * *
>
> "(c) Any person who recruits, solicits, supplies or employs workers to gather wild forest products, as that term is defined in paragraph (23) of this section * * *
>
> " * * * * *
>
> "(23) 'To gather wild forest products' or 'the gathering of wild forest products' means the gathering of evergreen boughs, yew bark, bear grass, salal or ferns, *and nothing else*, from public lands for sale or market prior to processing or manufacture. This term does not include the gathering of these products from private lands in any circumstance or from public lands when the person gathering the products, or the person's employer, does not sell the products in an un-

manufactured or unprocessed state.

"Example: A nursery uses its own employees to gather evergreen boughs, which it uses in the manufacture of Christmas wreaths. The nursery is not engaged in farm labor contracting activity and therefore would not be required to obtain a license."

A plain reading of the applicable statute and rule indicates that, in this case, Respondents were not acting in their capacity as a farm labor contractor when OGI agreed to "purchase" cones from the USFS. The USFS representative testified that no license was necessary to obtain a special use permit for cone collecting, and there is no evidence that shows OGI gathered any other wild forest products in May 2000. The forum concludes from these facts that cone collecting is not a regulated activity requiring a farm labor contractor license. There being no evidence that Respondents acted in their capacity as a farm labor contractor in May 2000 when OGI obtained cone collecting permits from the USFS, the forum finds Respondents did not violate ORS 658.440(1)(d).

D. Failure to Provide Pay Stubs to Employees in Violation of ORS 653.045(3)

In order to prevail, the Agency must establish that Respondents (1) employed workers and (2) issued paychecks to workers that did not include itemized statements containing information required under Oregon's wage and hour law.

Evidence establishes that OGI issued 106 checks to 29 workers in payment for bags of cones gathered by the workers between May and August 2000. OGI stipulated that itemized statements were not included with the checks issued to workers. OGI contended at hearing, however, that the workers were not employees but were working as free lance cone harvesters, *i.e.*, independent contractors, who determined their own work days and hours, used their own initiative to affect the amount of pay they earned each day, and who were free to come and go without constraint.[4] Respondents did not raise this affirmative defense in their answer, and the forum deems the defense waived. *See* OAR 839-050-0130(2). Evidence establishes that OGI, through its corporate president and majority shareholder Respondent Ochoa, transported workers to Central Oregon to collect cones for the nursery business. OGI provided the workers with lodging owned by the corporation and furnished the permits that allowed workers to collect cones on federal land. Additionally, OGI paid each worker for the cones they collected. The forum concludes, therefore, that OGI suffered or permitted workers

[4] None of the workers were called to testify at the hearing and Respondents produced no evidence to support their bare assertion.

to perform work for OGI, and the corporation is liable for any violations found. ORS 653.010(3) and (4). OGI was an employer subject to Oregon wage laws and despite the fact that none of the workers testified, there is sufficient evidence to conclude Respondents' workers were employees and not independent contractors. OGI and its corporate president admit the workers were not given pay stubs with each paycheck and the forum concludes that OGI is liable for the failure to do so.

E. Failure to Make and Keep Available Required Records in Violation of ORS 653.045(1)

In order to prevail, the Agency must establish that Respondents (1) employed workers and (2) failed to make and keep available required records. The forum has already found herein that Respondent Ochoas' Greens, Inc. employed 29 workers between April and August 2000 and was subject to Oregon wage and hour laws. Respondents admit that other than the corporate "Account Quick Report" the corporation maintained during the applicable time period, the corporation did not make and keep records in accordance with ORS 653.045(1). The forum concludes, therefore, that OGI is liable for 29 violations of ORS 653.045(1).

F. Misrepresentations, False Statements - Certifications and Willful Concealment on the License Application in Violation of ORS 658.440(3)(a)

Misrepresentation

A misrepresentation, for the purpose of ORS 658.440(3)(a), is "an assertion made by a license applicant which is not in accord with the facts, where the applicant knew or should have known the truth of the matter asserted, and where the assertion is of a substantive fact which is influential in the [Commissioner's decision] to grant or deny a license." *In the Matter of Alejandro Lumbreras*, 12 BOLI 117, 125 (1993). Although the Agency's substantive allegation refers to "intentional" misrepresentations, this forum has previously held that the Legislature did not intend misrepresentation to include an intention to deceive or mislead because of its "omission of any word next to 'misrepresentation' showing an element of intent." *See In the Matter of Raul Mendoza*, 7 BOLI 77, 82-83 (1988). The forum also observed that the Legislature did not intend that a false assertion, such as an erroneous zip code on a license application, would be grounds for license denial; hence, the requirement that a misrepresentation be of a substantive fact that is influential in the decision whether to grant or deny a license. *Id.* at 82.

False Statement

A false statement, for the purpose of ORS 658.440(3)(a), is "an incorrect statement made with knowledge of the incorrectness or with reckless indifference to the actual facts, and with the intention to mislead or deceive." As with a misrepresentation, the false statement must also be about a substantive matter that is influential in the decision to grant or deny a license. *Id*. at 83.

Willful Concealment

Willful concealment means, for the purpose of ORS 658.440(3)(a), "withholding something which an applicant knows and which the applicant, in duty, is bound to reveal, said withholding must be done knowingly, intentionally, and with free will * * * and must be of a substantive matter which is influential in the [Commissioner's decision] to grant or deny a license." *Id*. at 84.

Standard of Proof

This forum has previously held that in the case of a license disciplinary action based upon misrepresentation, false statement or willful concealment, the forum employs clear and convincing evidence as the standard of proof. *In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990). Such evidence is defined as "evidence that is free from confusion, fully intelligible and distinct and for which the truth of the facts asserted is highly probable." *Id*. at 146, *quoting Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

Accordingly, the forum has applied the clear and convincing evidence standard to the Agency's five allegations that Respondents made misrepresentations, false statements, and willfully concealed information on their joint farm labor license application.

Respondents' statements and certifications

(a) The Agency alleges that Respondents' statement and certification that Respondent Ochoa owns 50 percent of Respondent Ochoas' Greens, Inc. constitutes a misrepresentation or a false statement. The forum finds neither applies in this case. No evidence was offered to show that Respondents' assertion was incorrect or not in accord with the facts at the time the assertion was made on the application. Respondent Ochoa had no inkling at the hearing whether he owned 50 or 51 percent of the corporation. He testified that he had always believed he and his wife owned the business "50/50," but agreed he told his daughter, and reported to BOLI, that he owned 51 percent in response to BOLI's subsequent inquiry about the ownership. Since the statement Respondents made on the application is a statement against interest, *i.e*., imposes duties and liabilities on the other majority shareholder, the forum finds it is more likely than not that the assertion on the application is true. In the absence of clear and convincing evidence to the contrary, the forum concludes that Respondents did not make a misrepresentation or false state-

ment when stating and certifying that Respondent Ochoa owns 50 percent of the corporation.

(b) The forum finds the Agency established by clear and convincing evidence that Respondents' statement and certification that no other person, other than Respondent Ochoa, has a financial interest in Respondent Ochoas' Greens, Inc. is a misrepresentation. Respondents acknowledge that Respondent Ochoas' wife is a co-owner of the family business. Respondents, therefore, knew or should have known that Respondent Ochoa was not the only one with a financial interest in the business. Respondents' argument that Respondent Ochoa did not understand the question, does not understand the term "shareholder," and believed the inquiry referred to financially interested persons outside the family business, is not entirely believable. The facts establish that the business has been incorporated since 1994, and on a license application Respondents submitted in 1997, Ochoa listed his wife as a financially interested person with a 25 percent interest in the corporation. Given that Respondent Ochoa indicated on the pending application that he owned 50 percent of the business, the forum concludes that Respondent Ochoa knew his statement that "no other persons have a financial interest" in the business was incorrect. Additionally, the disclosure of those financially interested in Respondents' proposed operations is clearly a substantive matter, influential in the decision to grant or deny a license, because in order to properly enforce the farm labor contractor laws, the Commissioner must know to whom he is licensing. There is no clear and convincing evidence that Respondent Ochoas' statement was made with the intention to mislead or deceive the Agency. The forum finds, however, that Respondents misrepresented the number of persons financially involved in Respondents' business, in violation of ORS 658.440(3)(a).

(c) The Agency further alleges that Respondents willfully concealed "the name, address and telephone numbers of all persons financially interested in Respondent Ochoas' Greens, Inc. other than Respondent Ochoa." OAR 839-015-0505(1) defines "knowingly" or "willfully" as:

> "action undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person 'should have known the thing to be done or omitted' if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts knowingly or willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of this rule, the farm labor contractor * * * is presumed to know the affairs of their business operations relat-

> ing to farm * * * labor contracting."

Here, Respondents had a duty to reveal to the Agency the identity of all persons financially interested in the business. The facts establish that Respondents had actual knowledge of at least one person's financial interest in the business, and failed to disclose her identity and other pertinent information about her on the license application. Such data is a substantive matter influential in the commissioner's decision to grant or deny a license. The forum concludes that Respondents withheld that information knowingly, intentionally, and with free will, in violation of ORS 658.440(3)(a).

(d) The Agency alleges Respondents made a misrepresentation or false statement when Respondents certified that there are no judgments or administrative orders of record against Respondents. The facts establish that Respondent Ochoa entered into a consent judgment in U.S. District Court in 1994, and that both Respondents entered into a stipulated consent order with BOLI in 1999. Both documents are consent judgments, "the provisions of which are settled and agreed to by the parties to the action," *i.e.*, settlement agreements. *See* Black's Law Dictionary 842 (6th ed. 1990). The Agency has not alleged Respondents breached either agreement. Nor is there evidence that the agreements remain recorded or docketed in a court or with the Agency. While each document constitutes a record, the term "of record" as it is used in the contractor license application is defined as follows:

> "Recorded; entered on the records; existing and remaining in or upon the appropriate records * * *."

Id. at 1085. Although the license application does not denote a specific type of judgment or administrative order, the forum infers from the language that the Agency's intent is to establish whether a contractor has judgment liens pending that could affect the contractor's competence to hold a license, *i.e.*, the ability to pay debts incurred or wages earned while performing a farm labor contract.[5] In this case, there is no evidence that Respondents had judgment liens or a final administrative judgment pending against them and the forum therefore concludes that Respondents did not make a misrepresentation or false statement when they denied having such on their joint license application.

(e) The Agency further alleges, and the forum finds by clear and convincing evidence, that Respondents made a misrepresentation when they certified all of the information on the license application was true and correct. Respondents knew or should have known they were not

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[5] The question on the application is: "Are there any judgments or administrative orders of record against you?"

giving correct information when responding to questions about the financial composition of their business. A contractor's truthfulness is a substantive matter that directly influences the Agency's decision to grant or deny a license and is the core of the contractor's character, competence and reliability, particularly with respect to certifying payroll records during the course of forestation or reforestation contracts. In this case, Respondents misrepresented the truthfulness and accuracy of the information they provided the Agency on their license application and the forum finds Respondents violated ORS 658.440(3)(a).

RESPONDENT'S CHARACTER, COMPETENCE AND RELIABILITY

The Agency proposes to deny a farm labor contractor license to Respondents based on their multiple violations of ORS chapter 658 and ORS chapter 653, which violations demonstrate that their character, competence, and reliability make them unfit to act as a farm labor contractor.

ORS 658.420 provides that the Commissioner shall investigate each applicant's character, competence and reliability and any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor. The Commissioner shall issue a license only if satisfied as to the applicant's character, competence, and reliability.

In making the determination, the Commissioner must consider whether an applicant has violated any provision of ORS 658.405 to 658.503 or the applicable rules. *See* OAR 839-015-0145(7), 839-015-0520(3)(a). Here, the Agency established that Respondents, while previously licensed, repeatedly failed to timely file certified true and accurate copies of payroll reports in accordance with ORS 658.417(3). Evidence shows that more recently on four contracts Respondents failed to submit a single timely and accurate certified payroll record and instead submitted uncertified payroll records late six times. On all of the contracts the first submission was defective, and on several submissions Respondents failed to report the number of hours each employee worked. Such actions demonstrate Respondents do not have the requisite character, competence and reliability to act as farm labor contractors.[6]

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[6] *See, e.g.*, *In the Matter of John Mallon*, 12 BOLI 92, 101-102 (1993) (the forum found that where a contractor repeatedly submitted untimely and inaccurate certified payroll reports, such actions demonstrated that the contractor's character, competence, and reliability make him unfit to act as a farm labor contractor); *In the Matter Alvaro Linan*, 9 BOLI 44, 48 (1990) (the forum found that a contractor who repeatedly fails to observe agency rules by failing to file certified payroll records is unreliable and the agency should deny the contractor a license).

Moreover, where an applicant has made a misrepresentation, false statement, or willful concealment on a license application, or has failed to comply with federal, state, or local laws relating to the payment of wages, such violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny the license application. OAR 839-015-0520(1). In this case, the Agency established that Respondents willfully concealed information and made two misrepresentations on their license application and failed on two occasions to comply with state wage and hour laws. Each of these is of such magnitude or seriousness that Respondents may be denied a farm labor contractor license. Having found multiple violations that demonstrate Respondents lack the character, competence, and reliability to act as a farm labor contractor, the forum denies their joint application for a farm labor contractor license for a period of three years, effective the date the Final Order in this matter issues.

CIVIL PENALTIES

The Agency proposed civil penalties for (1) Respondents' failure to timely file accurate certified payroll reports (8 violations), in violation of ORS 658.417(3); (2) Respondents' failure to provide itemized statements of deductions to employees (106 violations), in violation of ORS 653.045(3); (3) Respondents' failure to make and retain required employment records (30 violations), in violation of ORS 653.045(1); and (4) Respondents' misrepresentations, false statements, and willful concealment on Respondents' farm labor contractor license application (1 violation), in violation of ORS 658.440(3)(a).[7]

The Commissioner may assess a civil penalty not to exceed $2,000 for each of the farm labor violations found herein. ORS 658.453(1)(c) and (e); OAR 839-015-0508(1)(e), (f), (j), and (2)(b). The Commissioner may consider aggravating and mitigating circumstances when determining the amount of civil penalty to impose. OAR 839-015-0510(1). It shall be the responsibility of the Respondents to provide the Commissioner with any mitigating evidence. OAR 839-015-0510(2).

The Commissioner may also assess a civil penalty not to exceed $1000 for each willful violation of ORS 653.045. ORS 653.256; OAR 839-020-1000; 839-020-1010. Willfully means knowingly, and is described as follows in OAR 839-020-0004(33):

> "An action is done knowingly when it is undertaken by a person with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A

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[7] The Agency also sought civil penalties for alleged violations of ORS 658.440(1)(c) and (d). Elsewhere herein, the forum dismissed those allegations for lack of evidence.

> person 'should have known the thing to be done or omitted' if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules."

As with farm labor violations, the Commissioner may consider aggravating and mitigating circumstances when determining the amount of civil penalty to impose for wage and hour violations and it is the responsibility of Respondents to provide the Commissioner with any mitigating evidence. OAR 839-020-1020(1) and (2).

FAILURE TO FILE COMPLETE AND ACCURATE CERTIFIED PAYROLL RECORDS

Respondents knew of their obligation to submit accurate and complete certified payroll records and failed to do so multiple times on multiple USFS contracts. The violations are aggravated by Respondents' recent history of failing to file complete, accurate, and certified records that resulted in a written consent order, which included a $4,000 penalty, that was signed by Respondents in February 1999. Respondents' assurances at hearing of future compliance by improving and monitoring their bookkeeping system ring hollow in view of the 1999 consent agreement wherein Respondents acknowledged their previous failure to comply with the certified payroll report requirements. The violations are only somewhat mitigated by the absence of any evidence showing Respondents' workers were not paid appropriately by Respondents.

Having considered the aggravating and mitigating circumstances, and in light of recent orders related to violations of ORS 658.317(3), the forum finds the following penalties more appropriate than the $2,000 per violation requested by the Agency:

> $1,000 for deficient records filed on USFS contract #0092 ($1,000 for one violation).
>
> $4,000 for untimely, uncertified, and deficient records filed on USFS contract #0078 ($1,000 for each of four violations).
>
> $2,000 for untimely and uncertified records filed on USFS contract #0073 ($1,000 for each of two violations).
>
> $1,000 for defective records filed on the St. Helens USFS contract ($1,000 for one violation).

The forum finds Respondents Ochoa and Ochoas' Greens, Inc. jointly and severally liable for $8,000 assessed as civil penalties for the eight violations found herein.

FAILURE TO PROVIDE EMPLOYEES WITH ITEMIZED STATEMENTS OF EARNINGS

The forum found that Respondent Ochoas' Greens, Inc. employed 29 workers between May and August 2000 to harvest cones in Central Oregon and failed to provide them with written itemized statements of earnings each time they were paid for work performed. Evidence shows that 106 paychecks were issued to OGI's workers, constituting a separate and distinct violation each time a check issued to an employee. OAR 839-020-1000. One of the purposes of the statute is to afford workers an opportunity to verify that they have been correctly paid for all of the hours they worked. *In the Matter of Labor Ready*, 22 BOLI 245, 289 (2001). In this particular case, although evidence shows the workers were paid on a piece rate basis and knew how much they earned for each bag of cones harvested, they had no way of knowing whether they were paid at least minimum wage for the hours they worked because OGI did not provide them with the information. Accordingly, the forum finds the violations serious because they potentially affect the substantive rights of workers. The Agency seeks $150 for each violation. ORS 653.256 allows the commissioner to assess a maximum $1,000 civil penalty for each violation of ORS 653.045. Having considered the aggravating and mitigating circumstances, the forum finds the Agency's proposed $150 per violation an appropriate penalty. Therefore, the forum finds Respondent Ochoas' Greens, Inc. liable for $15,900 in civil penalties for 106 violations of ORS 653.045(3).

FAILURE TO MAKE AND KEEP AVAILABLE PAYROLL RECORDS

The Agency seeks $200 for each of 29 violations of ORS 653.045(1). The violations are serious because failure to make and keep available payroll records significantly impedes the commissioner's ability to determine whether employees are properly compensated, which potentially affects the substantive rights of the workers. The forum finds that given the seriousness of the violation, and that OGI knew or should have known it was required to keep records for its employees, $200 per violation is reasonable. There is no evidence of mitigation on the part of Respondents. Therefore, the forum finds Respondent Ochoas' Greens, Inc. liable for $5,800 in civil penalties for 29 violations of ORS 653.045(1).

MAKING MISREPRESENTATIONS, FALSE STATEMENTS, AND WILLFUL CONCEALMENTS ON FARM LABOR LICENSE APPLICATION.

Although each violation is separate and distinct,[8] the Agency only seeks the maximum civil penalty of $2,000 for Respondents' two misrepresentations and willful concealment of information on the farm labor license applica-

[8] *See* OAR 839-015-0507.

tion. Based on Respondents' history of farm labor violations, the fact that Respondents had actual knowledge of information that was either misrepresented or not disclosed, and Respondents' failure to establish any mitigation, the forum finds $2,000 an appropriate penalty. Respondents Ochoa and Ochoas' Greens, Inc. are jointly and severally liable for $2,000 in civil penalties for their multiple violations of ORS 658.440(3).

RESPONDENTS' EXCEPTIONS

Respondents filed exceptions to the ruling on Respondents' motion to amend its answer, the proposed ultimate findings of fact, the proposed conclusions of law, the proposed opinion, the proposed denial of license, and the proposed civil penalties in the proposed order. The forum has changed portions of the order in response to some of the exceptions and denied the remainder of the exceptions as discussed below.

A. Exception 1 – Ruling on Motion

Respondents object to the forum's denial of Respondents' motion to amend its answer to conform to the evidence presented at hearing. Respondents contend that, contrary to the forum's ruling, evidence was presented to support its eleventh-hour assertion that Respondents' workers were independent contractors. To support their contention, Respondents cite either facts that are not in the record or mischaracterize the facts found by the forum. None of the facts that Respondents contend support their theory constitute prima facie evidence of an independent contractor relationship. Respondents' exception is denied.

A. Exception 2 – Proposed Ultimate Findings of Fact

(1) Respondents correctly assert that the forum failed to address or consider Respondents' affirmative defense of waiver. The forum has revised applicable sections of the order to cure the omission.

(2) The forum denies Respondents' exception to the ultimate finding that Respondents willfully failed to file timely, accurate and complete payroll records because there is substantial evidence in the record to support the finding.

(3) The forum denies Respondents' objection to the ultimate finding that characterizes "cone pickers" as "employees." In the ultimate findings, the forum found that Respondent OGI employed workers to gather cones, hence the term "employees" to characterize the workers.

(4) Respondents agree with the ultimate finding that failure to disclose the identity of persons with a financial interest in an applicant's business is a substantive matter. Respondents object, however, to its application to Respondent Ochoas' wife, because "virtually every married couple in the State of Oregon has a financial interest in one or the other's business operations" and that in this particular case "the failure to

list ones wife as having a financial interest is insubstantial and irrelevant in a license application." Respondents miss the point. Evidence shows Respondent Ochoas' wife is a substantial stakeholder in the business as the corporate secretary and only other shareholder. Respondents' failure to disclose the wife's financial interest impedes the Commissioner's ability to know whom he is licensing and hinders enforcement of ORS chapter 658. Accordingly, the disclosure of whom is financially interested in an applicant's proposed operations is a substantive matter, influential in the decision to grant or deny a license. ORS 658.415(1)(d) makes that information a necessary part of the application and does not qualify the question by excluding an applicant's spouse. Respondents' exception is denied.

B. Exception 3 – Proposed Conclusions of Law

1. Proposed Conclusion of Law 5

As noted elsewhere herein, Respondents have excepted to the forum's failure to discuss their waiver defense. In response, the forum has addressed Respondents' defense in the opinion section of this Final Order.

2. Proposed Conclusion of Law 7

In this exception, Respondents point out that the forum failed to conclude that Respondents' misrepresentations or willful concealment were of a substantive matter that is influential in the in the decision to grant or deny a farm labor contractor license. The forum has clarified Conclusion of Law 7 to reflect Respondent's exception.

3. Proposed Conclusions of Law 8 and 9

Respondents except to the conclusions that the workers hired to gather cones were OGI's employees. Substantial evidence and reason support both conclusions. Respondents' exception is denied.

4. Proposed Conclusion of Law 10

Respondents except to the conclusion that Respondents lack character, competence and reliability rendering them unfit to act as farm labor contractors. The conclusion is based on substantial evidence and reason and Respondents' exception is denied.

C. Exception 4 – Proposed Opinion

For the reasons set forth above, and except for the changes noted herein, Respondents' exception to the proposed opinion is denied.

D. Exception 5 – Proposed Denial of License

Respondents except to the proposed denial of a farm labor contractor license on four grounds. First, Respondents contend that none of the violations for failure to timely file accurate and complete certified payroll records were of a substantive nature.

Notwithstanding Respondents' other violations that demonstrate their lack of character, competence and reliability to hold a license, there is substantial evidence that Respondents filed several payroll records that were not certified, did not include the number of hours worked by each employee, and, in one case, did not provide a contract number. Each of those omissions is substantive and is a repeat violation. Respondents' exception on that ground is denied. Second, Respondents contend that their prior violations were more substantive in nature and in the present case the violations are primarily "clerical errors." The evidence shows otherwise. Respondents' repeat failure to certify their payroll records and to report required information on several contracts is substantive in nature and demonstrates Respondents' lack of competence to handle the paperwork required of a farm labor contractor. Third, Respondents point out that the forum's conclusion that Respondents failed to report the number of hours each employee worked on every submission is incorrect. The forum has modified the opinion section of the order to reflect the factual findings. Finally, Respondents' assertion that the only evidence of misrepresentation on Respondents' license application is Respondents' "uncertainty as to Respondent's wife's financial interest in the corporation" is erroneous. There is substantial evidence that Respondents misrepresented the number of persons financially interested in the corporation and willfully concealed information they were required to disclose. Both are substantive matters that influence the Commissioner's decision to issue a license. Except for the modification to the opinion section noted herein, Respondents' exception is denied.

E. Proposed Civil Penalties

Respondents challenge the proposed civil penalties as excessive and not warranted by the facts in the record. The penalties for each violation established are supported by substantial evidence and warranted by the aggravating factors established in the record. Respondents' exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the penalties assessed for violations of ORS 658.417(3), ORS 658.440(1)(d) and (e), and ORS 658.440(3)(a), the Commissioner of the Bureau of Labor and Industries hereby orders **Ochoas' Greens, Inc.** and **Rodrigo Ayala Ochoa** 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 TEN THOUSAND DOLLARS ($10,000), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Or

der and the date Respondents comply with the Final Order;

FURTHERMORE, as authorized by ORS 653.256, and as payment of the penalties assessed for violations of ORS 653.045(1) and (3), the Commissioner of the Bureau of Labor and Industries hereby orders **Ochoas' Greens, 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 TWENTY ONE THOUSAND SEVEN HUNDRED DOLLARS ($21,700), 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 Ochoas' Greens, Inc. complies with the Final Order;

FURTHERMORE, the Commissioner of the Bureau of Labor and Industries hereby denies **Ochoas' Greens, Inc.** and **Rodrigo Ayala Ochoa** each a license to act as a farm labor contractor, effective on the date of the Final Order. **Ochoas' Greens, Inc.** and **Rodrigo Ayala Ochoa** are each prevented from reapplying for a license for three years from the date of this denial, in accordance with ORS 658.415(1)(c) and OAR 839-015-0520.

In the Matter of

WAL-MART STORES, INC. dba Wal-Mart

Case No. 35-01

Final Order of Commissioner Jack Roberts

Issued September 27, 2002

SYNOPSIS

Complainant suffered an on-the-job injury and applied for and used the procedures in ORS chapter 656 while in Respondent's employ. After accommodating Complainant's series of increasingly restrictive medical releases over a two-month period, Respondent terminated Complainant for violating Respondent's policy prohibiting offensive language in the workplace and did not terminate other workers who violated the same policy. The Commissioner found that Respondent's reason was a pretext for discrimination and that Respondent discharged Complainant because he invoked and used the procedures in ORS chapter 656 and awarded Complainant $25,000 in back pay damages, $623.50 in benefits lost, and $7,500 in mental suffering damages. The Commissioner also found that the Agency did not establish that Respondent failed to reemploy Complainant in available and suitable work, in violation of *former* ORS 659.420. *Former* ORS 659.410(1), *former* ORS 659.420; *former* OAR 839-

006-0120, *former* OAR 839-006-0105(4)(a), *former* OAR 839-006-0135.

The above-entitled 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 October 30-31 and November 1, 2001, in the Oregon Employment Department conference room, located at 1007 SW Emkay, Bend, Oregon.

David K. Gerstenfeld, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). William F. Masters ("Complainant") was present throughout the hearing and was not represented by counsel. Leah C. Lively, Attorney at Law, represented Wal-Mart Stores, Inc. ("Respondent"). Jeff Keys was present throughout the hearing as Respondent's corporate representative.

In addition to Complainant, the Agency called as witnesses: Rebecca and Russel Horn, Complainant's friends; Christopher Bjerke, John Leese, Tony Farkes, and James Shortreed (by telephone), former Respondent employees; Jesse Hornbeck and Jamey Osborne, current Respondent employees, and Linda Bailey, Respondent's automotive manager.

Respondent called as witnesses: Jeff Keys, Respondent's Tire/Lube Express ("TLE") store manager; Leslie Taylor (formerly Van Sant), Respondent's personnel manager; Kurt Gale (by telephone), Respondent's Redmond store manager; Liesa Holliday and Jesse Hornbeck, current Respondent employees; and Christopher Bjerke, former Respondent employee.

The forum received as evidence:

a) Administrative exhibits X-1 through X-14;

b) Agency exhibits A-1 through A-14 (submitted prior to hearing) and A-15 through A-24 (submitted at hearing);

c) Respondent exhibits R-1 through R-55 (submitted prior to hearing) and R-56 through R-88 (submitted at hearing).

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 August 18, 1999, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging Respondent had required him to work beyond medical restrictions that were in place as a result of Complainant's on-the-job injury. Complainant further alleged Respondent terminated him based

on his use of the workers' compensation laws. On June 14, 2000, Complainant filed an amended complaint that did not make any substantive changes to Complainant's initial complaint. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting Complainant's allegations.

2) On April 5, 2001, the Agency submitted to the forum specific charges alleging (1) Respondent discriminated against Complainant by terminating him based in substantial part on his application for and use of the procedures provided for in ORS chapter 656, in violation of *former* ORS 659.410(1), and (2) Respondent failed to provide Complainant available and suitable work, in violation of *former* ORS 659.420(1). The Agency also requested a hearing.

3) On April 6, 2001, the forum served on Respondent the specific charges, accompanied by the following: a) a Notice of Hearing setting forth October 30, 2001, in Bend, Oregon, as 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 May 24, 2001, Respondent, through counsel, filed a timely answer to the specific charges, denying the allegations of unlawful employment practices and alleging certain affirmative defenses.

5) On March 29, 2001, the Hearings Unit received a copy of Respondent's informal request to the Agency for the production of documents.

6) On September 10, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damage calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by October 19, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

7) On September 26, 2001, Respondent moved to postpone the hearing and included an affidavit of its counsel stating that the participants were in the midst of discovery and still coordinating out of state witnesses and that the Agency case presenter had no objection to a postponement.

8) On September 26, 3001, the forum denied Respondent's motion for postponement, stating in pertinent part:

"I have considered OAR 839-050-0150(5), which says, in part:

'If all participants agree to a postponement, in order for the postponement to be effective, the administrative law judge must approve of this agreement. Whether the administrative law judge grants or denies such a motion for postponement, the administrative law judge shall issue a written ruling setting forth the reasons therefore.'

"In addition, I have considered OAR 839-050-0000 which states that one of the purposes of the hearings rules is to provide for timely hearings. Despite the Agency's agreement to postpone the scheduled hearing, I do not approve of the agreement and Respondent's motion is **DENIED** based on the following considerations.

"As Respondent points out, no previous postponements have been requested and neither participant has indicated that it was prepared to proceed. However, until this motion, neither participant had indicated that it was not prepared to proceed. In fact, by implication, the Agency indicated its readiness for a hearing by requesting a hearing date on March 7, 2001. The October 30 hearing date was originally set on April 5, 2001, with no objection from either participant in the almost six months since the hearing notice issued. According to Respondent, it is still conducting discovery and will need to coordinate the schedules of witnesses who are now living in locations other than Oregon, yet this late date is the first time Respondent has brought its case preparation issues to the forum's attention.

"Regarding the discovery issue, this forum has previously denied a respondent's motion for postponement based on failure to complete discovery where the respondent failed to demonstrate adequate efforts to complete discovery in the months leading up to the hearing. *In the Matter of Staff, Inc.,* 16 BOLI 97, 100 (1997). In this case, Respondent does not contend there were any problems conducting discovery nor is there a record of any formal attempts to obtain discovery, *i.e.*, requests for a discovery order. By the October 30 hearing date, the participants will have had seven months, more than ample time, to complete discovery. In the same vein, Respondent has had since early April, and at least two attorneys of record at the ready, to contact witnesses and arrange for their appearance at the scheduled hearing. Moreover, any witness whose schedule is not compatible with the hearing date can give testimony either by telephone or sworn statement. Postponement is not necessary in this case given the other reason-

able options. The forum finds Respondent's reasons do not constitute good cause for postponement. *See* OAR 839-050-0150(5)(a) and OAR 839-050-0020(10).

"Additionally, the participants agree that the only times available to reset the hearing are the weeks of February 18 and March 18, 2002. The Hearings Unit docket shows that Mr. Gerstenfeld is scheduled for another hearing on the February 18 date, leaving March 18, "or anytime thereafter," the only date the participants' representatives are available for hearing. The forum finds it manifestly unjust to expect the Complainant in this matter to wait almost one year from the date the hearing notice issued to obtain a hearing on his complaint. This matter will not be easier to try or defend with the passage of more time – fairness cannot be realized by delaying this hearing for another five months.

"The hearing will convene as scheduled on **Tuesday, October 30, 2001**, at the time and place set forth in the Notice of Hearing issued April 5, 2001.

"**IT IS SO ORDERED.**"

The ruling is hereby affirmed.

9) On October 9, 2001, the Agency filed a motion for a discovery order seeking three categories of documents. The Agency provided a statement describing the relevancy of the documents sought and further stating that the same documents and information had been requested on an informal basis and not provided. Respondent did not file a response to the Agency's motion.

10) On October 16, 2001, the forum granted the Agency's motion for discovery order and ordered Respondent to provide the three categories of documents sought by the Agency.

11) On October 16, 2001, after the forum's ruling on the Agency's motion for postponement had been posted, the Hearings Unit received Respondent's "Memorandum in Response to the Agency's Discovery Order" requesting the Agency's motion be denied because the documents sought were not relevant and not likely to lead to relevant evidence. Because the response was timely, the forum considered Respondent's objections and issued a supplemental ruling on the Agency's motion on October 18, 2001. The forum affirmed its October 16, 2001, ruling in its entirety.

12) On October 19, 2001, the Agency and Respondent filed case summaries.

13) At the start of 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.

14) At the start of hearing, the Agency and Respondent clarified and confirmed the material

facts they stipulated to in their case summaries. Additionally, the Agency and Respondent stipulated that Complainant made $1,503.30 in purchases between October 16, 1998, and May 24, 1999, using his employee discount card, which qualified him for a 10% discount on those purchases.

15) During the hearing, the Agency and Respondent stipulated that the medical notes in the record form the basis of Complainant's work restrictions and his time off work.

16) During the hearing, the Agency and Respondent stipulated that Complainant did not work on May 30 or May 31, 1999.

17) At the conclusion of the hearing, the Agency and Respondent stipulated to the admission of the Agency investigator's contact reports, exhibits A-19, A-20, R-84 through R-86, as impeachment evidence.

18) The ALJ issued a proposed order on August 14, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency did not file exceptions. Respondent filed a timely exception, which is addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Wal-Mart Stores, Inc. was a foreign corporation operating retail establishments under the assumed business name Wal-Mart ("Respondent"), and was an Oregon employer utilizing the personal services of six or more persons.

2) On September 23, 1998, Respondent employed Complainant as a "Tire/Lube Technician" in its Redmond, Oregon, store's Tire/Lube Express ("TLE") department.

3) When he was hired, Complainant reviewed and signed a "Wal-Mart Stores Matrix of Essential Job Functions," on which he indicated that he had "the ability to perform all of the [listed] functions with or without a reasonable accommodation." According to the matrix, the essential functions of Complainant's technician job included: automotive service and repair; completing accounting records and forms; customer assistance; inputting and retrieving information; maintaining records and logs; preparing, mailing, and filing routine paperwork; pricing merchandise; stocking and setting displays; unloading trucks and checking in merchandise; lifting medium heavy objects occasionally; and moving some objects with assistance. Complainant's job functions also included repetitive hand and foot action, basic reading and writing, bending, twisting, squatting and "fine manipulation." Complainant's job performance also required sitting, standing, and walking.

4) At times material herein, the TLE department included an office/reception area and an

automotive shop that were separated by a low divider. The service areas in the shop were called "bays" and each bay included a "pit" that enabled TLE technicians to service cars from the underside. The pit was called the Lower Bay and the service area above the ground floor was called the Upper Bay. When the Lower Bay was not in use, a metal grate that weighed about 25 pounds covered it. To gain access to a car from the Lower Bay, technicians had to lift the grate slightly and slide it sideways in its track. The technicians typically drove the cars to be serviced into the Upper Bay and onto a railed platform that lowered and raised the cars over the Lower Bay. Technicians typically changed oil filters, lubricated chassis, checked and filled, if necessary, washer, transmission, power steering, and differential fluids, and checked and replaced, if necessary, headlamps, signal lights, taillights and brake lights, tire pressure, wiper blades, and air filters. The technicians also vacuumed carpeting and changed tires as part of their automotive service. Lubricating a chassis and checking and filling transmission and differential fluids took place in the Lower Bay. Depending on the type of vehicle, most of the other services were performed in the Upper Bay. Except for changing tires, none of the services required lifting over 10 pounds. Some bending at the waist was required for vacuuming and changing the oil on some types of vehicles.

5) In the TLE office/reception area, a technician could perform work as a "greeter" by greeting customers, writing up service orders, and making sales. The greeter job was considered "light duty" that Respondent made available to workers who were temporarily physically restricted from performing their regular job duties. Depending upon the extent of a worker's physical restrictions, a greeter's duties could include some Upper Bay work.

6) At times material herein, Jeff Keys was the TLE store manager and was Complainant's supervisor. Keys was responsible for assigning shifts and making the weekly schedule. He assigned two workers to open the department in the morning and two workers to close up each evening. Another worker came in mid-day to supplement the opening and closing shifts. The "openers" generally prepared the shop for business by "cleaning out merchandise" on the shelves, stocking shelves, if necessary, and mopping the floor. The "closers" pulled in merchandise that was displayed outside, carried out garbage bags, and stocked shelves, if necessary. Outdoor displays sometimes included cases of oil, tires, and pallets of "ice melt." Bags of "ice melt" weighed about 40 pounds each and tires ranged in size from 25 to 60 pounds each.

7) Although swearing was against Respondent's official policy, it was tolerated in the TLE

department. Almost everyone, including Keys and Jesse Hornbeck, used swear words or offensive language in the workplace. Most of the technicians, including Complainant, tried to watch their language around co-worker Jamey Osborne because he was thought to be very religious and he made known to his co-workers his distaste for foul language. Osborne never complained to management about workplace swearing, but did confront individuals about their language whenever he was particularly offended. Automotive manager Linda Bailey heard "swearing quite often" from all of the technicians, but never reported it to upper management, despite a store requirement that she do so. The only complaints Bailey heard from others concerning swearing were about Ron Crowder, a service manager, who many considered particularly offensive. Some technicians were louder than others and were told by Keys or Bailey to watch their language within customer earshot. Complainant was occasionally loud, but was never given a verbal warning about his use of swear words in the workplace. The use of "bitch," "prick," and "slut" was common and considered "guy language" among the technicians. Respondent has not terminated anyone in the TLE department for offensive language alone or for using "profanity[1] against another associate."

8) Respondent's disciplinary policy, "Coaching for Improvement," published in Respondent's corporate employee handbook and in effect at times material, stated in pertinent part:

> "Coaching for Improvement is designed to be progressive. Apply Coaching for Improvement in a fair, timely and consistent manner. Always start at the appropriate Coaching Level depending on the classification of behavior to be addressed. More serious levels of coaching are used at appropriate intervals until either the Associate's conduct or performance reaches the desired improvement or all coaching levels have been exhausted.
>
> "Coachings should be conducted in a manner which allows the Associate to explain his/her behavior and to learn from the discussion.
>
> "Investigations are a routine part of the coaching process. It ensures a complete review of the facts and allows time for proper consideration of appropriate disciplinary action. During the investigation, the Associate may be suspended without pay if it is in the best interest of all parties involved.
>
> " * * * * *
>
> "Administering the Coaching for Improvement Process

[1] The witnesses used the words "profanity" and "swearing" interchangeably throughout the hearing to denote vulgar or offensive language.

> "1. Gather the facts including witness statements, if appropriate.
>
> "2. Discuss the situation with the Associate to get his/her side of the story and any additional facts.
>
> "3. Follow the procedures for effective coaching (set climate, etc.).
>
> "4. Conduct the Coaching for Improvement session, along with another member of management present, if the facts and the initial discussion with the Associate concludes a coaching is appropriate.
>
> "5. Properly classify whether the action is related to job performance or a specific behavior (misconduct or gross misconduct).
>
> "6. Determine the appropriate level of coaching. Depending upon the behavior, steps may be skipped.
>
> "7. Complete the Coaching for Improvement Form, including the Action Plan."

The policy includes three levels of "Coaching for Improvement." The first is verbal notification to the employee that he or she does not meet Respondent's expectations. The verbal contact is documented by the supervisor, but not maintained in the employee's personnel file. Level two is a written "coaching" that requires the employee's signature. It is used when "Verbal Coaching has not been successful in changing or correcting the unacceptable behavior or performance." Level three is a "decision making day" and is the "final opportunity for an Associate to evaluate his or her behavior in view of Wal-Mart's expectations prior to Termination." According to the policy, "Level three must also be formally documented and should be signed by the Associate," the supervisor must "clearly explain the deficiencies noted at earlier Coaching for Improvement Levels and the specific improvement required, "and the employee is required to "complete and sign a detailed action plan." The policy describes the "decision making day" as follows:

> "After conducting the Level Three session, the Associate is given one (1) day off with pay to decide whether he/she will make the required improvement. The Decision-Making Day is the Associate's next scheduled workday. The Associate should be paid for the number of hours he/she was actually scheduled to work. For payroll, designate these hours as 'Other Pay – Decision Making Day.'
>
> "Meet with the Associate at the start of his/her next scheduled work day to review the Associate's detailed action plan developed during the Decision Making Day and to discuss his/her decision as to making the required improvement.
>
> "An Associate may be given only one (1) Decision-Making Day within a 12 month period. If the Associate has already been given a Decision Making

> Day within the preceding 12 month period and reaches this coaching step for a separate behavior issue, the Associate is subject to immediate termination."

Complainant received and read the handbook in September 1998.

9) In November 1998, Complainant received a 90-day "Associate Evaluation" for the period September 23 to December 23, 1998, which stated, in pertinent part:

> "William is a good leader, he sets a good example for others to follow. He has always shown respect for everyone he works with. William needs to develop motivational skills & help the productivity of our shop through the team.
>
> " * * * * *
>
> "William provides good service to our customers. He has no problem meeting their needs as an individual. William needs to focus on our 15/40 goal to promote the best customer service possible, [*i.e.*], teamwork.
>
> " * * * * *
>
> "William communicates well. He is able to ask questions without hesitation. William needs to communicate more with his co-workers, to inform them about what he is working on & where he left off (this will prevent accidents & better the overall communication in the shop).
>
> "William is dependable & has proven himself to be verry [*sic*] flexible. William needs to remember to wear his safety glasses at all times.
>
> "William meets company goals with no problem on tires * * * William reacts well to changes in workload. (Sometimes taking latter [*sic*] lunches, staying late &/or missing breaks.) His CBL training is complete as well as his tech. training.
>
> "OVERALL STRENGTHS * * * William has a good understanding of what customer service is. He provides it verry [*sic*] well. His knowledge of tires is great. His ability to learn is good. He can be a good leader when he applies himself.
>
> "AREAS OF IMPROVEMENT * * * William needs to focus on his area of responsibility (the shop). He needs to wear his safety glasses at all times in the service area. William also needs to let his co-workers know when he [is] moving on to another job, preventing accidents & confusion. William also needs to focus on 15/40 with the rest of the team."

In the section for "Associate Comments/Goal Setting," Complainant wrote:

> "I do not agree with needing to develop motivational skills. I also don't believe I have a problem focusing on my area of responsibility."

10) On December 18, 1998, Complainant received a written coaching (level two) after he was observed "clocking out at the end of his shift and leaving out the TLE exit." Complainant's behavior was characterized as "a form of gross misconduct impacting the associate's integrity" and Complainant was advised that henceforth he would be expected to "enter and exit the facility through the front entrance during business hours as stated in the Associate Handbook that he [had] signed." Complainant signed the written coaching, but in the "comments" section he wrote, "I don't think it is right that when we are not on the clock we still have to enter thru [*sic*] the front doors."

11) In February 1999, Complainant received a "Decision-Making Day" (level three) after "falsifying" a customer's arrival on a service order. Keys "coached" Complainant and admonished him that "this act of faulsification [*sic*] is not allowing us to properly track our 15/40 results, and it is not allowing us to strive to reach our company goal honestly." Complainant was warned that he would be terminated if "this behavior continues." Complainant wrote an action plan that stated: "In the future if there is a work order without the time of arrival, I will be sure to bring it to the attention of the associate who wrote the customer up, so if they remember the time they can fill it in and if not I will just leave it blank. I will continue to do my job as asked of me and do everything I can to keep away from integrity issues." The decision day was documented and signed by Keys and Complainant.

12) On April 1, 1999, Complainant suffered an on-the-job back injury while lifting a 60-pound tire. Complainant reported his injury to Respondent and made a claim for workers' compensation benefits as provided under ORS chapter 656. His claim was accepted for "lumbosacral strain" and classified as disabling.

13) Complainant sought immediate medical attention for his back injury. The treating physician took Complainant off work for one day and scheduled him for reevaluation the following morning "before returning to work tomorrow." The next day, April 2, 1999, Complainant was reevaluated and released with the following instructions:

> "Rest back * * * No lifting > 15 lbs. No climbing ladders, pushing, pulling, prolonged standing or prolonged sitting. If desk work available – he may do this for brief periods at a time. Best that he is totally off work & resting for next few days.
>
> "Sun 4-4 or Mon 4-5 for [re-evaluation] before returning to work. If unable to return to work Mon 4-5 will be referred to orthopedic MD.
>
> "Do not return to work F 4-2 or Sa 4-3 (unless <u>light</u> duty available)." (emphasis in original)

Complainant acknowledged, in writing, that he had received all of

the instructions indicated above. Complainant did not work April 2, April 3, or April 4, 1999.

14) On April 5, 1999, Complainant notified Respondent's workers' compensation insurer that he was changing his "attending physician." His new physician authorized Complainant to be off work for the period April 1 through April 11, 1999. Complainant did not work April 5 through April 11, 1999.

15) By form letter dated April 8, 1999, Respondent, through its "Early Return to Work Nurse," Sandra Fuchs, notified Complainant's physician that it had "light duty work available for [Complainant] during the time [he was to be] recovering from his injury" and described the light duty as a "greeter" who "[w]elcomes customers to the store, may alternate between standing, walking and sitting [with] no lifting or carrying required."

16) Complainant's supervisor, TLE manager Jeff Keys, telephoned Complainant's physician's office twice on April 12, 1999, and expressed concern that Complainant was off work and indicated a desire to speak to the doctor about returning Complainant to light duty work. Complainant's physician's notes, dated April 12, state the following:

> "1. Will get back x-rays today.
>
> "2. Would like [Complainant] to start on Physical Therapy program for the next 2 weeks.
>
> "3. I have put [Complainant] off work for 1 week and then, after that he may go back to a light duty position, 8 hours per day.
>
> " * * * * *
>
> "5. Have FAX'd a form to attention of Sandra Fuchs, R.N., that [Complainant] may go back to a light duty position as of 04-19-99, at 8 hours per day."

17) On April 12, 1999, Complainant's physician wrote a brief note stating Complainant was "off work 4/12 – 4/19 due to LS strain." Complainant did not work April 12 through April 19, 1999.

18) On April 19, 1999, Complainant's physician released him for his regular job duties with "no restrictions." Complainant did not work on April 19, 1999, but resumed his regular job duties with no physical restrictions on April 20 for the first time since his injury date.

19) On April 22, 1999, Complainant's physician modified the April 19 work release by limiting Complainant to four-hour workdays and a 25-pound lifting restriction. Thereafter, Respondent offered Complainant light duty work as a "greeter" which, in the TLE department, included greeting customers, writing up service orders, and sweeping floors. Complainant did not work April 21 through April 24, 1999. He began his light duty work on April 25, 1999, and worked the remaining days of April except for April 29, for a total of five days

under the 25-pound lifting restriction and four-hour workdays in April. He did not work May 1, 1999, but worked May 2 though May 4, while still under the April 22 restrictions. There is no evidence that Complainant worked more than four hours per day or lifted over 25 pounds between April 25 and May 5, 1999.

20) On May 5, 1999, Complainant was released to work eight-hour days, but his lifting restriction was decreased to 15 pounds "for the next 3 weeks." Complainant did not work May 5 or 6, but worked May 7-11, May 14-15, May 17, and May 21-24 with a 15 pound lifting restriction. Keys did not ask Complainant to work beyond his restrictions between May 7 and May 24, 1999. The TLE department was understaffed and Complainant sometimes felt pressured by Keys and co-workers to work beyond his lifting restrictions and occasionally did so on his own volition.

21) On May 26, 1999, Complainant's weight restriction was reduced to 10 pounds and he was restricted from "work that involve[d] bending over at the waist on a regular basis." Complainant did not work May 25-27.

22) On May 28, 1999, Complainant worked in the Upper Bay. Invoices show that Complainant, in addition to checking fluids, vacuumed and checked the tire pressure on several cars that day.

23) On May 29, 1999, Keys asked Complainant to help with the tires because the TLE department was understaffed that day. Complainant worked on the tires and when he began to experience pain, he told Keys that he wanted to go home early and take some pain pills. Keys told him to continue working. At some point during the day, Keys was given a copy of Complainant's May 26 medical restrictions by the personnel office. On the copy he received, Keys noted the date, "5-29-99" and time, "2:30 p.m.," and wrote: "[Complainant] is to greet customers, write up service orders & work within his doctor's orders." Both Keys and Complainant signed the note.[2] Sometime thereafter, Complainant left work and returned with a note from his physician, dated May 29, 1999, that stated: "Mr. Masters may not return to work until 6/4/99, if approved by Dr. Moore." By the time Complainant returned with a different note from his physician, Keys was not available, so Complainant made copies of the note and pinned one to the bulletin board near the cash register and asked the cashier to show it to Keys. When he returned home, he received a telephone call from Keys' supervisor, Steve Bock, who berated Complainant "for leaving work early after [Keys] told him no" and for leaving his physician's note on the bulletin board without giving it to Keys. Bock

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[2] During cross-examination, Complainant reluctantly acknowledged signing the note, but failed to mention it during the Agency's investigation or when he recounted the events of May 29 during his testimony at hearing.

said to Complainant, "shame on you," several times, which upset Complainant very much. Complainant did not work May 30 or 31, 1999.

24) Complainant's doctor referred him to a bone and joint specialist, Dr. Moore, who examined him on June 3, 1999, and returned Complainant to modified work on June 4, 1999. The modified release included a four-hour workday and modified restrictions for sedentary work that included the following limitations: "Lifting 10 lbs. maximum. Includes occasionally lifting and/or carrying small objects. Involves sitting; a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking, standing is required only occasionally and all other sedentary criteria are met." Additional restrictions included "no changing tires, no repetitive stooping, bending or twisting." The release indicated that the restrictions were temporary and the doctor expected Complainant to return to 6-hour days in one week and 8-hour days after three weeks.

25) Complainant returned to work around 8:00 a.m. on June 4, 1999, and gave Keys his medical release. Keys prepared a written list of job duties Complainant could perform within his restrictions that stated:

> "William Masters is to perform the following job duties.
>
> "(1) He is to greet the customers, write up their Service Orders, prepare their static cling window sticker. This Job Dutie [*sic*] will be defined as the greeter position.
>
> "(2) William will also pull cars into and out of our lube bays[,] then page the customer to let them know their car is completed.
>
> "In the event we are not servicing a vehicle[,] William will be responsible for sweeping inside & outside service area & moping [*sic*] all areas as necessary.
>
> "William is not to perform any duties that conflict with his doctor's orders if William performs any other dutie [*sic*] not defined in this discription [*sic*] he does it at his own risk an[d] against Wal-Mart policy & doctors orders."

Both Keys and Complainant signed the document. Complainant worked his four-hour shift without incident and was not asked at any time to perform work beyond his medical restrictions.

26) After he finished his shift, Complainant looked for Keys to "talk to him about something," and found him in his office typing what Complainant thought was a "termination notice." Keys asked Complainant to follow him to Kurt Gale's office where Keys and Gale told him he was being terminated for "using profanity to verbally degrade a fellow employee." Complainant was shown a "Coaching for Improvement Form" that stated the following:

> "William has been previously coached and sent on a decision making day for integrerty [*sic*] on two seperate [*sic*] occasions.
>
> " * * * * *
>
> "William has used profanity tward [*sic*] other associates in our unit.
>
> " * * * * *
>
> "This is in direct violation of Wal-Mart policy and will not be tolerated.
>
> " * * * * *
>
> "[T]his is the third violation of Wal-Mart policy and termination."

Complainant signed the coaching, but wrote in the comment section: "Did not verbally abuse another associate. I know I am being terminated due to my on the job injury & I won't let this issue be." Complainant also signed an "Exit Interview" form that stated, in pertinent part: "William used profain [*sic*] language twart [*sic*] another associate in the Tire Lube Express." Keys and Gale also signed the coaching and interview forms.

27) On June 4, 1999, Keys asked Hornbeck to write up a complaint Hornbeck purportedly had regarding Complainant's language toward him in the workplace. The written complaint was dated "6-4-99" and stated: "I would apprecate [*sic*] if [Complainant] whod [*sic*] not use bad language at me when in shop. I do not like be [*sic*] cald [*sic*] a bitch or prick. Jesse H." Hornbeck had purportedly talked to Keys several times before about Complainant's language, but on this day he was asked to write down his complaint.

28) On June 4, 1999, Keys asked John Leese if he had heard any swear words in the shop that morning. Leese told Keys that Complainant had said, "bitch," and Keys asked Leese to document what he had heard. Leese wrote a note stating: "Jeff has asked me to write a statement on the laungue [*sic*] being used in the shop. The only word I heard was bitch [and] that came from Bill Masters. John Leese, 6-4-99." Keys did not ask Leese if the language offended him. Leese was not offended by the language and did not know that Keys' request for the note pertained specifically to Complainant.

29) Hornbeck believed that Complainant was exaggerating his work injury in order to avoid working and discussed his belief with Keys, who shared the same "suspicions." Keys also made comments to other workers, including Leese and Bailey, that he believed Complainant was "milking his injury" and just did not want to work, and that Complainant was "stretching it out."

30) One month after Complainant was terminated, Hornbeck was promoted to service manager and received a .50 pay increase. Three months later, he received a .90 pay increase.

31) During Complainant's employment, Ron Crowder was the service manager in the TLE department. At some point, Crowder suffered a compensable shoulder injury and was released for full duty with no restrictions in November 1998. While Crowder was on light duty, Keys referred to Crowder as the "one armed man." Crowder told Keys he was offended by the comment and Keys apologized.

32) On April 30, 1999, Respondent terminated Ron Crowder after he was "observed treating customers rudely." On Crowder's "Coaching for Improvement Form," Keys stated:

> "On one occasions [*sic*] Ron was abusive in unacceptable language referencing a customer. Also Ron was observed canceling [*sic*] service orders using abusive language again and being overheard by customers."

Keys noted on the form that Crowder had two previous coachings involving "oriontation" [*sic*] and "customer care and culture." Keys also noted on the form that Crowder was terminated "effective this coaching." There are no signatures on the written coaching. Crowder's purported termination was based on written complaints from Liesa Holliday and Jesse Hornbeck. Holliday's complaint was dated April 28, 1999, and stated:

> "On Saturday April 24, 99, [*sic*] a woman came in and said we changed her oil on Friday April 23, 99 [*sic*]. She asked for her air filter to be changed and it wasn't so I took one off the shelf and took it to her car & Ron [Crowder] said 'That bitch was here last night, you don't need to do anything for her.'"

Hornbeck's complaint was dated April 14, 1999, and stated:

> "Regarding the incident on April 12, 1999, a female customer stopped by to pick up her car aproximatley [*sic*] 6:30 p.m. She had brought it in for a tire change over earlier in the day. I talked with the woman and assured her that after I finished up the car I was currently working on I would pull her car in and do the job. Then I asked Ron [Crowder] to pull it in on another bay for me. At that time he picked up the paper work on the customer's car and said 'I'm am [*sic*] just going to cancel these fucking orders [illegible].' And then started canceling the orders. After he knew I had already told the customer that I would do her car next. Overhearing what Ron said to me, the female customer asked for her keys back. Ron's attitude then went pissy because the customer caught him in his bad attitude. I got up from what I was doing. Ron gave her her keys, then asked Ron what his name was he told her and she left. She returned shortly thinking that she didn't have all of her keys. At that time I stepped in and helped look for

> more keys and found nothing. It was obvious that she felt belittled and that her business wasn't needed. Ron continued to belittle the customers and employees the rest of the day. This was not the only customer Ron was rude to on this day."

On the same day Hornbeck wrote his complaint, he received a pay increase of .25 and a commendation from Keys for, among other things, continuously going "above and beyond the normal call of duty."

33) On June 22, 1999, Keys wrote a note stating:

> "Associate Ron Crowder was being coached on 4-30-99 for abusive behavior toward a customer. When asked if he had anything to say or if he was going to defend the coaching he said 'Why don't I save you the trouble, I'll quit.' I accepted his resignation as this was going to be a termination anyway. He saved us from proceeding at that point."

Keys based his decision to terminate Crowder on Hornbeck's complaint. Hornbeck replaced Crowder as the service manager in July 1999.

34) Complainant usually gave Respondent a copy of his medical restrictions the day after or within two days of seeing his physician.

35) Complainant was "upset and depressed" that Respondent "used his on-the-job injury to take [his] job away." He also suffered financial strain due to his sudden loss of income that resulted from his termination. His credit cards, which had stayed current while he worked for Respondent, were eventually turned over to a collection agency. He also lost the benefit of his employee discount card for purchasing necessities. Although he still shops at Respondent's Redmond store, he continues to experience a loss of savings that averages approximately $21.50 per month. Complainant would have saved approximately $623.50 in purchases had he continued in Respondent's employ. Additionally, Complainant no longer engages in his hobby of purchasing "wild baby horses" to tame and sell because he cannot afford the $20-$50 purchase price for wild horses.

36) Complainant's physician released him for "full" duty with a 50 pound lifting restriction approximately two months after Respondent terminated him. When he was terminated, Complainant was earning $7.80 per hour and was subject to a medical release that authorized four-hour workdays and sedentary work. The week prior to his termination, Complainant was scheduled to work five workdays. There is no evidence that Complainant would not have been kept on the same weekly schedule had he continued in Respondent's employ, nor is there any evidence establishing that Respondent would not have continued to accommodate the medical restrictions in place when Complainant was terminated.

During that two-month period, Complainant would have earned $1,248 ($7.80 per hour x 4 hours per day x 5 days per week x 8 weeks) had he continued his employment with Respondent.

37) After Complainant received his "full" work release, he had a difficult time finding suitable employment. At the time of hearing he was still unemployed after 29 months. During that time, he applied for 30 to 35 jobs, at farms and ranches, and with employers such as, Les Schwab's, Leathers' Fuel Station, Texaco, Star Mart, Shotard Farms, Ace Buyers of Madras, and the Oregon Livestock Auction. Five to six months after he was terminated, Complainant was hired by the Oregon Livestock Auction, but was terminated thereafter for lack of work. He earned approximately $3,000. He applied again later for the same job, but was told they were not hiring at that time. There is no evidence that Complainant would not have been reinstated nor reemployed after he received his full work release had he continued his employment with Respondent. Complainant would have earned $33,696 between August 1999 and the date of hearing ($7.80 per hour x 8 hours x 5 days per week x 4 weeks x 27 months) had he continued in Respondent's employ. After deducting Complainant's interim earnings, the total Complainant would have earned, but for his termination, is $30,696 in gross wages.

38) Complainant's testimony was somewhat self-serving. He insisted Keys "forced" him to work beyond his medical restrictions within a few days after he returned to work and continually thereafter, despite evidence that he was initially returned to work with no restrictions and his own testimony that Keys did not ask him to exceed his restrictions between May 5 and May 25, 1999. Except for two occurrences, he was unable to remember specific dates Keys asked him to work beyond his restrictions, what work Keys asked him to perform, or what medical restrictions were applicable at the time. One of his examples purportedly took place during "icy" weather and involved "pulling in pallets of ice melt." Credible evidence shows, however, that the only time that incident could have occurred was on April 20, a day that he was working under a full work release. When asked by an Agency investigator, Complainant denied ever receiving a "full" work release while still employed by Respondent. At hearing he insisted he had no memory of the documented release. Additionally, his initial statement to the Agency investigator that Keys forced him to work beyond his most restrictive work release his last full day of work, June 4, 1999, was contradicted by his testimony at hearing that he was not asked to do anything beyond his medical restrictions that day.

On the other hand, Complainant acknowledged that he occasionally worked beyond his medical restrictions on his own volition and the forum found his testimony that he felt compelled to

do so at times because he thought it was expected of him, believable. The forum also believed his testimony that on May 29, 1999, Keys asked him to help with the tires. The forum accepts Complainant's account of the events that day, except for the timing and with the addition of an event Complainant omitted during his testimony at hearing.[3] Overall, the forum found Complainant's testimony more credible than that of Keys. Consequently, the forum has relied on Complainant's testimony in deciding the material facts, particularly where other credible evidence supported that testimony. In some instances, where Complainant's testimony was not corroborated, did not seem inherently credible, and was self-serving, the forum has not credited it.

39) Russel and Rebecca Horn's testimony was not entirely credible. They both showed a bias as Complainant's "foster parents" by their emphatic belief that virtually anything Complainant told them must be the truth. Moreover, their memory of pertinent events was unreliable and at times was inconsistent with prior statements each made to the Agency investigator. For instance, when explaining knowledge of Complainant's work restrictions and his being pushed beyond those restrictions, Russel Horn told the Agency investigator that he went with Complainant to all of his doctor's appointments and saw the doctor with Complainant each time. At hearing, he stated he did not go to two of the medical appointments and had not read all of the medical releases, but had relied on Complainant's statements about some of his restrictions. Both Horns testified that Complainant was released within four or five days after he was injured, with a very limited work restriction - "to do almost nothing" - and that Respondent forced Complainant to work beyond those restrictions within a week or two of his release. Yet the only incident they describe with clarity is one where Russel Horn helped Complainant move pallets of "ice melt" into the shop at closing time, on a date Horn claims could "very easily be April 20."[4] On that date, Complainant had a full work release with no restrictions. Additionally, both Horns told the Agency investigator that Complainant had to work with a "new" person who "didn't know what he was doing" on the night Complainant and Horn moved the pallets of "ice melt." At hearing, both testified with certainty that Complainant had been "forced" to work alone that night, which caused him to work beyond his

[3] *See* Finding of Fact – The Merits 23.

[4] An April 1999 calendar shows that April 20 is the only date that corresponds with the Horns' testimony about Complainant's "first" medical release and the specific incident wherein they witnessed Complainant pulling a pallet of "ice melt." Complainant did not work between April 1 and April 20, and did not work for four days after April 20.

restrictions. Despite their confusion about the sequence of events and their prior inconsistent statements, the forum finds their testimony that Complainant was a hardworking person who will "go above and beyond what he is supposed to do" believable. On all other matters, the forum credits their testimony only where it is uncontroverted or corroborated by other credible testimony.

40) Linda Bailey's testimony was credible. She readily acknowledged that swearing was commonplace in the TLE department and that she heard it, did not like it, but did not report it to upper management as required by her management position. Bailey credibly testified that no one was terminated for swearing. The forum credits her testimony in its entirety.

41) Christopher Bjerke was a credible witness. Despite his involuntary termination from Respondent's employ, he showed no animosity toward Respondent nor did he exaggerate his testimony to enhance Complainant's case. He credibly testified that Keys told him that Complainant was not allowed to lift more than 25 pounds due to a back injury and thereafter Bjerke made a point of helping Complainant "so that he wouldn't throw his back out." He acknowledged that he never heard Keys tell Complainant to perform duties beyond his medical restrictions, but he did hear Keys tell Complainant to "get to work." Bjerke also credibly testified that he was aware of a company policy discouraging swearing, but that most employees swore, including Bjerke. Bjerke's testimony was straightforward and unbiased and the forum credits it in its entirety.

42) John Leese testified credibly on key issues. He readily acknowledged that his knowledge of Complainant's medical restrictions was based on Complainant's description of his restrictions. His testimony was straightforward and substantially consistent with his previous statements to the Agency. The forum finds no reason to disbelieve him.

43) Jesse Hornbeck was not a credible witness. His bias toward Respondent was evident by his demeanor, particularly when he testified as Respondent's witness. His testimony differed substantially from his prior statement to the Agency. For example, he told the Agency investigator that he had "dug through" invoices to see if Complainant had initialed any work orders and claimed he found no invoices with Complainant's initials. In contrast, there are numerous invoices in the record, dated May 28, 1999, that show Complainant's initials. Additionally, Hornbeck's testimony that two other technicians, including Jamey Osborne, complained to Hornbeck about Complainant's language on Complainant's last day of work conflicted with other credible testimony. The forum does, however, believe Hornbeck's testimony that he and Keys believed that Complainant exaggerated his injury to avoid work

and "go home early" as a statement against interest. On all other matters, the forum believed Hornbeck only when his statements were corroborated by credible evidence.

44) Jamey Osborne credibly testified that between April 1 and June 4, 1999, the TLE department was "always understaffed," which increased the workload for each technician. He recalled that during that time Complainant worked hard and was willing to help anyone who needed assistance. Osborne also credibly testified that Complainant's language was no worse than others, including Jesse Hornbeck's, and denied complaining about Complainant's language. He acknowledged that swearing was commonplace in the shop and that he swore at times, though infrequently. The forum credits Osborne's testimony in its entirety.

45) Kurt Gale's testimony had little bearing on key issues. His memory was unreliable – he couldn't recall who decided to terminate Complainant - and despite his position as Redmond store manager, his explanation of Respondent's policy pertaining to the use of swearing or "profanity" was confusing. He also appeared to have little understanding of Respondent's termination policy. The forum gave little weight to Gale's testimony and only when other credible evidence corroborated it.

46) Liesa Holliday was generally credible, although she demonstrated some bias toward her employer. The forum consequently gave more weight to her testimony when other credible evidence corroborated it.

47) Jeff Keys' testimony was biased and tailored to counter adverse testimony he had the opportunity to hear throughout the hearing. His testimony that he was unaware that Complainant was working beyond his medical restrictions was not believable and contrary to other credible testimony. He acknowledged, however, that he used swear words occasionally and that "some" swearing was overlooked in the workplace. The forum credited Keys' testimony only where it was corroborated by other credible testimony or was logically credible.

48) Tony Farkas, James Shortreed, and Leslie Taylor (formerly Van Sant) were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Wal-Mart Stores, Inc. was a foreign corporation operating retail stores in Oregon under the assumed business name of Wal-Mart, and engaged the personal services of six or more persons within Oregon.

2) At all times material, Respondent employed Complainant at the Wal-Mart store located in Redmond, Oregon.

3) Complainant sustained a compensable injury on April 1, 1999. He applied for and received

workers' compensation insurance benefits.

4) Complainant was temporarily disabled from performing his regular job duties and regularly provided Respondent with medical documentation describing changes in his physical limitations.

5) Respondent provided Complainant with suitable modified work while he was disabled from performing his regular job duties.

6) On his own volition, Complainant occasionally worked beyond his medical restrictions with Respondent's knowledge.

7) Complainant's physical limitations increased by May 26, 1999.

8) Complainant's supervisor expressed his concern to others that Complainant was "milking his injury" and "stretching it" to avoid work.

9) On May 29, 1999, Complainant provided Respondent with a medical note that authorized Complainant to be off work until June 4, 1999.

10) On June 4, 1999, Complainant provided Respondent with a medical release that authorized Complainant to work four hours per day and to temporarily perform sedentary work only.

11) On June 4, 1999, Respondent informed Complainant that he was being terminated for having used "profanity" to degrade a fellow worker.

12) Respondent had a policy prohibiting the use of vulgar or offensive language in the workplace that was not enforced in the TLE department.

13) All of the TLE department employees used vulgar language regularly in the work place, except one who used it occasionally.

14) Complainant was the only TLE department employee terminated by Respondent for using vulgar language in the work place.

15) Complainant was terminated because he applied for and used the workers' compensation provisions under ORS chapter 656.

16) Complainant suffered lost wages and benefits and experienced mental suffering as a result of his discharge.

CONCLUSIONS OF LAW

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

2) *Former* OAR 839-006-0120 provided:

> "To be protected under ORS 69.410, a person must be a worker as defined in OAR 839-006-0105(4)(a)."

Former OAR 839-006-0105(4)(a) defines "worker" as follows:

> "Worker' means any person * * * who engages to furnish services for remuneration, subject

to the direction and control of an employer * * *."

Complainant was at all times material a worker entitled to the protection of *former* ORS 659.410(1) and 659.420.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practices found herein. ORS 659A.820, ORS 659A.830, ORS 659A.835.

4) The actions, inaction, statements, and motivations of Jeff Keys, described herein, are properly imputed to Respondent.

5) At times material herein, *former* ORS 659.410(1)(1) provided:

"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 discriminated against Complainant with respect to his tenure by terminating Complainant because he invoked and utilized procedures under the workers' compensation laws, in violation of *former* ORS 659.410(1)(1).

6) At times material herein, *former* ORS 659.420 provided, in pertinent part:

"(1) A worker who has sustained a compensable injury and is disabled from performing the duties of the worker's former regular employment shall, upon demand, be reemployed by the worker's employer at employment which is available and suitable.

"(2) A certificate of the worker's attending physician that the worker is able to perform described types of work shall be prima facie evidence of such ability.

"(3) Notwithstanding subsection (1) of this section, the right to reemployment under this section terminates when whichever of the following events first occurs:

" * * * * *

"(d) The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary."

Former OAR 839-006-0135 provided, in pertinent part:

"(1) An employer with 6 or more employees is required to re-employ an injured worker not physically able to perform the former job to the most suitable vacant position available if:

"(a) The injured worker is medically released to perform

the duties of the vacant suitable position; and

"(b) Timely demand is made as provided in OAR 839-06-135(4) [*sic*].

"(2) A suitable position is one which is as similar as practicable to the former position in compensation, duties, responsibilities, skills, location, duration (full or part-time, temporary or permanent) and shift;

"(a) The injured worker shall have the right to discuss and receive clarification in writing of the specific duties of the position with the employer prior to actually commencing work;

"(b) At the time of the injured worker's demand for reemployment, a suitable alternative may not be available. When this occurs, the injured worker must follow the employer's non-discriminatory and written reporting policy which has been effectively made known to the employer's work force and is practiced by the employer, until the employer offers the injured worker a suitable position. If the employer has no such reporting policy, the injured worker must inform the employer of any change in address and telephone number within ten days of the change.

"(3) The attending physician's approval for the injured worker's return to a suitable position is prima facie evidence of the injured worker's physical ability to perform the job. The employer may require the worker to provide such approval in writing prior to reemployment.

" * * * * *

"(4) The injured worker will make demand for reemployment according to the employer's written policy. If the employer has no such policy, the injured worker's demand:

"(a) May be oral or written;

"(b) Must be made to a supervisor, personnel officer or someone in management; and

"(c) May be made at any time after release by the attending physician, but no later than the seventh calendar day following the date the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician has released the worker for employment * * *.

"(6) The employer has no obligation to create a job for a returning injured worker and is under no obligation to continue a particular position if one has been created.

"(7) Except as provided in these rules, the injured worker has no greater right to a job or other employment benefit than if the worker had not been injured."

Respondent did not violate former ORS 659.420 as charged, because Complainant was not medically released for reemploy-

ment until after Respondent terminated him.

7) Pursuant to ORS 659A.850(2) and by the terms of ORS 659A.850(4), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are appropriate exercises of that authority.

OPINION

The Agency alleged in its Specific Charges that Respondent violated *former* ORS 659.410(1) by discharging Complainant because he applied for benefits under and utilized the provisions of ORS chapter 656. The Agency further alleged that Respondent failed to reemploy Complainant in an available and suitable job in violation of *former* ORS 659.420. Respondent does not dispute that it is subject to the provisions of ORS chapter 659 or ORS chapter 659A, or that Complainant was compensably injured while in Respondent's employ and terminated from employment two months thereafter. However, Respondent denies terminating Complainant because of his on-the-job injury and alleges in its answer that Complainant was terminated because he used "foul and abusive language" against fellow employees in violation of company policy. Respondent also asserts that during the time Complainant was restricted from performing certain job duties, Respondent made available to Complainant suitable duties that he could perform within his work restrictions.

TERMINATION/*FORMER* ORS 659.410(1)

In order to prevail, the Agency must show, by a preponderance of the credible evidence, a causal connection between Complainant's termination and his use of statutory workers' compensation provisions. The Agency, at all times, has the burden of proving Complainant was terminated for an unlawful reason. The Agency has met that burden.

A. Causal connection between termination and use of workers' compensation provisions

Former OAR 839-005-0010(2) describes two methods of determining whether there is a causal connection between a respondent's adverse action and a complainant's protected class status. One is the Specific Intent Test, the other is the Different or Unequal Treatment Test. In this case, the Agency established a causal connection under the specific intent theory. Specific intent may be shown by circumstantial evidence. *In the Matter of Sierra Vista Care Center*, 9 BOLI 281, 296 (1991). Evidence includes inferences and more than one inference may be drawn from the

basic fact found. *Id.* at 297. In this case, while the temporal relationship alone is not dispositive, the progression of events following Complainant's injury and his supervisor's expressed suspicion that Complainant was "milking his injury," are enough to establish a link between the two events. Evidence shows that as Complainant's physical limitations increased, Keys' patience with Complainant decreased to the extent that he expressed skepticism about Complainant's work restrictions to another manager (Bailey) and at least one of Complainant's co-workers (Hornbeck). Finally, after Complainant was taken off work for four days after complaining about pain he suffered while helping Keys with tires,[5] and following his first day back at work with an additional, even more restrictive medical release, he was terminated. Although Respondent claims Complainant was terminated because he called a co-worker a "bitch," evidence shows Respondent's reason is pretext for discrimination as discussed below. The forum concludes that Respondent knowingly and purposefully terminated Complainant because he invoked and used the provisions of ORS chapter 656. *See former* OAR 839-005-0010(2)(a).

B. Pretext

Unequivocal evidence shows Complainant was singled out for using the word "bitch" and was Respondent's only TLE department employee to lose his job for that reason alone. There is no dispute that vulgar language was tolerated and widespread in the TLE department and that no one was terminated for using it. Keys distinguished Complainant's offensive language from others by arguing that it was directed toward a co-worker who complained about Complainant's use of the word "bitch," making it intolerable by Respondent's standards.[6] That argument fails for several reasons. First, Hornbeck, the co-worker who complained, also used profanity in the workplace, including the same words he found offensive when spoken by Complainant. Second, Hornbeck demonstrated a clear bias when he admitted he believed Complainant was exaggerating his physical limitations in order to avoid working. He also acknowledged that he spoke with Keys about his "suspicions" and that Keys agreed with him. Keys also told Leese and Leese overheard Keys tell Bailey that he thought Complainant was "milking his in-

[5] There is no evidence in the record showing that Complainant actually lifted a tire.

[6] Despite Respondent's assertion that others also complained about Complainant's language, there is no evidence in the record to support that position. Leese credibly testified that he was not offended by Complainant's language and that he did not know the reason behind Keys' request that he write a statement describing the swear word Complainant used the day of Keys' request. Osborne also denied complaining to anyone about Complainant's language.

jury" to avoid work and go home early, demonstrating a motive to terminate Complainant that diminishes Respondent's professed reason. Third, Hornbeck was promoted to service manager, which included a pay increase, one month after writing the complaint that resulted in Complainant's termination. Although the promotion alone does not denote a plan between Keys and Hornbeck to get rid of Complainant, the forum notes that Hornbeck also received a commendation and pay increase from Respondent on the same day he wrote a complaint about Crowder, who was also terminated as the result of a Hornbeck complaint.[7] In Crowder's case, the termination may have been justified, but the forum notes that Crowder also had a work injury while employed by Respondent and had been released for work only five months before his termination.

Finally, Respondent did not follow its own disciplinary procedure with regard to Complainant's termination. Noticeably absent from the process were required steps, including a pre-coaching investigation to "gather the facts including witness statements, if appropriate * * * and discuss the situation with the Associate to get his/her side of the story and any additional facts." If Respondent "concludes a coaching is appropriate," then the employee's behavior is classified to determine "whether the action is related to job performance or a specific behavior (misconduct or gross misconduct)." It is only after the behavior is classified, that Respondent then determines "the appropriate level of coaching. Depending upon the behavior, steps may be skipped." In this case, there was no investigation, Complainant's behavior was not classified as misconduct or gross misconduct, and there was no discernable determination of the appropriate level of coaching necessary. Instead, Respondent skipped all of the steps and summarily terminated Complainant based on what the forum has found to be a sham complaint.

The forum infers from those facts that Keys was, at best, irritated by Complainant's physical restrictions, perceived they were not altogether legitimate, and consequently found an excuse to terminate him. Respondent's reason for terminating Complainant was a pretext for discrimination and Respondent terminated Complainant because he used the workers' compensation provisions.

REEMPLOYMENT/*FORMER* ORS 659.420

The Agency is required to prove by a preponderance of the evidence that (1) Complainant sustained a compensable injury and (2) was disabled from performing the duties of his former regular employment, and (3) that upon Complainant's demand, (4) Respondent failed to reemploy

[7] Hornbeck complained on April 14 and Keys terminated Crowder on April 30, 1999, based on Hornbeck's complaint.

Complainant at (5) available and (6) suitable employment. *Former* ORS 659.420. There is no dispute that Complainant sustained a compensable injury and was disabled from performing his regular job duties. The Agency, however, has not established the remaining elements. First, Complainant did not make a demand for reemployment in accordance with *former* OAR 839-006-0135(4)(c), which requires the demand "be made at any time after release by the attending physician, but no later than the seventh calendar day following the date the worker is notified by the insurer or self insured employer by certified mail that the worker's attending physician has released the worker for employment * * *." The Agency contends that each time Complainant presented a copy of his medical restrictions, he was making a demand for reemployment. That argument is not logical. The evidence shows only that Complainant was temporarily disabled from performing some of his regular job duties after his injury. Complainant's work restrictions were temporary and fluctuated week to week. When Complainant was terminated he was still working under temporary restrictions. Respondent is not required to offer Complainant suitable employment until Respondent knows the extent of Complainant's physical disability to a reasonable degree of certainty. *See former* OAR 839-006-0135(3). Neither Complainant nor Respondent was in a position to make a reasoned assessment of "suitable" employment without Complainant's physician's input. Other than the April 19 unequivocal work release that permitted Complainant to return to his regular job duties, all other medical releases imposed temporary restrictions. By Complainant's own testimony, he was not medically released to "full" duty until almost two months after he was terminated from employment. It is axiomatic that Complainant would not seek reemployment until he was reasonably certain he could no longer be reinstated to his former employment.

Evidence shows that Respondent offered suitable modified work that conformed to Complainant's ever-changing medical restrictions. Complainant does not deny that he voluntarily worked beyond his restrictions occasionally, and his own testimony limits the time frame to two days in May 1999 that Keys may have told him to perform work beyond his medical restrictions. The forum believes Complainant's testimony that Keys asked Complainant to help with tires in late May 1999, but there is no credible evidence that Keys repeatedly told Complainant to work beyond his restrictions before May 29, 1999. Even if a preponderance of the evidence showed Complainant was forced to work beyond the temporary restrictions imposed by his physician, Complainant's claim is under *former* ORS 659.410(1) with respect to his terms and conditions of employment and not under *former* ORS 659.420.

DAMAGES

A. Back Pay

The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits that the complainant would have received but for the respondent's unlawful employment practice. *In the Matter of ARG Enterprises, Inc.*, 19 BOLI 116, 136 (1999). A complainant seeking back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *Id*. at 136. Where the forum deems a back pay award appropriate, the respondent has the burden of proving the complainant failed to mitigate his or her damages. To meet that burden, a respondent must prove the complainant "failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified." *Id*. at 137.

In this case, the Agency established that Complainant was terminated in violation of ORS 659.410(1) and that he has been unable to obtain suitable employment as of the hearing date. The only issue to determine, therefore, is the amount of back pay to which Complainant is entitled. Evidence shows Complainant was earning $7.80 per hour when he was terminated and that he had worked an average of 38 hours per week prior to his work injury.

At the time he was terminated, Complainant was under a doctor's care and was released to do sedentary work activities that included a 10-pound lifting limitation. Complainant's testimony that two months after he was terminated he was fully released by his doctor with a 50-pound lifting restriction is uncontroverted. After he was medically released, Complainant first applied for numerous ranch or farm jobs, but was turned down. By the date of hearing, he had applied to places such as Les Schwab's, Leathers' Fuel Station, Texaco, Star Mart, Shotard Farms, Ace Buyers of Madras, and the Oregon Livestock Auction. He was hired by the Oregon Livestock Auction for a brief period until his employer "ran out of work" for him to do. He earned $3,000 during that interim employment. There is no evidence in the record about Complainant's pay rate or work schedule while he was employed by the Oregon Livestock Auction. Also, there is no evidence that controverts Complainant's testimony that since his "full" work release he has applied for 30 to 35 jobs. Complainant testified credibly that he does not have a high school diploma, that the job market was poor in his locale, and that he was required to give his job history on applications, including his reason for leaving Respondent. On the other hand, Respondent has offered no evidence showing that jobs were plentiful at times material or that Complainant had opportunities for employment that he refused, thereby failing to ex-

ercise reasonable care and diligence in seeking employment. The forum concludes that Respondent did not meet its burden of proving Complainant failed to mitigate his damages.

The forum's calculations show that even when deducting Complainant's interim earnings, Complainant's back wages exceed the $25,000 the Agency seeks in its pleading.[8] At hearing, the Agency declined to calculate Complainant's back pay based on the evidence presented at hearing and did not move to amend its charging document to conform to that evidence. Therefore, the back pay award is limited to $25,000, the amount sought in the Agency's pleading.

B. Mental Suffering

The Agency asks this forum to award Complainant $20,000 damages for mental suffering as an effect of Respondent's unlawful employment practices found herein. In determining an award, the commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. *In the Matter of James Breslin*, 16 BOLI 200, 219 (1997), *aff'd without opinion, Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999). While the forum may also review the mental suffering damages awarded in previous years to determine the amount of damages that would appropriately compensate Complainant for the mental suffering he experienced,[9] the amount of the award depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999).

Complainant testified credibly that he suffered some financial strain, was "upset and depressed," and experienced difficulty finding work as a result of his termination. At the time of hearing, he was still unemployed despite some unsuccessful efforts to gain employment. Other than his inability to make his credit card payments, Complainant did not point to any specific or lasting adverse effects of the financial strain or depression he suffered. The forum, however, has held previously that the anxiety and uncertainty connected with the loss of employment income is compensable when attributable to an unlawful practice. *In the Matter of Tyree Oil, Inc.*, 17 BOLI 26, 44 (1998). In *Tyree*, the complainant, an injured worker, was awarded $10,000 for distress from financial hardship caused by his unemployment, his difficulty in finding other work, and his impaired self esteem as effects from the respondent's failure to reinstate him after he was medically released for work. The complainant in that

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[8] *See* Finding of Facts – The Merits 36 & 37.

[9] *See In the Matter of Bob G. Mitchell*, 19 BOLI 162, 189 (2000).

case testified that he was over 40 years old and the sole provider for his wife and two children. He also testified that he experienced sleeplessness, his wife was forced to clean houses for income, he could not pay his bills, and he had to borrow money from his mother as a consequence of the respondent's action. *Id*. at 33. The facts in this case are not as egregious as those found in *Tyree*, but are sufficient to show that Complainant suffered some financial hardship and angst, albeit short-lived, connected to his loss of employment. The forum therefore concludes that $7,500 in this case is an appropriate award for Complainant's mental suffering.

C. Benefits Lost

Complainant credibly testified that while employed, he regularly enjoyed the use of an employee discount card Respondent provided as a benefit to its employees. The Agency and Respondent stipulated that between October 1998 and May 1999, Complainant made purchases totaling $1,503.30 using his employee discount card. The participants agree that a 10 per cent discount on that amount afforded Complainant average savings of $21.50 per month on household items during his employment. Based on those facts, the forum finds that the employee discount card is a fringe benefit that Complainant lost as a result of Respondent's unlawful employment practice. The forum concludes that Complainant would have saved an average of $623.50 ($21.50 per month x 29 months) had he continued in Respondent's employ.

RESPONDENT'S EXCEPTION

Respondent excepts to the forum's $10,000 mental suffering award in the proposed order. Contrary to Respondent's assertion that there are no facts to justify any award in this case, substantial evidence in the record demonstrates otherwise. Respondent, however, accurately distinguishes the facts in *Tyree* to those in this case and the forum has modified its opinion to reflect the argument raised by Respondent in its exception and has adjusted its mental suffering award accordingly.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), to eliminate the effect of Respondent's unlawful employment practices, and as payment of the damages assessed for its violation of *former* ORS 659.410(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Wal-Mart Stores, Inc.** to

1) 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 William F. Masters in the amount of:

a) TWENTY FIVE THOUSAND DOLLARS ($25,000), less appropriate lawful deductions, representing wages Complainant lost from June 4, 1999, through the date of hearing, as a result of Respondent's unlawful employment practice; plus

b) Interest at the legal rate on the sum of $25,000 from August 4, 1999, until paid; plus

c) SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice; plus

d) Interest at the legal rate on the sum of $7,500 from the date of the final order until paid; plus

e) SIX HUNDRED TWENTY THREE DOLLARS AND FIFTY CENTS ($623.50), representing benefits lost as a result of Respondent's unlawful employment practice.

2) Cease and desist from discriminating against any employee in tenure of employment based upon the employee's having filed for benefits or invoked or utilized Oregon's workers' compensation laws.

In the Matter of

NES COMPANIES LP

Case No. 21-02

Final Order of Commissioner Jack Roberts

Issued October 9, 2002

SYNOPSIS

The Agency alleged that Respondent unlawfully denied Complainant OFLA sick child leave and discharged him due to his absence while he cared for his sick child. The Commissioner found that Complainant was discharged because he violated Respondent's attendance notice requirements by not calling in or reporting to work for three consecutive days and that Respondent had enforced its uniformly applied policies in discharging Complainant. The Commissioner dismissed the complaint and Specific Charges. *Former* ORS 659.470(1), *former* ORS 659.474(1), *former* ORS 659.472(1), *former* ORS 659.476(1)(d), *former* ORS 659.478, *former* ORS 659.480, *former* ORS 659.492(1) and (2); *former* OAR 839-009-0210(2), OAR 839-009-0210(4), OAR 839-009-0230(4), *former* OAR 839-009-0240, *former* OAR 839-009-0250.

The above-entitled 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 for the State of Oregon. The hearing commenced on June 25, 2002, in Hearings Room 1004, Portland State Office Building, Portland**,** Oregon. Closing arguments were made by telephone on June 27, 2002. The hearing reconvened on August 1, 2002, in Hearings Room 1004 to retake the testimony of Michael Helmer.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. Complainant Edward Keith Schroeder was present throughout the hearing and was not represented by counsel. Respondent was represented by Leah C. Lively, attorney at law. Mike Helmer, Respondent's Portland branch Operations Manager, was present throughout the hearing for the purpose of assisting Respondent's case pursuant to OAR 839-050-0150(3)(d).

The Agency called as witnesses: Complainant; Jamie Thomson, nursing supervisor of the Multnomah County head lice team; Jennifer Coleman, Complainant's former babysitter; and Randy Trachsel, Complainant's roommate.

Respondent called as witnesses: Edwin Jory, Respondent's former general manager; Christopher Sellon, Respondent's dispatcher; John Carter, a truck driver employed by Respondent; and Michael Helmer, Respondent's operations manager.

The forum received into evidence:

a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing), and X-12 through X-15 (submitted at or after the hearing);

b) Agency exhibits A-1 through A-25 (submitted prior to hearing), and A-26 (submitted at hearing);

c) Respondent exhibits R-1 through R-15 (submitted prior to hearing).

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 January 22, 2001, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging he was the victim of the unlawful employment practices of Respondent. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued an Administrative Determination on May 25, 2001.

2) On April 25, 2002, the Agency issued Specific Charges alleging that Respondent discriminated against Complainant in violation of *former* ORS 659.476(1)(d) by discharging him because of his absence from work to care for his three-year-old daughter, who had head lice and

required home care, and who had no other family member other than Complainant to care for her.

3) On April 25, 2002, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth June 25, 2002, in Portland, Oregon, as 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.

4) On May 13, 2002, Respondent, through attorney David G. Hosenpud, filed an answer to the Specific Charges. Respondent's answer included three alternative affirmative defenses: that Complainant was not an eligible employee under ORS 659A.156(a) or (b); that Complainant failed to take reasonable steps to make alternative child care arrangements and, therefore, the leave taken was not qualified under OFLA; or that Complainant's child's medical condition, if established she in fact suffered from head lice, does not qualify for sick child leave under OFLA.

5) On May 17, 2002, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damage calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The forum ordered the participants to submit case summaries by June 17, 2002, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency filed its case summary, with exhibits, on June 6, 2002. Respondent filed its case summary on June 18, 2002, and an amended case summary on June 19, 2002.

7) At the start of the hearing, 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 agency case presenter waived the ALJ's recitation of the manner in which objections may be made and matters preserved for appeal.

8) Prior to opening statements, the Agency gave the forum a supplemental case summary. Respondent did not object and it was received as an administrative exhibit.

9) During the hearing, the Agency moved to amend the Specific Charges to claim back pay for Complainant from October 30, 2000, until August 27, 2001. Respondent did not object and the ALJ granted the motion.

10) During the hearing, Respondent moved to amend its Answer to substitute *former* ORS 659.474(a) and (b) for ORS 659A.156(a) or (b) in its first affirmative defense. The Agency did not object and the ALJ granted the motion.

11) At the end of the hearing, Respondent and the Agency stipulated that the statements recorded by Agency investigator Peter Martindale in investigative interviews and received as Agency Exhibits A-5, and A-17 through A-22 accurately reflect what each witness told Martindale.

12) On June 26, 2002, the ALJ held a telephone conference with Mr. McSwain and Ms. Lively to discuss Respondent's request to brief two issues and schedule closing arguments. Respondent's request to file a brief on two issues was granted, and Respondent and the Agency were ordered to file briefs by July 12, 2002. The two issues to be covered in the briefs were: (a) If Respondent was not Complainant's actual employer for 180 days prior to Complainant's discharge on October 30, 2000, is Respondent still potentially liable as a successor-in-interest under OFLA? (b) Under OFLA, must the Agency prove that Respondent intentionally discriminated against Complainant in order to establish liability, and if so, the standard the forum should apply in determining if Respondent intentionally discriminated against Complainant. Closing argument was set for 2:30 p.m. on June 27 by telephone conference.

13) Closing arguments were made by telephone on June 27, 2002.

14) The Agency and Respondent timely filed post hearing briefs on July 12, 2002. Respondent withdrew its affirmative defense that Respondent was not a successor in interest to Cantel for the purposes of OFLA.

15) On July 9, 2002, the ALJ discovered that cassette tape four from the hearing was blank. On that tape was the redirect and recross testimony of Christopher Sellon, the entire testimony of John Carter, and the entire testimony of Mike Helmer. On July 10, the ALJ held a telephone conference with Ms. Lively and Mr. McSwain. After some discussion, the participants agreed that the ALJ would prepare a summary from his hearing notes of the redirect and recross testimony of Sellon and the testimony of Carter and that the hearing would be reconvened to retake Helmer's testimony. After Ms. Lively obtained confirmation of Helmer's availability, the hearing date was set for August 1 at 10:30 a.m. in Portland. On July 10, the ALJ issued an interim order confirming the above and enclosed summaries of Carter's and Sellon's testimony. The ALJ instructed Lively and McSwain to review the statements and to let him know by July 18 if they were in agreement that the summaries accurately reflected the testimony of Carter and Sellon. On July 30, 2002, the ALJ

held a brief telephone conference with Lively and McSwain, both of whom agreed that the ALJ's summaries of Carter and Sellon's testimony accurately reflected their testimony.

16) The hearing reconvened on August 1, 2002, at 10:30 a.m., and Mike Helmer testified again. After brief closing arguments, the record closed.

17) On August 26, 2002, 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 exceptions on August 28, 2002. Those exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) Respondent is a limited partnership in Delaware that registered with the Oregon Corporation Division as a foreign limited partnership ion February 14, 1997.

2) Complainant was hired by Cantel, Inc. on August 12, 1994, as a truck driver.

3) In November 1999, Respondent purchased Cantel, Inc., and Complainant became an employee of Respondent. Complainant continued to work as a truck driver.

4) Respondent employed 25 or more persons in Oregon during each working day in each of the 20 or more calendar weeks in the year 2000.

5) Complainant worked an average of at least 25 hours per week for the 180 days immediately preceding October 25, 2000.

6) Respondent's personnel policy in effect during Complainant's employment with NES was contained in a handbook that Respondent distributed to its employees, including Complainant. Among its provisions were the following paragraphs:

> "2) Employees should notify their supervisor as far in advance as possible whenever they are unable to report for work, know they will be late, or must leave early. The notice should include a reason for the absence and an indication of when the employee can be expected to report for work. If the supervisor is unavailable, notification should be made to the Personnel Department.
>
> "3) * * * Failure to notify the Company properly of any absence may result in loss of compensation during the absence and may be grounds for disciplinary action.
>
> "* * * * *
>
> "9) Unauthorized or excessive absences or tardiness will result in disciplinary action, up to an including termination. An absence is considered to be unauthorized if the employee has not followed proper notification procedures or the absence has not been properly approved. Generally, absences in excess of those allowed in Short-Term Ab-

sences, and Leaves of Absence, and tardiness or early departure more than three times in a three-month period are grounds for discipline.

"10) Employees who are absent from work for three consecutive days without giving proper notice to the Company will be considered as having voluntarily quit. * * *"

7) Respondent's attendance policy enforced at its Portland, Oregon location in the year 2000 required employees to call Respondent before work each day they were going to be absent. If an employee knew in advance that he or she would miss work more than one day and also knew the date he or she would return to work, the employee was only required to call in the first day of his or her absence if he or she announced their extended absence and the date he or she planned to return to work during that call. At a minimum, Complainant had actual knowledge of this policy throughout October 2000.

8) On March 8, 2000, Complainant received a "verbal" warning for not calling in to work on February 28 and 29 when he was absent from work. Ed Jory, Respondent's operations manager, signed the warning.

9) On June 12, 2000, Complainant received another warning for being absent from work on June 9, 2000, without calling in to work. Complainant was suspended without pay for two days and was told that he would be fired the next time he was absent without calling in. Jory signed the warning.

10) In October 2000, Complainant had two children. His youngest child, Cher'ee, was three years old. Cher'ee usually stayed with her mother, Tami Willis, during the week, and with Complainant on weekends.

11) Beginning on Wednesday, October 18, 2000, Complainant had to provide childcare for Cher'ee because Tami left the area without giving him any advance warning and because he was unable to obtain alternative childcare.

12) Complainant missed work again on October 19, 20, 23, and 24 because Tami was still gone and Complainant was unable to obtain alternative childcare. Complainant was not scheduled to work on October 21 and 22.

13) Complainant called Respondent each morning before work on October 18, 19, 20, 23, and 24 and stated that he would be absent from work because he had no childcare for his daughter.

14) On October 24, 2000, Complainant made arrangements with Jennifer Coleman, a neighbor and friend who lived in an adjacent apartment, to provide childcare for Cher'ee, starting the morning of October 25.

15) Complainant took Cher'ee to Coleman's apartment sometime before 7 a.m. on October 25, then left Coleman's

apartment. Coleman assumed Complainant had left for work.

16) Cher'ee slept until 8:30 or 9 a.m., when she awoke and Coleman fed her. During the morning, Coleman observed Cher'ee playing with her hair and pulling it. Around noon, Coleman examined Cher'ee's head and determined that Cher'ee had both nits and head lice.

17) Complainant did not report to work on October 25 and did not call Respondent on October 25.

18) Complainant returned to pick up Cher'ee between 2 and 4 p.m. on October 25. At that time, Coleman told him that Cher'ee had nits and head lice, and that she would not care for Cher'ee again until the nits and lice were gone. She also told Complainant he should buy Rid or Nix to treat the lice and that it took 7-10 days to get rid of the nits and lice.

19) Complainant remained home on October 26 and 27 to care for his daughter. No other family member was available to care for Cher'ee on those days.

20) Complainant did not call Respondent on October 26.

21) On October 25, 26, and 27, Jory, Christopher Sellon, Respondent's dispatcher, and Mike Helmer, Respondent's head dispatcher, called Complainant at home but Complainant did not answer the phone. Eventually, Sellon left a message for Complainant to call Respondent.

22) Complainant's next call to Respondent was in the late afternoon of Friday, October 27, when he called Respondent in response to Sellon's phone message. Complainant spoke with Mike Helmer. Complainant told Helmer he had been gone from work because his daughter had head lice and that he would return to work early the next week.

23) In October 2000, in public schools and licensed daycare facilities, children who had head lice ("pediculosis") were excluded from attendance. Most schools in the United States also exclude children who have nits. In October 2000, there was an Oregon administrative rule excluding children from school and daycare who had pediculosis.

24) So long as nits are present, there is a possibility of reinfestation.

25) Depending on the treatment, it can take from a couple of days to a couple of years to get rid of all nits from a child infested with nits.

26) On October 27, Helmer met with Jory to discuss Complainant's work status. Helmer was aware that Complainant had not called in to work for three days in a row. Helmer recommended that Complainant be discharged based on not reporting to work for three days in a row and not following Respondent's call-in procedures and because of his two prior warnings. Jory seemed reluctant to discharge Complainant. At the time, Jory and Helmer

considered Complainant a valuable employee because he was Respondent's only trained boom truck operator.

27) Sometime between late afternoon on October 27 and Complainant's October 30 meeting with Jory, Helmer told Jory that Complainant's daughter had head lice.

28) Tami returned home on October 29. Complainant left Cher'ee with Tami and went to work at his regular time on Monday, October 30. When Complainant reported to work, he was instructed to go talk with Ed Jory. Complainant then met with Jory.

29) Jory told Complainant that he was discharged.

30) Jory discharged Complainant because of his past history of absences and because Complainant did not follow Respondent's procedures for calling in to report his absences on October 25, 26, and 27.

31) On October 30, 2000, Jory completed an "Employee Separation Form" for Complainant. The form contains a series of questions. One question asked, "What one, single, last incident caused employee to be discharged on day?" Jory wrote "not reporting to work."

32) Jory had been trained on Respondent's policy on OFLA/FMLA leave, but was not aware of OFLA's "sick child leave" provision before discharging Complainant, and would not have recognized Complainant's need to stay home with his sick child as OFLA leave.

33) Complainant earned $12.25 per hour at the time of his discharge, earning gross wages of $98 per day. Half his wages were taken out of his check for child support.

34) Complainant diligently sought work as a truck driver or construction worker after his discharge, but did not find other employment until August 27, 2001, when he obtained work with comparable pay and benefits. Complainant would have earned at least $14,406 in gross wages between October 30, 2000, and August 27, 2001, had he not been discharged.

35) After his discharge, Complainant applied for and collected unemployment benefits for 26 weeks, collecting $396 per week. $198 was garnished for child support.

36) After his discharge, Complainant was distraught because of his financial situation. He went to bed later and slept in more. He did not have enough money to pay his bills and got behind on auto insurance payments. Respondent's health plan covered him for two months after his discharge, at which time he did not continue it because of his inability to pay the premiums. He did not lose any medical care due to his loss of health insurance. He felt bad because he had to rely on Trachsel to pay more of the grocery and utility bills.

37) Helmer discharged Tyler Donaugh on March 29, 2000, because of multiple tardies after Donaugh was 4 ½ hours late to work on March 29 without calling in.

38) Jory discharged Ricardo Ramirez on September 26, 2000, because Ramirez had two unexcused absences.

39) Jory discharged Daniel Aday on September 23, 2000, because Aday failed to call or show up for work.

40) Donaugh, Ramirez, and Aday were not on OFLA/FMLA leave during the absences that caused them to be discharged.

41) No evidence was presented to show whether or not Respondent had posted the BOLI Family Leave Act notice required by *former* ORS 659.490 during Complainant's employment.

42) No evidence was presented to show whether or not Complainant had actual knowledge of the 24-hour notice requirement in *former* ORS 659.480(3) and *former* OAR 839-009-0250(3) during his employment with Respondent.

CREDIBILITY FINDINGS

43) Chris Sellon's recollection of dates that Complainant called in to announce his absences from work between October 16 and October 30 was uncertain. A contemporaneous memo that he wrote about Complainant's call-ins was vague and conflicted with more credible witness testimony. Consequently, the forum has not relied on the contents of Sellon's memo or his testimony concerning specific dates that Complainant called in or failed to call in between October 16 and October 30. The forum has credited Sellon's testimony that Complainant did not tell him his daughter had head lice, as that testimony comports with Complainant's testimony and is a specific event Sellon would be more likely to recollect than specific dates that Complainant did or did not call in.

44) Jamie Thomson, whom the Agency called as an expert witness on the subject of head lice, was a credible witness and the forum has credited her testimony in its entirety.

45) Jennifer Coleman, listed in the case summaries as a witness for both sides, was the only witness to the key events in this case who had no potential bias or apparent interest in the outcome of the case. She answered questions candidly, without hesitation. Her recollection of events was convincing, and no credible evidence suggested that her memory was impaired. The forum has credited her testimony in its entirety and has relied heavily on it because of her neutrality.

46) Complainant's testimony regarding a key event -- the date he took his daughter Cher'ee to Coleman and learned she had head lice -- was filled with internal inconsistencies, improbabilities, and conflicted with statements made earlier to the agency investigator. In February 2001, he told

the agency investigator that he arranged childcare for October 25 with Jennifer Coleman on the previous evening, and that he first noticed Cher'ee had head lice on the morning of October 25. During direct examination, he repeated that story. He added that he took Cher'ee to Coleman's apartment at 6:30 a.m. on October 25, expecting to be at work at 7 a.m., and brought Cher'ee back to his apartment before 7 a.m., after Coleman told him Cher'ee had head lice, that he should get a product to treat the lice, and that she was unwilling to babysit until the lice and nits had disappeared. Complainant testified that he called Mike Helmer at 7 a.m. and said his daughter had head lice, he had no childcare, and he would be back to work in 7 days based on the treatment indicated on the label of the lice medication.[1] He testified further that he had left Cher'ee with Coleman on only one occasion before October 25, when he and Trachsel had gone on a fishing trip. On redirect, he testified he was "sure" that Coleman watched Cher'ee on October 24, explaining that he had gone to look for his ex-girlfriend's mother that day. He also claimed he may have known Cher'ee had head lice on the night of October 24 and that he didn't recall the exact date he learned she had head lice.[2] These are major inconsistencies in Complainant's testimony and suggest his willingness to alter his testimony to bolster his credibility. Two improbabilities further degrade his credibility. First, Complainant was scheduled to be at work at 7 a.m. on October 25. He gave no reason for his alleged return to Coleman's apartment between 6:30 and 7 a.m. that morning after he had presumably began his drive to work. Second, Complainant testified that he called Mike Helmer at 7:00 a.m. on October 25, told Helmer about the head lice problem, and said he would be off work for seven days based on the length of treatment printed on the head lice medication. He did not explain how he acquired the head lice medication so as to be able to read from its label. The forum finds it improbable that Complainant would have purchased head lice medication in the short span of time between leaving Coleman's apartment and calling Helmer a few minutes later, at 7:00 a.m., and does not believe this testimony.

There were additional inconsistencies in Complainant's testimony regarding his dates of absence from work in the week of October 16-20 and concerning a phone call made to Respondent on October 27. Complainant testified on direct that Monday in the

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[1] Complainant testified "when I went over there, she had diagnosed her with head lice. She was itching her head. So I brought her back to the house, and that's when I called and talked to Mike and said that she's got head lice. That was at 7 a.m."

[2] His specific testimony was "by Wednesday I knew she had head lice, possibly Tuesday night; I don't recall the exact date."

week prior to October 25 was the first day he missed work, that he missed work on October 16 and 17 because Tami didn't show up to pick up Cher'ee on the night of October 15, and that he missed work every day that week. On cross-examination, he testified that he couldn't recall for sure the days he missed work that week. On redirect, when presented with Respondent's attendance records, he testified that the first day he missed work was October 18. On direct, he testified that he did not call Respondent on October 27. During cross examination, he testified both that he did not call Respondent on October 27 and that he did call and talk to someone at Respondent's workplace on October 27 in response to a phone message left by one of Respondent's employees. He was unable to recall who he talked to.

Based on Complainant's inconsistent and improbable testimony, the forum finds that Complainant was not a credible witness and has disregarded his testimony wherever it was improbable or conflicted with the credible testimony of other witnesses or credible documentation.

47) Randy Trachsel has been friends with Complainant for about 30 years and Complainant's roommate for the last two and one half years. Although he responded to questions in a direct, unhesitating manner, his bias caused him to shade his testimony on several key points in an attempt to aid Complainant. First, he testified that he heard both sides of the conversation over the apartment speakerphone whenever Complainant called in to work during his October 2000 absence. Trachsel did not mention this fact when interviewed by an agency investigator in March 2001, and Complainant told the same investigator in February 2001 that Trachsel "wouldn't have heard Respondent's end" of the conversations. Second, Trachsel testified that Complainant spoke with "Mike" when Complainant called Respondent on October 25. Again, he omitted this fact in his investigative interview, telling the agency's investigator that he didn't know the names of all the people Complainant spoke with when Complainant called Respondent during his October 2000 absences and the only name he recalled was "Eddie." Third, he testified during direct examination that Complainant took his daughter to Coleman's apartment between 6:30 and 7 a.m. on October 25 and returned in 15 minutes or less with his daughter. This echoed Complainant's testimony during direct examination. The forum disbelieves Complainant's testimony on this issue and finds Trachsel's testimony unbelievable for the same reasons. The forum has only credited Trachsel's testimony where it was corroborated by the testimony of other credible witnesses or supported by credible documentary evidence.

48) Ed Jory left Respondent's employ about a year before the hearing and testified only because of the subpoena he

received. His testimony was internally consistent and consistent with statements he made to the Agency's investigator in April 2001. He was not impeached on cross-examination and the forum has credited his testimony in its entirety. (Testimony of Jory; Exhibit A-20)

49) Mike Helmer had the misfortune of having to testify twice because the cassette tape recording his initial testimony was defective. As a result, the ALJ has not relied on his notes of Helmer's initial testimony and has only considered Helmer's August 1 testimony in making this credibility finding and evaluating the record as a whole. As of July 1, 2002, Helmer was no longer employed by Respondent, and was employed by a company that purchased Respondent's trench shoring operations. This lessened any potential bias Helmer may have had stemming from his employment with Respondent. Helmer's testimony was internally consistent and was also consistent, with one exception, with statements he made to the Agency's investigator in April 2001. At that time, he told the Agency investigator that Complainant was "an average employee." In contrast, he testified at hearing, he testified that Complainant was a "valuable employee," in that Complainant was Respondent's only trained boom truck operator and it was a hardship for Respondent to lose Complainant. On one important issue, Helmer's testimony was at odds with Respondent's February 9, 2001 position statement. In that statement, Respondent's benefits manager wrote "[Complainant] called in on Friday, October 27th, and told the Operations Manager, Mike Helmer, that his child had head lice and he could not return to work until Monday, Oct. 30, 2000." In contrast, Helmer testified that he spoke with Complainant on the afternoon of October 27th, but that he didn't know Complainant's daughter had head lice until October 30, after Complainant was fired. Respondent's position statement squares with Jory's testimony that he knew Complainant's daughter had head lice before he fired Complainant, and that he learned of this fact from either Helmer or Sellon. The forum did not believe Helmer's testimony on this issue, but has credited the remainder of his testimony.

ULTIMATE FINDINGS OF FACT

1) Complainant was employed by Respondent in November 1999 and averaged 25 hours or more of work per week in the 180 days prior to October 25, 2000.

2) Respondent employed 25 or more persons in the Oregon for each working day during each of 20 or more calendar workweeks in the year 2000.

3) Respondent's attendance policy enforced at its Portland, Oregon location in the year 2000 required employees to call Respondent before work each day they were going to be absent. If an employee knew in advance

that he or she would miss work more than one day and also knew the date he or she would return to work, the employee was only required to call in the first day of his or her absence if he or she announced their extended absence and the date he or she planned to return to work during that call. At a minimum, Complainant had actual knowledge of this policy throughout October 2000.

4) Complainant missed work on October 18, 19, 20, 23 and 24, 2000, because he had to provide childcare for his three-year old daughter due to the unexpected absence of his daughter's mother, who usually cared for her. Complainant called Respondent each morning before he was scheduled to be at work and stated he would not be at work because he had no one to care for his child.

5) Complainant obtained childcare starting October 25. He took his daughter to the babysitter that morning before work and returned in the afternoon to pick up his daughter. At the time he left his daughter, he did not know she had head lice or any other health condition. Complainant did not go to work on October 25 and did not call in to say he would be absent from work. When Complainant picked up his daughter that afternoon, the babysitter told him his daughter had head lice, she needed treatment, and that the babysitter would not care for his daughter until the lice and nits were gone.

6) Complainant stayed home to care for his daughter on October 26 and 27. On October 26, Complainant did not call Respondent. On October 27, Complainant called Respondent in the afternoon in response to a phone message from Respondent's dispatcher. Complainant spoke with Mike Helmer and told him he was absent because his daughter had head lice.

7) Cher'ee's mother returned home on October 29, and Complainant returned Cher'ee to her that day.

8) Complainant went to work on October 30, 2000, and was discharged by Ed Jory, Respondent's Operations Manager.

9) Complainant was discharged because of his failure to show up or call in to work in on October 25, 26, and 27, 2000, pursuant to Respondent's uniformly applied disciplinary policy and practice regarding employee attendance.

10) Respondent discharged two to other employees in 2000 because they failed to call or show up for work. Respondent discharged a third employee in 2000 because of two unexcused absences. None of these employees were on OFLA/FMLA leave during the absences that caused them to be discharged.

11) No evidence was presented to show whether or not Respondent had posted the BOLI Family Leave Act notice required by *former* ORS 659.490 during Complainant's employment.

12) No evidence was presented to show whether or not Complainant had actual knowledge of the 24-hour notice requirement in *former* ORS 659.480(3) and *former* OAR 839-009-0250(3) during his employment with Respondent.

13) Complainant lost $14,406 in gross wages and experienced emotional distress as a result of his discharge.

CONCLUSIONS OF LAW

1) *Former* ORS 659.040 provided:

> "Any person claiming to be aggrieved by a violation of ORS 659.470 to 659.494 may file a complaint with the Commissioner of the Bureau of Labor and Industries in the manner provided by ORS 659.040. The Commissioner of the Bureau of Labor and Industries shall enforce the provisions of ORS 659.470 to 659.494 in the manner provided in ORS 659.010 to 659.110 for the enforcement of other unlawful employment practices."

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. *Former* ORS 659.492(2); *former* ORS 659.010 *et. seq*, ORS 659A.800 to ORS 659A.850.

2) *Former* ORS 659.472(1) provided:

> "The requirements of ORS 659.470 to 659.494 apply only to 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."

Respondent was a "covered employer" subject to the requirements of *former* ORS 659.470 to 659.494.

3) The actions and motivations of Ed Jory and Mike Helmer are properly imputed to Respondent.

4) *Former* ORS 659.474(1) provided in pertinent part:

> "All 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:
>
> "(a) An employee who was employed by the covered employer for fewer than 180 days immediately before the date on which the family leave would commence.
>
> (b) An employee who worked an average of fewer than 25 hours per week for the covered employer during the 180 days immediately preceding the date on which the family leave would commence."

OAR 839-009-0210(4) provides, in pertinent part:

> "'Eligible employee' means an employee employed in the

> State of Oregon on the date OFLA leave begins.
>
> "* * *
>
> "(b) For purposes of taking all other types of OFLA leave [except parental leave], * * * an employee must be employed by a covered employer for an average of at least 25 hours per week during the 180 calendar days immediately preceding the date OFLA leave begins.
>
> "(A) In determining that an employee has been employed for the preceding 180 calendar days, the employer must count the number of days an employee is maintained on the payroll, including all time paid or unpaid. If an employee continues to be employed by a successor in interest to the original employer, the number of days worked are counted as continuous employment by a single employer."

Complainant was an "eligible employee."

Former OAR 839-009-0210(2) provided, in pertinent part:

> "'Child' for the purposes of parental and sick child leave, means a biological, adopted, foster or stepchild of the employee, for whom the employee has parental rights and duties, as defined by law, and is responsible to provide care and nurturance, or a child with whom the employee is or was in a relationship of in loco parentis. The child must be:
>
> "(a) Under the age of 18[.]"

Former ORS 659.476(1)(d) provided that an eligible employee could take family leave:

> "To care for a child of the employee who is suffering from an illness, injury or condition that is not a serious health condition but that requires home care."

OAR 839-009-0230(4) provides that eligible employees may take family leave:

> "(4) To care for an employee's child who is suffering from an illness or injury that requires home care but is not a serious health condition. An employer is not required to grant leave for routine medical or dental appointments for conditions not requiring home care ('sick child leave')."

Based on the length of time required to successfully treat pediculosis and Oregon law excluding children with pediculosis from school and childcare, Complainant's daughter had a condition that was not a serious health condition but required home care.

Former ORS 659.478(1) provided:

> "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."

Former OAR 839-009-0240 provided, in pertinent part:

> "(1) An eligible employee is entitled to as much as 12 weeks of family leave in any one-year period except that [no exceptions apply].
>
> "* * * * *
>
> "(7) Sick child leave need not be provided to an eligible employee by a covered employer if another family member, including a non-custodial biological parent, is willing and able to care for the child."

No other family member was willing and able to care for Complainant's daughter on October 26 and 27, 2000. Complainant was entitled to take sick child leave to care for his daughter during the time he was aware she suffered from pediculosis.

Former ORS 659.480 provided, in pertinent part:

> "(1) Except as provided in subsection (2) of this section, a covered employer may require an eligible employee to give the employer written notice at least 30 days before commencing family leave. * * *
>
> "(2) An eligible employee may commence taking family leave without prior notice under the following circumstances:
>
> "* * * * *
>
> "(b) An unexpected illness, injury or condition of a child of the employee that requires home care[.]
>
> "(3) If an employee commences leave without prior notice under subsection (2) of this section, the employee must give oral notice to the employer within 24 hours of the commencement of the leave, and must provide the written notice required by subsection (1) of this section within three days after the employee returns to work. The oral notice required by this subsection may be given by any other person on behalf of the employee taking the leave."
>
> "(4) If the employee fails to give notice as required by subsections (1) and (3) of this section, the employer may reduce the period of family leave required by ORS 659.478 by three weeks, and the employee may be subject to disciplinary action under a uniformly applied policy or practice of the employer."

Former OAR 839-009-0250 provided, in pertinent part:

> "(1) Except in situations described in sections (2) and (3) of this rule, a covered employer may require an eligible employee to give 30 days written notice, including an explanation of the need for leave, before starting OFLA leave. When an employee is able to give advance notice and requests leave, an employer may request additional information to determine that the leave qualifies for designation as OFLA leave. The

employee is not required to specify that the request is for OFLA leave.

"(2) When an employee is unable to give the employer 30 days notice, the employee is encouraged to give the employer as much advance notice as is practicable.

"(3) When taking OFLA leave in an unanticipated or emergency situation, an employee must give verbal or written notice within 24 hours of commencement of the leave. This notice may be given by any other person on behalf of an employee taking unanticipated OFLA leave. The employer may require written notice by the employee within three days of the employee's return to work.

"(4) If an employee fails to give notice as required by sections (1), (2), and (3) of this rule or the employer's policies, the employer may reduce the period of unused OFLA leave by up to three weeks in that one-year leave period.

"(a) The employee may also be subject to disciplinary action under an employer's uniformly applied policy or practice. This practice must be consistent with the employer's discipline for similar violations of comparable rules.

"(b) An employer may not reduce an employee's available OFLA leave or take disciplinary action unless the employer has posted the required Bureau of Labor and Industries Family Leave Act notice or the employer can otherwise establish that the employee had actual knowledge of the notice requirement."

Complainant had actual knowledge of Respondent's notice requirement and did not meet that requirement on October 25, 26, or 27, 2000. Respondent disciplined Complainant for violation of Respondent's notice requirement. Respondent relied on its uniformly applied policy and practice in disciplining Complainant by discharging him on October 30, 2000. Complainant's discharge was consistent with Respondent's discipline for similar violations of comparable rules.

Former ORS 659.492 (1) provided:

"A covered employer who denies family leave to an eligible employee in the manner required by ORS 659.470 to 659.494 commits an unlawful employment practice."

Respondent discharged Complainant because Complainant violated Respondent's notice requirement related to attendance on October 25, 26, and 27, 2000. In doing so, Respondent applied Respondent's uniformly applied policy and practice on reporting to work and did not commit an unlawful employment practice.

5) Pursuant to ORS 659A.850(3), the commissioner shall issue an order dismissing the formal charges against any re-

spondent not found to have engaged in any unlawful practice alleged in the complaint.

OPINION

The Agency's Specific Charges allege that Complainant was absent on October 25, 26, and 27, 2000, to care for his daughter, who could not be in child care due to head lice and required home care and had no other family member available to care for her. They further allege that Respondent "knew or reasonably should have known" that Complainant missed work on October 25-27, 2000, because of his daughter's head lice. The Agency seeks $14,406 in back pay and $20,000 for mental stress damages.

COMPLAINANT WAS ENTITLED TO OFLA SICK CHILD LEAVE ON OCTOBER 26TH AND 27TH.

It is undisputed that Respondent is a "covered" employer and that Complainant met the average hours per week (25) and duration of employment (180 days) requirements needed to be an "eligible employee."

The Agency established, by a preponderance of the evidence, that Cher'ee was Complainant's daughter and that no other family member was available to care for her on October 25th, 26th, and 27th. The Agency also proved that Cher'ee had pediculosis during that time period and that pediculosis is a condition that requires home care because of its communicable nature and an Oregon administrative rule excluding children with pediculosis from school and daycare.

The forum concludes that Complainant became entitled to sick child leave when he first learned Cher'ee had head lice on the afternoon of October 25, 2000. Complainant was not entitled to sick child leave prior to that time.

COMPLAINANT DID NOT COMPLY WITH THE NOTICE REQUIREMENT OF *FORMER* ORS 659.480 OR *FORMER* OAR 839-009-0250(3).

Former ORS 659.480(3) required an employee who "commences leave without prior notice" due to a "condition of a child of the employee that requires home care" to give "oral notice to the employer within 24 hours of the commencement of the leave." *Former* OAR 839-009-0250(3) echoes that requirement. The Agency attempted to prove, through the testimony of Complainant and Trachsel, that Complainant met this requirement by calling Respondent at 7 a.m. on October 25 and telling Respondent that he would be absent from work for seven days because of his daughter's head lice. Due to Complainant's and Trachsel's lack of credibility, the forum has concluded that Complainant did not call Respondent on October 25 or 26, and first called Respondent in the late afternoon of October 27, and only then in response to Respondent's phone message. OFLA's 24 hour notice requirement began to run at 7 a.m. on October 26, Complain-

ant's first scheduled work time after he learned his daughter had head lice, and expired at 7 a.m. on October 27. Complainant did not call Respondent until late afternoon on October 27, well beyond the 24-hour timeline.

RESPONDENT WAS ENTITLED TO DISCIPLINE COMPLAINANT FOR HIS OFLA NOTICE VIOLATION

Former ORS 659.480(4) provided that an employee who failed to give the 24 hour oral notice required by *former* ORS 659.480(3) "may be subject to disciplinary action under a uniformly applied policy or practice of the employer." *Former* OAR 839-009-0250(4)(a) stated that the employer's "practice must be consistent with the employer/s discipline for similar violations of comparable rules."

The forum has already concluded that Complainant failed to give the required 24-hour oral notice, and Complainant's discharge was certainly a "disciplinary action." Respondent's attendance policy required employees to call in to work by the start of each workday they knew they would be absent. If an employee knew in advance that he or she would miss work more than one day and also knew the date he or she would return to work, the employee was only required to call in the first day of his or her absence if he or she announced their extended absence and the date he or she planned to return to work during that call. Complainant was aware of this policy, did not follow it, and was discharged because he failed to call in or report to work for three consecutive days. Respondent's discharges of comparators Donaugh and Aday in 2000 for failure to call in and of Ramirez in 2000 for two unexcused absences show that Respondent's practice with regard to its attendance policy was uniformly applied. Complainant's discharge came on the heels of a final written warning given to him on June 12, 2000, for his failure to call in or report to work during a one day, non-OFLA related absence. This is further indication of Respondent's consistent application of its attendance rules in taking disciplinary action.

One more analytical hurdle remains. In addition to the uniform application and consistency restrictions placed on an employer's ability to discipline an employee who has not complied with OFLA's notice requirement, *former* OAR 839-009-0250(4)(b) imposed two more restrictions. It prohibited an employer from taking disciplinary action unless the employer had posted BOLI's OFLA notice "or the employer can otherwise establish that the employee had actual knowledge of the notice requirement." No evidence was presented to show that Respondent had or had not posted BOLI's OFLA notice, so the forum may not conclude that the notice was posted. The second restriction requires the forum to determine the meaning of the words "notice requirement." In doing so, the forum must arrive at an interpretation that is plausible and

consistent with the wording of the former rule itself, its context, and the former statute. *Don't Waste Oregon Com. v. Energy Facility Siting,* 320 Or 132, 142 (1994).

Former OAR 839-009-0250(4)(b) interprets the provisions of *former* ORS 659.480(4), which in turn provides, in pertinent part, that "[i]f the employee fails to give notice as required by subsections (1) and (3) of this section * * * the employee may be subject to disciplinary action under a uniformly applied policy or practice of the employer." Subsection (1) of the statute refers to written notice that an employer may require an employee to provide prior to taking anticipated family leave. Subsection (3) of the statute sets out two notice requirements applicable to circumstances where an employee takes unanticipated family leave. It requires an employee to give "oral notice to the employer within 24 hours of the commencement of the leave" and to "provide the written notice required by subsection (1) * * * within three days after the employee returns to work." The 24-hour oral notice requirement is a mandate that is not subject to modification by the employer. In contrast, the three day written notice requirement in subsection (3) refers to the employer's written notice requirement in subsection (1). In sum, in unanticipated family leave situations, *former* ORS 659.480 created two sources for notice requirements, the employer and the statute itself. It also created two types of notice requirements, one oral and one written, that apply at different times relative to the leave.

Former OAR 839-009-0250(4)(b) is a subsection in a rule that elsewhere contains references to OFLA's 24-hour oral notice requirement and an employer's notice requirements. It is a specific subsection of *former* OAR 839-009-0250(4), which provides that an employee "who fails to give notice as required by sections (1), (2), and (3) of this rule or the employer's policies" may be subject to a maximum three week reduction of his or her OFLA leave. Section (1) of the rule contains language similar to that found in *former* ORS 659.480(1). Section (3) of the rule provides that the employer "may require written notice by the employee within three days of the employee's return to work." Subsection (4)(a) of the rule provides that an employee "may also be subject to disciplinary action under an employer's uniformly applied policy or practice." In context, the phrase "employer's uniformly applied policy or practice" can only be construed as referring to the employer's notice requirement.

Next, the forum examines the specific language of the rule in question. If the employer had not posted BOLI's OFLA notice, *former* OAR 839-009-0250(4)(b) requires an employer to prove that an employee "had actual knowledge of the notice requirement" before the employer can discipline an employee for violating the employer's "uniformly applied policy

or practice" pursuant to *former* OAR 839-00900250(4)(a). This implicit reference to subsection (4)(a), along with the specific reference to BOLI's OFLA leave notice in (4)(b), leads the forum to conclude that the "actual knowledge" requirement in (4)(b) refers to an employee's actual knowledge of OFLA's notice requirements or the employer's notice requirements. Finally, had the Agency intended the "notice requirement" in (4)(b) to refer only to an employee's actual knowledge of OFLA's notice requirement, it could have easily done so by appending the qualifying phrase "contained in OFLA" to the last sentence of that rule. This interpretation is consistent with the wording of the former rule itself, its context, and the former statute. Complainant had actual knowledge of Respondent's notice requirement, did not follow it, and was fired after he failed to call in or report to work for three days. As noted earlier, his belated call to Respondent on October 27 also did not meet OFLA's 24-hour notice requirement.[3]

In conclusion, Respondent proved that the disciplinary restrictions imposed by *former* OAR 839-009-0250(4)(a) and (b) did not apply to it in this case, and Respondent did not violate OFLA by discharging Complainant for not calling in or reporting to work for three consecutive work days.

THE AGENCY'S EXCEPTIONS

The Agency excepted to the ALJ's determination that Complainant would have been fired anyway for his non-OFLA related absence and the ALJ's reliance on that determination in concluding that Respondent did not violate OFLA. In response, the forum has abandoned that portion of the legal analysis in the opinion section of the proposed order and instead relied on *former* OAR 839-009-0250. Several findings of fact have been added and the Opinion has been largely rewritten to reflect a more appropriate legal analysis.

The Agency also argues that the ALJ's reliance on comparator evidence presented by Respondent was misplaced, in that Complainant was in a unique position because of his longevity and skills. This argument lacks merit.

Finally, the Agency argues that the language of OAR 839-005-0015 should apply. This argument is misplaced, as that rule no longer existed at the time Complainant was discharged.

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[3] The forum notes that an employer's notice policies, as practiced, may not be more onerous than OFLA's 24 hour oral notice requirement. For example, if Complainant had been entitled to OFLA leave beginning at 7 a.m. on October 25 and he had called Respondent before 7 a.m. on October 26, he would have met the rule's requirement. In that scenario, Respondent would have violated the statute and rule if they discharged him for not calling in before the start of his shift on October 25, in that Respondent's practice would have been more restrictive than OFLA's requirement.

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 NES Companies, LP, are hereby dismissed according to the provisions of ORS 659A.850(3).

In the Matter of

BARBARA and ROBERT BLAIR, dba Mid-Valley Mechanical

Case No. 74-02

Final Order of Commissioner Jack Roberts

Issued December 17, 2002

SYNOPSIS

Respondents employed two wage claimants and failed to pay them straight time and overtime wages between August and December 2001. Respondents were ordered to pay claimants a total of $3755 in due and unpaid wages. Respondents' failure to pay the wages was willful, and they were ordered to pay $4800 in civil penalty wages. ORS 652.140(1), *former* ORS 652.150, ORS 653.261, *former* OAR 839-001-0470(1), OAR 839-020-0030.

The above-entitled 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 for the State of Oregon. The hearing was held on November 5, 2002, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine NE, Building E, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Wage claimants Lawrence Winney and Brandon Speck ("Claimants") were present throughout the hearing and were not represented by counsel. Respondents Robert and Barbara Blair did not appear at the hearing and were found in default.

The Agency called the following witnesses: Lawrence Winney and Brandon Speck, wage claimants; Mary Nelson, Winney's girlfriend; Ellis Hallman and John Andrews, individuals who observed Winney's work; and Kathleen Johnson, BOLI Wage and Hour Division compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-15 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-19, and A-22 (submitted prior to hearing);

c) Exhibit ALJ-1, a copy of Claimant Winney's original calendar (submitted by the Agency as Exhibit A-5) made by the ALJ be-

cause some of the entries in Exhibit A-5 were too faint to be deciphered.

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 21, 2001, Claimants each filed wage claims with the Agency alleging that Respondent Robert Blair, dba Mid Valley Mechanical, had employed them and failed to pay wages earned and due to them.

2) At the time they filed their wage claims, Claimants assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from Respondent.

3) Claimants brought their wage claims within the statute of limitations.

4) On March 29, 2001, the Agency issued Order of Determination No. 01-5687 based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination alleged that Respondent "Barbara Blair dba Mid Valley Mechanical, Employer" owed a total of $3,755 in unpaid wages[1] and $4,800 in civil penalty wages,[2] plus interest, and required that, within 20 days, Respondent Barbara Blair 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 April 9, 2002, Respondent Barbara Blair and Robert Blair jointly filed an answer and request for hearing. The answer and request for hearing was typed on letterhead for "Mid Valley Mechanical, CCB#142619" and was signed by "Robert and Barbara Blair D.B.A. Mid Valley Mechanical." The address printed on the letterhead was "34058 Oakville Road, Albany, Oregon 97321." The answer denied that Respondents had employed Claimants or owed any money to them and alleged that they did not know Speck.

6) On May 17, 2002, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On May 22, 2002, the Hearings Unit issued a Notice of Hearing to Respondent Barbara Blair, the Agency, and Claimants stating the time and place of the hearing as November 5, 2002, at 3865 Wolverine Street NE, Building. E-1, Salem, Oregon.

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[1] The Agency alleged that Winney was entitled to $3,370 and Speck was entitled to $385 in unpaid wages.

[2] The Agency alleged that Claimants were each entitled to $2,400 in penalty wages.

Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, 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 839-050-000 to 839-050-0440. These documents were mailed to Respondent Barbara Blair at 34058 Oakville Road, Albany, OR 97321.

8) On June 5, 2002, the forum ordered the Agency and Respondent Barbara Blair each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); and a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only.) The forum ordered the participants to submit case summaries no later than October 25, 2002, and notified the Agency and Respondent of the possible sanctions for failure to comply with the case summary order. The forum also enclosed a form designed to assist *pro se* respondents in filing a case summary.

9) On September 25, 2002, the Agency filed a motion to add Robert Blair as a Respondent. The Agency accompanied its motion with documentation from the Oregon Construction Contractor's Board showing that Barbara and Robert Blair had declared themselves to be a partnership.

10) On October 15, 2002, the Agency filed a motion for a discovery order seeking documents from Respondents that would tend to show that Claimants worked for Respondents, the amount of money paid by Respondents to Claimants, and the dates that Claimants worked for Respondents. The Agency provided documentation showing it had informally requested these documents from Respondents and had received no response.

11) On October 15, 2002, the forum granted the Agency's motion to add Robert Blair as a Respondent and issued an amended interim order for case summaries that was identical to the first order except that the amended order was also sent to Robert Blair.

12) On October 24, 2002, the Agency filed its case summary.

13) On October 24, 2002, the forum issued a discovery order requiring Respondents to produce the documents requested by the Agency in its motion for a discovery order.

14) On November 5, 2001, at 10 a.m., Respondents did not appear for the hearing and had not earlier notified the Hearings Unit that they would not be present at the hearing. The ALJ went on the record and announced that he would wait until 10:30 a.m., pursuant to OAR 839-050-0330, to commence the hearing and that

Respondents would be in default if they did not make an appearance by that time. When Respondents did not appear by 10:30 a.m., the ALJ declared Respondents to be in default and commenced the hearing.

15) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) On November 19, 2002, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondents Barbara and Robert Blair owned and operated a business that engaged in metal fabrication and sandblasting under the assumed business name of Mid Valley Mechanical in Albany, Oregon. Respondents owned and operated Mid Valley Mechanical as a partnership.

2) Robert Blair hired Claimant Winney ("Winney") on August 8, 2001, to perform sandblasting, painting, ironwork, and other general contracting duties. Blair agreed to pay Winney $10 per hour for his work, and time and a half for all work over 40 hours in a given week.

3) When Winney was hired, Respondents operated their business out of a shop owned by Ellis Hallman. At the time, Winney was living in a recreational vehicle ("RV"). At Robert Blair's request, Winney parked his RV behind Respondents' shop and lived there. Winney's girlfriend, Mary Nelson, also lived in the RV during Winney's employment with Respondents.

4) On November 4, 2001, Hallman evicted Respondents from his property and Respondents relocated their business to 34058 Oakville Road, Albany, Oregon 97321.

5) Respondents did not keep a record of the hours worked by Winney, but Winney maintained a calendar on which he wrote down his hours of work for Respondents each day at the end of the workday.

6) Winney's last day of employment with Respondents was December 9, 2001. On December 10, 2001, he quit working for Respondents because Respondents hadn't paid him for his work.

7) Respondents paid Winney a total of $350 in cash for his work. Winney received an additional $750 in benefits, including rent, boots, and tools.

8) During his employment with Respondents, Winney worked on a project subject to the prevailing wage rate and also performed work not subject to the prevailing wage rate.

9) During his employment with Respondents, Winney earned $1,402.46 while working on the prevailing rate project. Although Respondents did not pay Winney anything for his work on this project, Respondents' surety, CNA Surety, paid Winney all wages owed to him for his work on the project.

10) During his employment with Respondents, Winney performed 444 hours of work on projects not subject to the prevailing wage rate. Six of these hours were overtime hours. Winney's overtime rate of pay was $15 per hour. Winney earned a total of $4,470 for this work, computed at $10 per hour for straight time work and $15 per hour for overtime work.

11) During his employment with Respondents, Winney submitted time sheets showing the hours that he worked to Robert Blair. Blair asked Winney do this because he did not keep track of Winney's hours.

12) At the time of hearing, Respondents owed Winney $3,370 in unpaid wages ($4,470 less $350 in wages paid and $750 in benefits).

13) Civil penalty wages are computed as follows for Winney, in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1): $10.00 per hour x 8 hours x 30 days = $2,400.

14) Robert Blair hired Claimant Speck ("Speck") to do sandblasting, grinding, and some driving. Blair agreed to pay Speck $10 per hour for his work.

15) Speck started work for Respondents on December 3, 2001, and worked through December 8, 2001.

16) During his employment with Respondents, Speck worked on a project subject to the prevailing wage rate and also performed work not subject to the prevailing wage rate.

17) During his employment with Respondents, Speck earned $352.84 while working on the prevailing rate project. Although Respondents did not pay Speck anything for his work on this project, Respondents' surety, CNA Surety, paid Speck all wages owed to him for his work on the project.

18) During his employment with Respondents, Speck performed 38.5 hours of work on projects not subject to the prevailing wage rate, earning $385 for this work, computed at $10 per hour.

19) Speck's last day of work for Respondents was December 8, 2001, after which he quit Respondents' employment because Respondents did not pay him.

20) At the time of hearing, Respondents had not paid Speck anything for his work and owed him $385 in unpaid wages.

21) Civil penalty wages are computed as follows for Speck, in accordance with *former* ORS 652.150 and *former* OAR 839-

001-0470(1): $10.00 per hour x 8 hours x 30 days = $2,400.

22) Winney, Speck, Hallman, Nelson, and Johnson were credible witnesses, and the forum has credited their testimony in its entirety. Andrews' testimony was credible except for his statement that Winney did not begin work for Respondents until September 2001.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Robert and Barbara Blair were partners doing business under the assumed business name of Mid Valley Mechanical and engaged the personal services of one or more employees.

2) Lawrence Winney was employed by Respondents from August 8 through December 9, 2001, at the agreed wage rate of $10 per hour. Winney quit Respondents' employment effective December 10, 2001.

3) From August 8 through December 8, 2001, Winney earned $4,470 in wages on non-prevailing wage rate jobs and has only been paid $1,100.

4) Respondents owe Winney $3,370 in due and unpaid wages.

5) Respondents willfully failed to pay Winney $3,370 in earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after Winney quit Respondents' employment and more than 30 days have elapsed from the date Winney's wages were due.

6) Civil penalty wages for Winney, computed in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1), equal $2,400.

7) Brandon Speck was employed by Respondents from December 3 through December 8, 2001, at the agreed wage rate of $10 per hour. Speck quit Respondents' employment effective December 9, 2001.

8) From December 3 through December 8, 2001, Speck earned $385 in wages on non-prevailing wage rate jobs and has not been paid any of this amount.

9) Respondents owe Speck $385 in due and unpaid wages.

10) Respondents willfully failed to pay Speck $385 in earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after Speck quit Respondents' employment and more than 30 days have elapsed from the date Speck's wages were due.

11) Civil penalty wages for Speck, computed in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1), equal $2,400.

CONCLUSIONS OF LAW

1) During all times material herein, Respondents Robert and Barbara Blair were employers and Claimants Winney and Speck were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material, Respondents employed Claimants.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

3) At times material, ORS 652.140(2) provided:

> "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 schedule payday after the employee has quit, whichever event first occurs."

Respondents violated ORS 652.140(2) by failing to pay Claimant Speck all wages earned and unpaid not later than December 14, 2001, five business days after Speck quit, and by failing to pay Claimant Winney all wages earned and unpaid not later than December 17, 2001, five business days after Winney quit. Those wages amount to $3,370 for Winney and $385 for Speck.

4) *Former* ORS 652.150 provided:

> "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."

Former OAR 839-001-0470(1) provided:

> "(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."

Respondents are liable for $4,800 in civil penalties under *former* ORS 652.150, computed by multiplying Claimants' hourly rate ($10 per hour) x 8 hours per day x 30 days = $2,400, for willfully failing to pay all wages or compensation to Claimants when due as provided in ORS 652.140(2).

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

When a respondent defaults, the Agency must establish a prima facie case to support the allegations of its charging document. *In the Matter of Peter N. Zambetti,* 23 BOLI 234, 241 (2002). The forum may consider unsworn assertions contained in a defaulting respondent's answer when making factual findings, but those assertions are overcome whenever controverted by other credible evidence. *Id.*

The Agency's prima facie case consists of credible evidence of the following elements: 1) Respondents employed Claimants; 2) Respondents agreed to pay both Claimants $10 per hour; 3) Claimants performed work for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondents. *In the Matter of Scott Miller,* 23 BOLI 243, 258 (2002).

RESPONDENTS EMPLOYED CLAIMANTS

Respondents asserted in their unsworn answer that they did not employ Claimants. Both Claimants credibly testified that Robert and Barbara Blair owned and operated a business under the assumed business name of Mid Valley Mechanics, that Robert Blair hired them, and that they performed work for Mid Valley Mechanics. In addition, the Agency provided uncontroverted written statements from several witnesses who corroborated this testimony. Respondents' answer, which appears on letterhead topped with the name "Mid Valley Mechanical," is signed "Robert & Barbara Blair D.B.A. Mid Valley Mechanical," indicating a partnership relationship between the Blairs. Based on Respondents' answer, the forum concludes that Robert and Barbara Blair were both Claimants' employers.

RESPONDENTS AGREED TO PAY BOTH CLAIMANTS $10 PER HOUR

Both Claimants credibly testified that Robert Blair agreed to pay them $10 per hour for their work, and Winney credibly testified that Blair agreed to pay him $15 per hour for any overtime work. The forum accepts this credible testimony as fact.

CLAIMANTS PERFORMED WORK FOR WHICH THEY WERE NOT PROPERLY COMPENSATED

Speck credibly testified that he worked 38.5 hours for Respondents on non-prevailing wage rate jobs and was paid nothing. Winney credibly testified that he worked 444 hours for Respondents on non-prevailing wage rate jobs and only received $1,100 in pay and benefits for his work, far below the $4,470 that he actually earned. Based on this credible testimony, the forum concludes that both Claimants performed work for which they were not properly compensated.

THE AMOUNT AND EXTENT OF WORK CLAIMANTS PERFORMED FOR RESPONDENTS

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by the claimants. The Agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. *In the Matter of Sreedhar Thakkun,* 22 BOLI 108, 115 (2001). When an employer produces no records of dates or hours worked by claimants, the forum may rely on credible testimony by the claimants to show the amount and extent of the claimants' work. *In the Matter of G & G Gutters, Inc.,* 23 BOLI 135, 145 (2002). In this case, credible testimony by Speck and Winney established that Speck worked 38.5 hours for Respondents on non-prevailing wage rate jobs, earning $385, and that he was paid nothing for his work. Credible testimony by Winney, bolstered by the contemporaneous entries of his work hours he made on his calendar, established that Winney worked 444 hours for Respondents on non-prevailing wage rate jobs.

RESPONDENT MUST PAY PENALTY WAGES TO BOTH CLAIMANTS

The forum may award penalty wages where a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she 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).

Both claimants credibly testified to their wage agreements with Respondents and that Respondent Robert Blair was aware of the amount and extent of the work they performed. There is no evidence to show that Respondents

acted other than intentionally and as a free agent in underpaying them.

Based on the foregoing, the forum concludes that Respondents acted willfully and assesses penalty wages in the amount of $2,400 each for Winney and Speck.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages owed as a result of their violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondents Robert and Barbara Blair 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 Claimant Lawrence Winney in the amount of FIVE THOUSAND SEVEN HUNDRED AND SEVENTY DOLLARS ($5,570), less appropriate lawful deductions, representing $3,370 in gross, earned, unpaid, due, and payable wages and $2,400 in penalty wages, plus interest at the legal rate on the sum of $3,370 from January 1, 2002, until paid and interest at the legal rate on the sum of $2,400 from February 1, 2002, until paid.

A certified check payable to the Bureau of Labor and Industries in trust for Claimant Brandon Speck in the amount of TWO THOUSAND SEVEN HUNDRED AND EIGHT FIVE DOLLARS ($2,785), less appropriate lawful deductions, representing $385 in gross, earned, unpaid, due, and payable wages and $2,400 in penalty wages, plus interest at the legal rate on the sum of $385 from January 1, 2002, until paid and interest at the legal rate on the sum of $2,400 from February 1, 2002, until paid.

In the Matter of

VIDAL and JODY SOBERON
dba The Prime House

Case No. 45-02

Final Order of Commissioner Jack Roberts

Issued December 20, 2002

SYNOPSIS

Where the forum's calculations showed Claimant was overpaid by $349 for the period between January 16 and March 10, 2001, based on original time cards and Claimant's acknowledgement of certain wages paid, the forum found that Claimant was paid all wages due to him when he quit his employment without notice. The forum also found no evidence that Respondent Jody Soberon conducted business jointly with Respondent Vidal Soberon and the forum dismissed the Order of

Determination. ORS 652.140(2); ORS 652.150.

The above-entitled 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 October 16, 2002, in the Hanscam Center conference room, located at 16399 Lower Harbor Road, Harbor, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Kirt A. McQueen ("Claimant") was present throughout the hearing and was not represented by counsel. Vidal Soberon ("Respondent V. Soberon") was present throughout the hearing and was not represented by counsel. Jody Soberon ("Respondent J. Soberon") was not present for any part of the hearing and no one appeared on her behalf.

The Agency called Claimant as its only witness.

Respondent V. Soberon called no witnesses, but testified on his own behalf.

The forum received as evidence:

Administrative exhibits X-1 through X-8 (generated prior to hearing) and X-9 through X-12 (generated after the hearing);

Agency exhibits A-1 through A-6 (filed with the Agency's case summary) and A-7 through A-11 (submitted at hearing);

Respondent exhibits R-10, R-24, R-25, and R-33 (submitted at hearing).

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 May 14, 2001, Claimant filed a wage claim form stating Respondents had employed him from October 11, 2000, until March 10, 2001, and failed to pay him the agreed upon rate of $9.00 per hour for all hours worked.

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

3) On September 14, 2001, the Agency issued an Order of Determination, numbered 01-2140. The Agency alleged Respondents had employed Claimant during the period January 16 through March 10, 2001, and failed to pay Claimant at least $9.00 per hour for each hour worked in that period, and was liable to Claimant for $1,057.60 in unpaid wages. The Agency also

alleged Respondents' failure to pay all of Claimant's wages when due was willful and Respondents, therefore, were liable to Claimant for $2,160 as penalty wages, plus interest. The Order of Determination gave Respondents 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On September 25, 2001, Respondent V. Soberon filed an answer and request for hearing that stated, in pertinent part:

"We admit that 'the wages were earned by the wage claimant in Oregon during the period January 16, 2001, through March 10, 2001, at the rate of $9.00 per hour for $1,633.50.'

"We deny that 'during said period of time, no part of which has been paid except the sum of $575.90.' We therefore deny all other allegations included in paragraphs II and III."

In his answer, Respondent V. Soberon listed draws taken by Claimant between January 12 and March 10, 2001, totaling $1,228.

5) On April 29, 2002, the Agency requested a hearing. On May 13, 2002, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on September 4, 2002. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "Summary of Contested Case Rights and Procedures" and a copy of the forum's contested case hearing rules, OAR 839-050-0000 to 839-050-0440.

6) On July 8, 2002, the forum ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of any agreed or stipulated facts; and (for the Agency only) any wage and penalty calculations. The forum ordered the participants to submit their case summaries by August 23, 2002, and advised them of the possible sanctions for failure to comply with the case summary order. On August 16, 2002, the Agency filed its case summary.

7) On August 16, 2002, the ALJ, on her own motion, rescheduled the hearing to commence on Wednesday, October 16, 2002, at the time and place previously scheduled, due to an unexpected scheduling conflict. The ALJ also extended the case summary due date to October 4, 2002.

8) On October 1, 2002, Respondent V. Soberon filed a timely case summary.

9) At the start of hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent V. Soberon of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) At the start of hearing, Respondent V. Soberon stated off the record that Respondent J. So-

beron could not attend the hearing due to the press of work.

11) The ALJ issued a proposed order on November 26, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On December 2, 2002, the Hearings Unit received a letter from Claimant requesting an extension of time to file exceptions to the proposed order. On the same date, the forum issued an order that stated in pertinent part:

> "Under the applicable rules, Claimant is not a party to this proceeding and therefore is not a participant for the purposes of filing exceptions to the Proposed Order that issued in this matter. On that basis, Claimant's request for an extension of time is **DENIED**.
>
> However, Claimant is not precluded from contacting the Agency to discuss possible exceptions and the forum will consider the Agency's, or Respondent's, exceptions if they are filed no later than 10 days from the date the Proposed Order issued. The forum will consider granting an extension of time to file exceptions as long as the Agency makes its request no later than **December 6, 2002,** which is the time limit for filing exceptions in this matter.

12) On December 6, 2002, the Agency timely requested an extension of time to file exceptions. By interim order issued the same date, the forum extended the deadline for filing extensions to no later than December 13, 2002. Neither the Agency nor Respondents filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent V. Soberon owned and operated a restaurant located in Brookings, Oregon under the assumed business name of The Prime House and employed one or more individuals in Oregon. The registrants of the assumed business name are listed with the Corporations Division as Vidal Soberon and Jody Soberon.

2) Respondent V. Soberon employed Claimant as a cook from on or about October 12, 2001, until March 10, 2002. (Testimony of Claimant, V. Soberon)

3) Until January 2001, Respondent V. Soberon paid Claimant every two weeks by check. Pay periods usually ran from the 1st to the 15th and from the 16th to the end of each month.

4) In early January 2001, Respondent V. Soberon quit giving Claimant regular paychecks because his business suffered a financial setback around November or December 2000. To help out the business, Claimant volunteered to accept some of his pay in the form of cash draws and payments toward Claimant's bar bill, credit card balance, and court fines. Claimant recorded his cash draws on his time cards and Respondent V. Soberon or his agent initialed Claimant's entries. All of

Claimant's handwritten entries were dated and initialed except for his bar tab entry.

5) The work hours recorded on Claimant's time cards, in his own handwriting, show that Claimant worked 159.5 hours between January 16 and March 10, 2001.

6) Respondent V. Soberon and Claimant agree that Claimant's rate of pay during that time period was $9.00 per hour.

7) Claimant recorded the following cash draws on his time cards between January 16 and March 10, 2001:

(1) January 18 - $10

(2) January 18 - $10.50 (recorded as "10 ½")

(3) January 18 - $1.00

(4) January 18 - $5.00

(5) January 26 - $50

(6) January 26 - $52

(7) January 28 - $460

(8) February 2 – $10

(9) February 6 - $10

(10) February 7 - $10

(11) March 1 - $32

(12) March 2 - $150

(13) March 3 - $60

(14) March 3 - $50

(15) March 10 - $160

(16) March 10 - $50

(17) Undated and not initialed by Respondent V. Soberon - $60 (recorded as "-60 Tab")

Additionally, at Claimant's request, Respondent paid Claimant's court fines totaling $50 by check (numbered 1154) dated January 16, 2000. Also at Claimant's request, Respondent paid Claimant's January credit card payment totaling $100 by check (numbered 1161) dated January 18, 2000.[1] Additionally, Claimant accepted $44 in "gift certificates" to use at Respondent V. Soberon's restaurant that he acknowledged were in lieu of some wages owed. Claimant considered the gift certificates and Respondent V. Soberon's payments toward Claimant's credit card and court fines as an offset for some of the wages earned at that time.

8) Claimant's time cards, kept and maintained by Respondent, show the dates and hours Claimant worked each work day and the total hours worked each week between January 16 and March 10, 2001.[2] The time cards also show the cash amounts Respondent paid Claimant for wages earned and, except for the $60 bar tab Claimant noted on his March time card, the dates the cash amounts

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[1] The participants stipulated that the checks were misdated and were actually written and issued on January 16 and 18, 2001.

[2] The January time card also shows that Claimant worked 22.5 hours prior to January 16, but those hours were not included in Claimant's wage claim and are not considered in this order.

were paid. The time cards do not show the amounts Respondent paid directly to Claimant's creditors or the $44 gift certificates Claimant accepted in lieu of cash.

9) Except for Claimant's final paycheck, Respondent V. Soberon did not provide Claimant with itemized statements showing lawful deductions during the claim period between January 16 and March 10, 2002.

10) Claimant quit his employment with Respondent on March 10, 2001, without prior notice to Respondent V. Soberon. He received a final paycheck dated March 10, 2001, signed by Respondent V. Soberon, in the amount of $29.90, shortly after he quit his employment.

11) Respondent included an itemized statement with Claimant's final paycheck that shows deductions for Medicare and state, federal, and social security taxes totaling $380.10. It also designates an "Hourly Rate (182.00 @ $9.00) $1,638" and "Draws -$1,228." The statement is dated March 10, 2001, and shows "year to date" earnings as $1,638 and "year to date" draws as $1,228.

12) Between January 16 and March 10, 2001, Claimant worked 159.5 hours and earned gross wages of $1,435.50 (159.5 hours x $9.00 per hour).

13) Claimant's cash draws and other compensation from January 16 to March 10, 2001, total $1,374.50.[3]

14) When Claimant quit his employment, Respondent V. Soberon owed Claimant gross wages of $61 ($1,435.50 - $1,374.50).

15) From Claimant's final paycheck, Respondent made deductions for Medicare and state, federal, and social security taxes from a gross amount of $1,638[4] that exceeded the gross wages owed when Claimant quit his employment, resulting in a $349 overpayment to Claimant ($1,435.50 gross wages - $1,374.50 in draws - $380.10 in withholdings - $29.90 net pay).

16) During the hearing, Claimant exhibited unwarranted hostility toward Respondent V. Soberon by responding to Respondent's direct examination with sarcastic remarks and impatience. Additionally, Claimant repeatedly disrupted the hearing with inappropriate comments and the ALJ was frequently compelled to admonish him about his lack of decorum during the hearing. Moreover, Claimant's testimony that Respondent altered Claimant's time cards to increase the amount of Claimant's draws was not credible. First, the ALJ thoroughly inspected the original time cards and found no evidence of

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[3] *See* Finding of Fact – The Merits 7.

[4] Respondent's calculations included the 22.5 hours that Claimant worked in January prior to the wage claim period.

tampering on the part of Respondent. Second, Claimant's testimony about his handwritten draws was inconsistent and evasive. For instance, he could not identify one of the entries at all, then later in his testimony claimed that only one of the numbers in the entry was a cash draw and denied he had written the second number. Later still, he claimed the entry was "probably" the name of an album cover that he had written down on the back of his time card. Throughout his testimony regarding the draws, Claimant claimed he could not remember receiving some of the larger cash draws, but had no problem recalling specific smaller amounts. Based on Claimant's general demeanor and unreliable testimony, the forum believed Claimant's testimony only when it was consistent with other credible evidence in the record, was logically credible or constituted a statement against interest.

17) Respondent J. Soberon did not respond to the Agency's charging document and did not appear at the hearing. The Agency did not move for a default order and presented no evidence at the hearing regarding J. Soberon.

ULTIMATE FINDINGS OF FACT

1) Respondent V. Soberon at all times material herein conducted a business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.

2) Respondent V. Soberon engaged Claimant's personal services between October 12, 2000, and March 10, 2001.

3) Respondent and Claimant agreed Claimant would be paid $9.00 per hour.

4) Claimant quit his employment without notice to Respondent on March 10, 2001.

5) Between January 16 and March 10, 2001, Claimant worked 159.5 hours and earned gross wages of $1,435.50. Respondent V. Soberon paid Claimant $1,784.50, less lawful deductions.

6) Respondent did not owe Claimant any wages when Claimant quit his employment on March 10, 2001.

7) There is insufficient evidence in the record to find Respondent J. Soberon conducted business jointly with Respondent V. Soberon.

CONCLUSIONS OF LAW

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

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) ORS 652.140(2) provides in part:

"When an employee who does not have a contract for a defi-

> nite 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."

Including a final paycheck issued March 10, 2001, Claimant was paid all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after he quit his employment with Respondent V. Soberon without notice.

4) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the Claimant's wage claim and Agency's Order of Determination filed against Respondents V. Soberon and J. Soberon.

OPINION

There is no dispute that Respondent V. Soberon ("Respondent") employed Claimant as a cook between January 16 and March 10, 2001. Respondent and Claimant also agree that the original time cards reflect the total number of hours Claimant worked during that time and that Claimant's wage rate was $9.00 per hour. The only disputed matters in this case are (1) whether Respondent paid Claimant all wages earned and unpaid within five days after Claimant quit without notice on March 10, 2001, and, if not, (2) whether Respondent's failure to pay any sums owed was willful.

RESPONDENT PAID CLAIMANT ALL WAGES EARNED AND OWED

Claimant and Respondent agree that between January 16 and March 10, 2001, Claimant was not paid regularly by check as was customary prior to January 2001. To assist Respondent's declining business, Claimant agreed to a more flexible pay arrangement of accepting sporadic cash draws which were noted on the original time cards in Claimant's own handwriting and were dated by either Claimant or Respondent. Respondent or his agent initialed each draw as it occurred. At hearing, Claimant further acknowledged an additional $60 bar tab that he entered on his March time card as a draw that was not dated or initialed by Respondent. Claimant also acknowledged two checks to Claimant's creditors written by Respondent on Claimant's behalf and receipt of $44 in gift certificates as offsets to the wages owed. Finally, Claimant acknowledged receiving a final paycheck for $29.90 that included an itemized statement of his earnings

over the wage claim period and deductions for draws and payroll taxes. For reasons stated elsewhere herein,[1] the forum finds Claimant's assertion that Respondent altered the time cards to increase the number and amount of draws shown on the time cards not credible. The forum finds, therefore, that Respondent not only paid Claimant all wages earned and owed when Claimant quit his employment, but the forum's calculation shows that Respondent overpaid Claimant by at least $349.

The Agency argues that Respondent should not be credited with legal deductions that accrued over the wage claim period and were not taken until Claimant decided to quit his employment. Respondent is permitted to make lawful payroll deductions, including those required by law. ORS 652.610(3)(a). The Agency does not articulate any legal theory that would negate Respondent's legal obligation to withhold certain amounts if they are not withheld timely. If the Agency had alleged and proven that Respondent did not actually pay the amounts withheld to the proper authorities, the forum may have found the deductions unlawful. However, that is not the case here. Claimant acknowledged receiving what appears to be a customary itemized statement that included standard payroll deductions that the forum is obliged to consider. Although evidence shows Respondent failed to provide itemized statements with each payment he made to Claimant between January 16 and March 10, 2001, as he was required to do by law, the Agency did not allege a violation of ORS 652.610. The forum, therefore, concludes that Respondent's deductions were lawful and Claimant was not owed any wages when he quit his employment with Respondent.

[1] *See* Finding of Fact – The Merits 16.

ORDER

NOW, THEREFORE, as Respondents have been found not to owe Claimant wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 01-2140 against **Vidal Soberon** and **Jody Soberon** be and is hereby dismissed.

In the Matter of

STEPHANIE NICHOLS dba Steph's Cleaning Service and STEPH'S CLEANING SERVICE L.L.C.,

Case Nos. 11-03 and 23-03

Final Order of Commissioner Jack Roberts

Issued January 2, 2003

SYNOPSIS

Respondent Steph's Cleaning Service LLC employed Claimant from October 15-24, 2001, at the agreed rate of $8 per hour and did not pay him all earned wages. Respondent Stephanie Nichols was a successor employer. The LLC and Nichols were ordered to

pay Claimant $228 in due and unpaid wages. The LLC's failure to pay the wages was willful and the LLC was ordered to pay $1,920 in penalty wages. The LLC failed to make and keep available records of the actual hours worked each week by Claimant and the total wages paid to Claimant and was assessed a civil penalty of $1,000. The LLC failed to make the record of total wages paid to Claimant available for inspection upon request by the Agency and was assessed a civil penalty of $1,000. As a successor employer, Respondent Nichols was not liable for the penalty wages, or civil penalties. ORS 652.140(2), *former* ORS 652.150, ORS 652.310, ORS 653.045(1) and (2); OAR 839-020-0080(1), OAR 839-020-0083(3).

The above-entitled 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 for the State of Oregon. The hearing was held on November 13, 2002, at the Eugene office of the Oregon Bureau of Labor and Industries, located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Wage claimant Joseph A. Francis ("Claimant") was present and was not represented by counsel. Respondent Stephanie Nichols ("Nichols") was present and was not represented by counsel.

The Agency called the following witnesses, in addition to the Claimant: Margaret Pargeter, Agency Compliance Specialist; William Owens, Claimant's prospective stepfather; and Anna Francis, Claimant's mother (by phone). Respondents called the following witnesses: Respondent Stephanie Nichols; Shane Van Horn, Nichols's brother; and Rhonda Lane, Van Horn's domestic partner.

The forum received into evidence:

a) Administrative exhibits X-1 through X-17 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-9 (submitted prior to hearing), and exhibits A-10 through A-12 (submitted at hearing);

c) Respondent exhibits R-1, R-2, R-3 and R-6 (submitted prior to hearing), and exhibits R-7 and R-8 (submitted at hearing).

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 November 29, 2001, Claimant filed a wage claim with the Agency alleging that Respondent Steph's Cleaning Service LLC had employed him and failed to pay wages earned and due to him.

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

3) Claimant brought his wage claim within the statute of limitations.

4) On April 17, 2002, the Agency issued Order of Determination No. 01-5354 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent "Steph's Cleaning Service L.L.C., Employer" owed a total of $276 in unpaid wages and $1,920 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 June 29, 2002, Nichols filed an answer and request for hearing. The answer admitted that Claimant "had worked for me (Steph's Cleaning)" from October 26 through October 31, 2001, for a total of 26 hours at the agreed rate of $8.50 per hour and that he had been paid a total of $238.

6) On October 3, 2002, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On October 2, 2002, the Agency filed a motion to add Nichols as an individual Respondent and to amend the amount of wages due Claimant from $276 to $228.

8) On October 4, 2002, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as November 13, 2002, at 1400 Executive Parkway, Suite 200, Eugene, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, 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 839-050-000 to 839-050-0440.

9) On August 28, 2002, the Agency issued a Notice of Intent to Assess Civil Penalties against Steph's Cleaning Service LLC and Stephanie Nichols dba Steph's Cleaning Service. The Notice proposed to assess civil penalties in the amount of $2,000 based on alleged violations of ORS 653.045(1) and ORS 653.045(2).

10) On October 10, 2002, Nichols filed an answer and request for hearing by fax in response to the Agency's Notice of Intent.

11) On October 15, 2002, the Agency moved to consolidate

the cases generated by the two charging documents issued against Respondents.

12) On October 15, 2002, the ALJ issued an interim order granting the Agency's motion to add "Stephanie Nichols" as an individual Respondent and to reduce the amount of unpaid wages sought to $228.

13) On October 15, 2002, the forum ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); and a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only.) The forum ordered the participants to submit case summaries no later than November 1, 2002, and notified the Agency and Respondents of the possible sanctions for failure to comply with the case summary order. The forum also enclosed a form designed to assist *pro se* respondents in filing a case summary.

14) On October 18, 2002, the ALJ issued an interim order granting the Agency's motion to consolidate.

15) On October 29, 2002, the Agency filed a motion for order of default based on the fact that Respondents had filed their answer and request for hearing with regard to the Agency's Notice of Intent by fax.

16) On October 30, 2002, the Agency filed its case summary with exhibits.

17) On October 31, 2002, the ALJ conducted a telephonic pre-hearing conference with Ms. Domas and Ms. Nichols. During the conference, Ms. Nichols stated that she had never received a Notice of Hearing and did not know the date scheduled for hearing. The ALJ reviewed the Notice of Hearing and determined that it had been incorrectly addressed to Ms. Nichols. The ALJ scheduled another conference for the following day and instructed Ms. Nichols to bring her original answer and request for hearing. The next day, the ALJ conducted a second pre-hearing conference with Ms. Nichols present and Ms. Domas participating by telephone. Prior to the hearing, the ALJ gave Ms. Nichols a copy of the Notice of Hearing, Wage & Hour Division Summary of Contested Case Rights & Procedures for non-attorneys, and a copy of the administrative rules governing contested case hearings in this forum, OAR 839-050-0000 *et seq*. The ALJ also obtained from her a copy of her answer and request for hearing in response to the Agency's Notice of Intent. After the pre-hearing conference, the ALJ forwarded one copy to Ms. Domas and another to the Hearings Unit Portland office to be included as an administrative exhibit in the original hearing file. During the conference, Ms. Nichols stated that she would be able to attend the hearing on November 13, 2002. Ms. Domas moved

to withdraw the Agency's motion for order of default, and the ALJ granted the motion. During the conference, the ALJ also provided Ms. Nichols with another copy of the interim order for case summaries, along with a form to assist her in completing the case summary. The ALJ ordered her to file it by November 5, 2002, instructing her that it must be postmarked by that date and to send two copies to the Hearings Unit in Portland and one to Ms. Domas in Salem. The ALJ further advised her that failure to file a case summary or to include names of witnesses or copies of exhibits she intended to offer could result in witnesses and exhibits being excluded or rejected at the hearing.

18) On November 4, 2002, Respondents filed a case summary, accompanied by six exhibits.

19) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the Agency and Nichols of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

20) At the start of the hearing, the ALJ asked Nichols if she intended to represent Steph's Cleaning LLC, as the LLC's authorized representative. Nichols stated that she was a managing member of the LLC and did intent to represent the LLC as an authorized representative. The ALJ instructed Nichols to write out a statement to that effect, and Nichols did so.

21) The ALJ issued a proposed order on December 5, 2002, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) Respondent Steph's Cleaning Service L.L.C. ("the LLC") was a limited liability company that registered with the Oregon Corporation Division on April 9, 1997, and was involuntarily dissolved sometime in 2002. Its members were Respondent Stephanie Nichols and her grandmother. Nichols was the LLC's registered agent and manager. The LLC did business in Eugene, Oregon.

2) The business of the LLC was cleaning construction sites.

3) In November 2001, the LLC had subcontracted with Meili Construction Co. to clean up construction that Meili was performing for Harvest House, a Eugene company.

4) Nichols hired Claimant to work for the LLC in October 2001. Nichols agreed to pay Claimant $8.00 per hour. Claimant was hired to perform cleanup at the Harvest House construction site.

5) Claimant worked six days in total for the LLC between October 15 and October 24, 2001. He worked with Anthony Vargas. Nichols also worked on the Harvest House job site for part of each of Claimant's shifts.

6) Claimant worked five hours for the LLC on October 15 and 17, and eight hours on October 16, 22, 23, and 24, 2001, earning $336 ($8 x 42 hours = $336). Complainant wrote down the hours he worked at the end of each day of work on a Meili Construction Co. timecard given to him by Nichols.

7) Nichols paid Claimant a total of $108. Nichols paid Claimant $10 in cash and $98 by two separate money orders. Nichols purchased a $60 money order on November 28, 2001 and had it delivered to Claimant that day. Nichols subsequently purchased a $38 money order and had it delivered to Claimant on a later date.

8) Claimant quit the LLC's employment because he was not getting paid. October 24, 2001, was his last day of work.

9) Nichols and the LLC did not create or maintain a record of Claimant's actual dates and hours worked while Claimant was employed by the LLC.

10) On December 12, 2001, BOLI sent a wage claim "demand" letter to Steph's Cleaning Service, LLC, stating that Claimant had filed a wage claim for "[u]npaid wages of $276.00 at the rate of $8.00 per hour from October 15, 2001 to October 31, 2001." The LLC did not respond to this letter.

11) On March 5, 2002, Pargeter sent a letter to Nichols, in Nichols's capacity as registered agent for the LLC. In the letter, Pargeter stated her conclusion that Claimant was owed unpaid wages and asked Nichols to "review the computations and take one of the following actions by March 15, 2002:

> "1. Submit to me a check payable to Joseph A. Francis in the gross amount of $276.00, along with an itemized statement of lawful deductions, if any.
>
> "2. Submit evidence that Mr. Francis was not employed by you or the hours claimed.
>
> "3. Submit evidence that my computations are not correct.

"If I do not hear from you by March 15, 2002, I will pursue collection of the wages owed through the Administrative Process in which case interest and civil penalties will be added to the wages owed."

12) Nichols and the LLC did not respond to Pargeter's March 5 letter. On March 18, 2002, Pargeter sent another letter to Nichols that stated, in pertinent part:

> "[I]n addition to the $276.00 in wages owed, penalties have accrued to the amount of $1,920.00. * * * We would prefer to resolve this matter prior to litigation. However, without your cooperation, this is not possible. You may stop this action by responding no later than March 28, 2002, with payment or, if you dispute the claim, with the appropriate records and/or information pertinent to this matter."

13) On March 22, 2002, Pargeter and Nichols talked by

phone. Nichols told Pargeter she had paid Claimant in full with money orders. Pargeter instructed Nichols to send copies of the money orders to her. Nichols said she would fax copies of the money orders to Pargeter by March 25, 2002.

14) On April 4, 2002, Pargeter sent a third letter to Nichols that stated, in pertinent part:

> "Per our phone conversation on March 22, 2002, you stated you would fax me copies of money orders paid to Joseph Francis showing he had been paid in full by Monday, March 25, 2002. I have not received that information from you.
>
> "As stated in my previous letter, Mr. Francis worked as a construction clean-up worker for year business during the period October 15, 2001, to October 24, 2001. He worked a total of 42 hours at the rate of $8.00 per hour earning $336.00, of which $60.00 has been paid, leaving a balance due and owing of $276.00.
>
> "Please take one of the following actions by April 15, 2002:
>
> "1. Submit to me a check payable to Joseph A. Francis in the gross amount of $276.00, along with an itemized statement of lawful deductions, if any.
>
> "2. Submit evidence that Mr. Francis has been paid in full.
>
> "If I do not receive either payment in full or copies of money orders paid to Mr. Francis by April 15, 2002, I will pursue collection of the wages owed through the Administrative Process in which case interest and civil penalties of $1,920.00 will be added to the wages owed.

"If you have any questions, please call me at the number listed below."

15) Pargeter mailed all her letters to P.O. Box 5912, Eugene, OR 97405, the correct mailing address for Nichols and the LLC.

16) Respondent Nichols began doing business as a sole proprietorship in March or April 2002, using the assumed business name of Steph's Cleaning Service. Her business is cleaning construction sites, the same type of business that the LLC engaged in. She uses the same mailing address as the LLC. There was no evidence presented that she employs the same persons as the LLC, that she had any of the same clients as the LLC, or that she uses the same equipment as the LLC. There was no evidence presented concerning the LLC's business property or that Nichols purchased or leased any of the LLC's business property for the continuation of the same business.

17) Nichols finally sent a copy of the $60 money order that she used to pay Claimant in response to the Agency's Order of Determination. At the time of hearing, Nichols had still not provided a copy of the second money order she used to pay Claimant or

a receipt for the cash paid to Claimant. Nichols made no attempts to obtain a copy of the second money order until a week before the hearing.

18) At the time of hearing, William Owens was engaged to marry Claimant's mother. His testimony primarily concerned the number of times and time of day he took Claimant to work and picked him up and Claimant's wage rate. His testimony was straightforward and consistent with other credible evidence in the record and was not impeached by any credible evidence. Despite his potential familial bias, the forum found him to be a credible witness and has credited Owens's testimony in its entirety.

19) Anna Francis is Claimant's mother and was a telephone witness. Her testimony was limited to statements concerning the number of times she drove Claimant to work and picked him up, the location of the job site, and how long he worked for the LLC. Like Owens, her testimony was straightforward and consistent with other credible evidence in the record and was not impeached by any credible evidence. Despite her potential familial bias, the forum found her to be a credible witness and has credited her testimony in its entirety.

20) Shane Van Horn is Nichols's brother. He testified that he saw two money orders Nichols gave to Leticia Vargas or Anthony Vargas to give to Claimant, including one made out to $138, but had no direct knowledge that Claimant ever received either money order. He also testified that he had been convicted of two felonies in the past 15 years, including burglary in 1994. These convictions reflect adversely on his credibility. Because Van Horn did not observe Claimant receive the money orders in question and Nichols failed to provide a copy of the alleged $138 money order showing it was actually made out to Claimant, the forum has not relied on his testimony except where it was corroborated by other credible evidence in the record.

21) Rhonda Lane is Van Horn's "domestic partner" and had been for four years at the time of hearing. She testified that she watched Nichols fill out a $60 and $138 money orders to Claimant in Lane's living room and hand them to Anthony Vargas. In 2000, she was convicted of conspiracy to commit identity theft and conspiracy to commit fraudulent use of a credit card. These convictions reflect adversely on her credibility. Because she did not observe Claimant receive the money orders in question and Nichols failed to provide a copy of the alleged $138 money order showing it was actually made out to Claimant, the forum has not relied on her testimony except where it was corroborated by other credible evidence in the record.

22) Claimant was a credible witness. His testimony, though brief, was consistent with the documentary evidence he submitted in support of his wage claim, and was not contradicted by any

credible evidence. The forum has credited his testimony in its entirety regarding the dates and hours that he worked. Because Claimant could not recall whether the second money order Nichols provided him was in the amount of $30 or $38, the forum has credited the LLC with having paid him $38, the larger amount.

23) Nichols testified that she gave two money orders to Anthony Vargas to give to Claimant, one for $60 and the other for $138. She provided a copy of the $60 money order, but only a stub for the purported $138 money order. Vargas, the only potential witness to the amount of the money orders and actual receipt of the purported $138 money order by Claimant, was listed by Nichols as a witness on Respondents' case summary. However, Nichols did not call him as a witness, stating that he was unavailable. Likewise, Nichols did not provide a copy of the alleged $138 money order, claiming her inability to obtain a copy. However, she apparently had no trouble obtaining a copy of the $60 money order. In addition, she testified that her "original" time records showed Claimant worked six days, yet the "original" record she provided at the hearing only showed Claimant working five days and included two entries that were missing from the exhibit representing her "original" time records for Claimant that she provided in her case summary. Nichols's failure to provide a copy of the $138 money order or call Vargas as a witness, combined with her inconsistent time records, caused the forum to disbelieve her testimony concerning the amount she paid Claimant and the number of hours that Claimant worked. Accordingly, the forum has believed Claimant whenever his testimony conflicted with Nichols's testimony. In addition, the forum has not believed Nichols's testimony that she created her handwritten record of Claimant's dates and hours of work contemporaneous with Claimant's employment.

24) Penalty wages, in accordance with *former* ORS 652.150, are computed as follows: $8 per hour x 8 hours = $64 x 30 days = $1920.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Steph's Cleaning Service L.L.C. ("the LLC") was a limited liability company doing business in Eugene, Oregon, that engaged the personal services of one or more employees. Respondent Stephanie Nichols was its registered agent and manager. Her grandmother was the other member.

2) The LLC employed Claimant between October 15 and 24, 2001, at the agreed wage rate of $8 per hour. Claimant worked six days and 42 hours in all for the LLC, earning $336 gross wages.

3) The LLC paid Claimant only $108 by means of $10 in cash and $98 in two money orders, leaving a balance due and owing of $228.

4) Claimant quit the LLC's employment because he was not getting paid. October 24, 2001, was his last day of work.

5) Penalty wages, computed in accordance with *former* ORS 652.150, equal $1920.

6) Nichols and the LLC did not create or maintain a record of Claimant's actual dates and hours worked while Claimant was employed by the LLC. (Entire Record)

7) On March 22, 2002, Pargeter, an Agency compliance specialist, asked Nichols to send copies of money orders showing all wages paid to Claimant. Nichols did not send a copy of the $60 money order that she used to pay Claimant until she received the Agency's Order of Determination. At the time of hearing, Nichols had still not provided a copy of the second money order she used to pay Claimant or a receipt for the cash paid to Claimant.

8) Respondent Nichols did not lease or purchase the LLC's business property for the continuance of the LLC's business.

9) Respondent Nichols is a successor to the LLC's business.

CONCLUSIONS OF LAW

1) During all times material herein, Steph's Cleaning Service L.L.C. ("the LLC"), 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, the LLC employed Claimant. Stephanie Nichols is a successor employer to the LLC.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

3) 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."

Claimant quit his employment on October 24, 2001, without giving prior notice. The LLC violated ORS 652.140(2) by failing to pay Claimant immediately all wages earned and unpaid when Claimant quit his employment on October 31, 2001. Those wages amount to $228. Stephanie Nichols and the LLC are liable for those unpaid wages.

4) *Former* ORS 652.150 provided:

> "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."

The LLC is liable for $1,920 in civil penalties under *former* ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

5) ORS 653.045(1) provides:

> "(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:
>
> "(a) The name, address and occupation of each of the employer's employees.
>
> "(b) The actual hours worked each week and each pay period by each employee.
>
> "(c) Such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder."

OAR 839-020-0080(1) provides:

> (1) Every employer regulated under ORS 653.010 to 653.261 must maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom the law applies:
>
> "(a) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;
>
> "(b) Home address, including zip code;
>
> "(c) Date of birth, if under 19;
>
> "(d) Sex and occupation in which employed. (Sex may be indicated by use of the prefixes Mr., Mrs., Miss, or Ms.);
>
> "(e) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at

the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole work force or establishment will suffice;

"(f) Regular hourly rate of pay for any workweek in which overtime compensation is due, and an explanation of the basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and the amount and nature of each payment which, pursuant to ORS 653.261(1) is excluded from the "regular rate of pay". (These records may be in the form of vouchers or other payment data.);

"(g) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of seven consecutive workdays);

"(h) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation;

"(i) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under subsection (h) of this section;

"(j) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions;

"(k) Total wages paid each pay period;

"(l) Date of payment and the pay period covered by payment."

The LLC violated ORS 653.045(1) and OAR 839-020-0080 by failing to make and keep available a record of the actual hours worked each workday and total hours worked each workweek by Claimant Francis and the total wages paid to Claimant Francis.

6) ORS 653.045(2) provides:

"Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time."

OAR 839-020-0083 provides:

"(1) All records required to be preserved and maintained by these rules shall be preserved and maintained for a period of at least two years.

"(2) All employers shall keep such records in a safe and accessible place.

"(3) All records required to be preserved and maintained by these rules shall be made

available for inspections and transcription by the Commissioner or duly authorized representative of the Commissioner."

The LLC violated ORS 653.045(2) and OAR 839-020-0083(3) by failing to make available for inspection by the commissioner's designee records showing the wages paid to Claimant Francis.

7) ORS 653.256 provides, in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed $1,000 against any person who willfully violates * * * ORS 653.045 * * * or any rule adopted pursuant thereto. * * *"

OAR 839-020-1010 provides, in pertinent part:

"(1) The commissioner may assess a civil penalty for any of the following willful violations:

"* * * * *

"(d) Failure to make required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080;

"(e) Failure to keep available required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080."

"* * * * *

"(2) The civil penalties for any one violation will not exceed $1000. The actual amount of the civil penalty will depend on all the facts and circumstances referred to in OAR 839-020-1020."

OAR 839-020-1020 provides:

"(1) The commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed and cite those the commissioner finds to be appropriate:

"(a) The history of the employer 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 employer 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 employer to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be assessed.

"(3) Notwithstanding 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.

The Commissioner has exercised his discretion appropriately by imposing a $2,000 in civil penalties for the LLC's violations of ORS 653.045(1), OAR 839-020-0080(1), ORS 653.045(2), and OAR 839-020-0083(3).

8) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Stephanie Nichols and the LLC to pay Claimant his earned, unpaid, due and payable wages, plus interest on that sum until paid, and to order the LLC to pay the penalty wages, plus interest on that sum until paid. ORS 652.332.

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 impose civil penalties for the violations found herein. ORS 653.256.

OPINION

WAGE CLAIM OF JOSEPH FRANCIS

In order to prevail, the Agency must prove: 1) that the LLC employed Claimant; 2) any pay rate upon which the LLC and the Claimant agreed; 3) that Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for the LLC. *In the Matter of Barbara Coleman*, 19 BOLI 230, 263, 264 (2000).

A. Claimant Was Employed By Respondent Steph's Cleaning Service L.L.C.

Undisputed testimony by Stephanie Nichols established that the LLC was Claimant's employer.

B. Claimant's Agreed Rate Of Pay

Nichols asserted in the answer she filed on behalf of the LLC that she agreed to pay Claimant $8.50 per hour. In contrast, Claimant wrote on his contemporaneous timecard and testified that Nichols agreed to pay him $8 per hour. The forum has determined that Claimant was a more credible witness than Nichols. Based on that credibility assessment, the forum concludes that Nichols agreed to pay Claimant $8 per hour, the wage rate cited by the Agency in its Order of Determination.

C. Claimant Performed Work For Which He Was Not Properly Compensated

Claimant testified credibly that he was only paid $108 for the work he performed for the LLC. Nichols testified that she paid Claimant $228 in the form of $30 in cash, and two money orders in the amounts of $60 and $138, respectively. However, Nichols produced no receipts for the cash. Nichols produced a copy of the $60 money order, but produced neither a copy of the $138 money order nor the testimony of Anthony Vargas, the only other

witness who could have provided testimony concerning that money order and whether or not it was given to Claimant. The forum draws two alternative adverse inferences from Nichols's failure to provide a copy of the $138 money order or to call Vargas, who was listed as a witness in Respondents' case summary.[2] The first is that the LLC never purchased a $138 money order for Claimant. The second is that the alleged $138 money order, even if purchased, was not received by Claimant. In Nichols's answer, she admitted that Claimant worked 26 hours for the LLC. 26 hours multiplied by $8 per hour equals $208. Based on Claimant's credible testimony of the amount he was paid and Respondent's admission of the number of hours Claimant worked, the forum concludes that Claimant performed work for which he was not properly compensated.

D. The Amount And Extent Of Work Performed By Claimant

Respondent did not keep contemporaneous records of Claimant's work hours. Claimant, on the other hand, kept a daily record of his hours on a timecard provided by Nichols. Although Nichols claimed she did not give the Meili Construction Co. timecard to Claimant, she offered no evidence concerning how Claimant might have obtained the timecard, had Nichols not given it to him. Vargas was the Claimant's only co-worker and presumably could have testified as to the actual hours worked by Claimant, but Respondents did not call him as a witness, despite listing him as a witness on their case summary. Consequently, the forum relies on Claimant's credible records and testimony to conclude that Claimant worked 42 hours, earning $336.

RESPONDENT STEPHANIE NICHOLS IS A SUCCESSOR TO STEPH'S CLEANING SERVICE LLC AND IS INDIVIDUALLY LIABLE FOR THE UNPAID WAGES

The Agency alleged that Respondent Nichols was personally liable for the unpaid wages as a successor to the LLC under ORS 652.310(2). The test used by the forum involves a determination of whether Nichols conducts essentially the same business that the LLC did. The forum looks at six elements: 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 for an employer to be a successor; the facts must be considered together. *In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 256 (1999). The Agency bears the burden of proof of establishing successorship.

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[2] *See, e.g., In the Matter of Toni Kuchar,* 23 BOLI 265, 275 (2002).

A. Name Or Identity Of The Business.

The name of the LLC was Steph's Cleaning Service LLC. The LLC had two members, Nichols and her grandmother. Nichols was the managing member, and there was no evidence that her grandmother actually did any work. Nichols, a sole proprietor and the alleged successor, does business as Steph's Cleaning Service and uses the same mailing address as the LLC. This element indicates successorship.

B. Location Of The Business.

The principal place of business for the LLC, as indicated by the LLC's registration with the Corporations Division, was 2926 Lincoln, Eugene, Oregon. There was no evidence presented as to the location of Respondent Nichols's principal place of business. However, both the LLC and Nichols use the same mailing address, PO Box 5912, Eugene, OR 97405. The only evidence presented regarding the nature of the cleanup business conducted by the LLC and Respondent Nichols was that it is conducted at construction job sites. Accordingly, Respondent Nichols's use of the same mailing address as the LLC tales on a heightened significance and is indicative of successorship.

C. Lapse In Time Between The LLC's Operation And Nichols's Sole Proprietorship.

Evidence in the record indicates that the LLC involuntarily dissolved sometime in 2002 and that Nichols began operating as a sole proprietorship in March or April 2000. This means that that Nichols began operating her sole proprietorship a maximum of three to four months after the LLC ceased to exist, indicating successorship.

D. Employment Of The Same Or Substantially The Same Work Force.

Except for the employment of Nichols herself, no evidence was presented to show whether Nichols employed any of the same persons that the LLC employed, and the forum concludes that this element is not indicative of successorship.

E. Manufacture Of The Same Product Or Offering The Same Service.

Testimony by Nichols established that the LLC and Nichols engage in the same business, cleaning construction sites. This indicates successorship.

F. Use Of The Same Machinery, Equipment, Or Methods Of Production.

No evidence was presented to show what machinery or equipment, or methods of production were used by the LLC in cleaning construction sites, other than evidence that Claimant cleaned windows by himself. Without more evidence, this element is not indicative of successorship.

G. Conclusion.

Four of the six elements – identity, location of the business,

lapse in time, and same service – indicate successorship. These four elements, considered together, establish that Respondent Nichols conducts essentially the same business as the LLC and is a successor employer, as defined by ORS 652.310(2), to the LLC. Accordingly, Respondent Nichols is individually liable as a successor employer for wages owed to Claimant Francis.

RESPONDENT NICHOLS WAS NOT A PURCHASER OR LESSEE OF THE LLC'S BUSINESS PROPERTY FOR THE CONTINUATION OF THE SAME BUSINESS

The second theory upon which Nichols can be held personally liable for the LLC's unpaid wages is to show that Nichols was a "lessee or purchaser of the [LLC's] business property for the continuance of the same business." ORS 652.310(1). No evidence was presented concerning the business property used by the LLC in the conduct of its business or the business property used by Nichols in the conduct of her sole proprietorship. Without this evidence, Nichols can not be held liable as a "lessee or purchaser" for Claimant Francis's unpaid wages.

PENALTY WAGES

An award of 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 (1983). Because Nichols herself worked at the Meili Construction Co. job site with Claimant, the forum concludes that she was aware of Claimant's hours of work. There was no evidence that Nichols, as the LLC's managing member, acted other than voluntarily or as a free agent in not paying Claimant for all the work he performed.

Claimant is entitled to $1,920 in penalty wages, computed at $8 per hour x 8 hours per day x 30 days = $1,920.

The LLC is liable for these penalty wages. Respondent Nichols, as a successor employer, is not individually liable for these penalty wages. *In the Matter of Anita's Flowers & Boutique,* 6 BOLI 258, 269 (1987).

RESPONDENT STEPH'S CLEANING SERVICE LLC VIOLATED ORS 653.045(1) AND OAR 839-020-0080(1).

The Agency alleged in its Notice of Intent that Respondents failed to maintain and preserve records regarding the employment of Claimant Joseph Francis in October 2001, in violation of ORS 653.045(1) and OAR 839-020-0080(1). The forum has determined that the LLC failed to make

a record of "the actual hours worked each week" by Francis or the "[T]otal wages paid each pay period" to Francis. This constitutes a single violation of the statute and administrative rule, for which the Commissioner may assess a civil penalty of up to $1,000. However, a civil penalty may not be assessed against Nichols individually, as the definition of "employer" that applies to ORS 653.045 is "any person who employs another person," and does not incorporate the concept of successor liability. *In the Matter of Sabas Gonzalez,* 19 BOLI 1, 15 (1999).

AMOUNT OF CIVIL PENALTY

The Notice of Intent asks that a civil penalty of $1000 be assessed against Respondents. OAR 839-020-1020 states the mitigating and aggravating circumstances that the Commissioner shall consider when determining an amount of civil penalties. It is the employer's responsibility to provide any mitigating evidence. The Commissioner must consider any mitigating circumstances presented.

In this case, there are several aggravating factors. First, Nichols, as the LLC's manager, knew or should have known of the violation, in that employers are presumed to know the laws they are required to follow and Nichols was acting as an agent for the LLC. *In the Matter of John Mathioudakis,* 12 BOLI 11, 20-21 (1993). Second, Nichols, who worked on the job site, could have easily written down Francis's daily hours worked. She could have just as easily made copies of the money orders she used to pay Francis and obtained a receipt for the cash that she paid him. Third, the violation was serious, in that it affected BOLI's ability to determine the actual amount of wages owed to Francis. The magnitude of the violation was not great, in that the violation only impacted one employee. Finally, the LLC's failure to make these records resulted in the loss of a substantive right to Francis in the form of $228 in unpaid wages. Respondent presented no mitigating circumstances. Under these facts, the $1,000 civil penalty sought by the Agency is appropriate.

RESPONDENT STEPH'S CLEANING SERVICE LLC VIOLATED ORS 653.045(2) AND OAR 839-020-0083(3).

The Agency alleged in its Notice of Intent that the Agency requested and Respondents failed to make available the records showing amounts paid to Claimant Joseph Francis in October 2001, in violation of ORS 653.045(2) and OAR 839-020-0083. ORS 653.045(2) requires employers to keep records required by ORS 653.045(1) "open for inspection by the commissioner or commissioner's designee at any reasonable time." OAR 839-020-0083(3) interprets the statute to require that these records "shall be made available for inspections."

ORS 653.045(1)(c) requires that every employer must keep a

record of "such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder." OAR 839-020-0080(1) contains the "other information" prescribed by the commissioner. Among its requirements are that employers must keep records of the "[T]otal wages paid each pay period." OAR 839-020-0080(1)(k).

On March 22, 2002, Pargeter, an Agency compliance specialist, asked Nichols to provide her with documents showing the wages that Claimant was paid. Nichols, acting on behalf of the LLC, eventually provided a copy of a $60 money order she used to pay Claimant. However, Nichols has never provided a receipt showing the cash the LLC used to pay Claimant or a copy of the second money order the LLC paid him with. This failure constitutes a single violation of ORS 653.045(2) and OAR 839-020-0083(3), for which the Commissioner may assess a civil penalty of up to $1,000. Again, Respondent Nichols is not individually liable for this civil penalty.

AMOUNT OF CIVIL PENALTY

The Notice of Intent proposed to assess a civil penalty of $1,000. In this case, there are several aggravating factors. First, Nichols, as the LLC's manager, knew or should have known of the violation, in that employers are presumed to know the laws they are required to follow and Nichols was acting as an agent for the LLC. *Id.* Second, Nichols could have easily obtained a receipt from Claimant Francis for the cash payment to him and presumably could have obtained a copy of the second money order to provide to Pargeter, had she made an attempt to do so.[3] Third, the violation was serious and of significant magnitude, in that it resulted in BOLI having to conduct a hearing to determine that wages were owed to Francis and the actual amount of wages owed. Finally, the LLC's failure to make these records resulted in the loss of a substantive right to Francis in the form of $228 in unpaid wages. Respondent presented no mitigating circumstances. Under these facts, the $1,000 civil penalty sought by the Agency is appropriate.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent Steph's Cleaning Service L.L.C. and Respondent Stephanie Nichols 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 Claimant Joseph Francis in the amount

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[3] *See* Finding of Fact 9 – The Merits.

of TWO HUNDRED TWENTY EIGHT DOLLARS ($228), less appropriate lawful deductions, representing $228 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on the sum of $228 from November 1, 2001, until paid.

NOW, THEREFORE, as authorized by ORS 652.332 and ORS 653.256, and as payment of the penalty wages, and civil penalties assessed as a result of its violations of ORS 652.140(2), ORS 653.045(1) and (2), and OAR 839-020-0080(1) and OAR 839-020-0083(3), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent Steph's Cleaning Service L.L.C. to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(2) ONE THOUSAND NINE HUNDRED AND TWENTY DOLLARS ($1,920), less appropriate lawful deductions, representing $1,920 in penalty wages, plus interest at the legal rate on the sum of $1,920 from December 1, 2001, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND DOLLARS ($2,000), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent Steph's Cleaning Service L.L.C. complies with the Final Order.

In the Matter of

ENTRADA LODGE, INC., dba Best Western Entrada Lodge

Case No. 25-00

Amended Final Order on Remand of Commissioner Dan Gardner

Issued February 10, 2003

SYNOPSIS

Respondent failed to restore Complainant to her former housekeeping position after she took OFLA leave and attempted to return to work, and the forum awarded Complainant $262.50 in lost wages and $15,000 damages for mental suffering that Complainant experienced as a result of Respondent's unlawful employment practice. The forum found that Complainant had not been constructively discharged when she quit Respondent's employ to go to work for another inn that offered more hours. *Former* ORS 659.470[1] *et. seq*., *former* OAR 839-009-0270.[2]

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[1] Effective January 1, 2002, ORS Chapter 659 was reorganized into two separate chapters, ORS Chapters 659 and 659A. All references to "*former*" Oregon Revised Statutes in this Final Order cite to the statute that was in effect in 1998.

[2] BOLI amended its OFLA administrative rules effective February 1, 2000, and again effective May 17, 2002. All

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The above-entitled 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 for the State of Oregon. The hearing was held on February 8 and 9, 2000, at the Bureau of Labor and Industries office located at 1250 N.E. 3rd, #B-105, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Complainant Cheryl Donovan[3] was present throughout the hearing, and was not represented by counsel. Respondent was represented by Gregory P. Lynch, trial attorney, and co-counsel Stanley D. Austin, of the law firm Hurley, Lynch & Re, P.C. Douglas F. Ritchie was present throughout the hearing as Respondent's representative.

The Agency called as witnesses, in addition to Complainant: Douglas Ritchie, Respondent's general manager; Christina (Crain) Delong and Kimberly Ford, formerly employed as housekeepers for Respondent; Richard Buxton, Complainant's husband; Jeffrey Carlson, accounting coordinator for BOLI; and Jane MacNeill, Civil Rights Division senior investigator.

Respondent called Ritchie and Complainant as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-19 (submitted prior to hearing), X-20 (submitted at hearing), and X-21 through X-30 (issued or submitted after hearing);

b) Agency exhibits A-1 through A-7 (submitted prior to hearing with the Agency's case summary), and A-8 through A-14 (submitted at hearing);

c) Respondent's exhibits R-1 (submitted prior to hearing with Respondent's case summary), R-2 through R-9, R-13 and the first four pages of R-14 (submitted at hearing).

On August 2, 2000, the Commissioner issued an Amended Final Order concluding that Respondent had violated *former* ORS 659.484(1) and *former* ORS 659.492(1), and ordering Respondent to pay $262.50 in lost wages and $15,000 in mental suffering damages to Complainant Donovan. Respondent appealed the Amended Final Order to the Oregon Court of Appeals. On October 16, 2002, the Oregon Court of Appeals issued an opinion in which it reversed and remanded the Amended Final Order for reconsideration under the correct legal standard.

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references to "*former*" Oregon Administrative Rules in this Final Order cite to the rule that was in effect in 1998.

[3] At the time of hearing, Complainant's last name was Buxton and it has since been changed to Donovan.

Having fully reconsidered the entire record in this matter, I, Dan Gardner, 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 28, 1998, Complainant filed a verified complaint with Agency's Civil Rights Division ("CRD") alleging that she was the victim of the unlawful employment practices of Respondent in that Respondent failed to return her to her former housekeeper position upon returning to work from parental leave. On July 16, 1999, BOLI amended Complainant's complaint to correct Respondent's name and added the name of Respondent's registered agent. After investigation and review, the CRD issued an Administrative Determination finding substantial evidence supporting the allegation that Respondent did not return Complainant to her former job following her medical leave.

2) On November 8, 1999, the Agency submitted to the forum Specific Charges alleging that Respondent discriminated against Complainant by: (a) failing to restore her to the position she held at the time she commenced family leave after she was ready to return to work; and (b) constructively discharging her by reducing her hours so that it was necessary for her to find other employment, both in violation of ORS 659.492. The Agency also requested a hearing.

3) On November 18, 1999, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth February 8, 1999, in Bend, Oregon, as 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.

4) On December 6, 1999, Respondent, through Gregory P. Lynch, filed an answer to the Specific Charges.

5) On January 6, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damage calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The forum ordered the participants to submit case summaries by January 28, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On January 20, 2000, Respondent filed a motion for a postponement in which it alleged that the Agency would not cooperate in arranging discovery depositions that Respondent needed to conduct "to ensure that respondent has a full and fair opportunity to present its case at the contested hearing."

7) On January 20, 2000, Respondent also filed a motion for a discovery order to be allowed to take the deposition of Complainant.

8) On January 25, 2000, the Agency filed objections to Respondent's motion to postpone, arguing that the Agency had not impeded Respondent's efforts to seek a deposition or obtain discovery of documents and that Respondent's failure to make adequate efforts to complete discovery before the scheduled hearing date did not constitute good cause for granting a postponement.

9) On January 25, 2000, the Agency filed objections to Respondent's request to take Complainant's deposition, arguing that Respondent's request was untimely and failed to demonstrate why a deposition rather than informal or other means of discovery was necessary.

10) On January 25, 2000, the forum issued an interim order denying Respondent's motion to take Complainant's deposition on the basis that Respondent had failed to seek discovery through an informal exchange of information before requesting a discovery order to take Complainant's deposition. The forum noted that an informal attempt to arrange for a deposition did not constitute an attempt to seek discovery through an informal exchange of information. In the same order, the forum denied Respondent's motion for a postponement on the basis that Respondent's inability to make an informal arrangement to take Complainant's deposition did not meet the good cause requirement of OAR 839-050-0020(10).

11) On January 28, 2000, Respondent filed a motion for reconsideration of the forum's rulings on its motions for postponement and to take Complainant's deposition.

12) On January 28, 2000, the Agency and Respondent timely filed their case summaries.

13) On January 28, 2000, the forum denied Respondent's motion for reconsideration of the forum's rulings on Respondent's motions to postpone and to take Complainant's deposition.

14) At the commencement of the hearing, 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) Prior to opening statements, Respondent objected to the ALJ's receipt of the Agency's case summary, marked as Exhibit X-15, into evidence on the basis that Respondent had just received it at 3 p.m. on February 7, the

previous day. Respondent alleged that it was prejudiced by the Agency's failure to provide Respondent with the case summary in a timely manner. At the ALJ's request, Respondent provided the forum with the manila envelope that the Agency's case summary was mailed in, bearing the postmark of "Jan 28'00," and it was marked and received as Exhibit X-20. The ALJ admitted Exhibit X-15 because: (1) Exhibit X-20 demonstrated it was timely filed pursuant to the requirements of OAR 839-050-0040(1); and (2) testimony by Jeffrey Carlson, BOLI's accounting coordinator who is responsible for internal controls regarding BOLI's mailroom procedures, established that Exhibit X-20 was in fact postmarked and placed in a U. S. Postal Service receptacle on January 28, 2000, in the normal course of business.

16) On May 4, 2000, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions, and a Final Order was issued on June 8, 2000.

17) On June 27, 2000, Respondent's attorney Respondent's attorney, Gregory P. Lynch, notified the Agency's case presenter that neither the Proposed Order nor the Final Order had been served on him. After confirming this fact, on July 10, 2000, the Commissioner issued an order entitled "Order Withdrawing Final Order For Purpose of Reconsideration." The Commissioner ordered that the ALJ reissue the Proposed Order and serve it on Mr. Lynch so that Respondent would have the opportunity to file exceptions pursuant to OAR 839-050-0380. On July 12, 2000, an amended[4] Proposed Order was reissued pursuant to that Order.

18) On July 20, 2000, Respondent filed exceptions to the Amended Proposed Order.

FINDINGS OF FACT – THE MERITS

1) In 1998, Respondent was an Oregon corporation providing commercial lodging in and around Bend, Oregon, under the assumed business names of Best Western Entrada Lodge ("Entrada") and Best Western Inn & Suites.

2) Respondent employed 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in both 1997 and 1998.

3) Douglas Ritchie, Entrada's general manager, hired Complainant as a housekeeper at Entrada on January 16, 1998. Complainant's first day of work was January 17, 1998. When Complainant was hired, her last name was Schulze.

4) When Complainant was hired, Ritchie did not promise Complainant a specific schedule

[4] There were no substantive changes in the Amended Proposed Order.

or number of hours she would work per week. It was Ritchie's policy not to guarantee any housekeeper any particular hours.

5) Complainant was paid the state minimum hourly wage throughout her employment with Entrada. In 1998, the state minimum wage was $6.00 per hour.

6) Complainant's husband, Richard Buxton, interviewed with Ritchie on the same day as Complainant and was hired as Entrada's maintenance person. He began work at the same time as Complainant. Complainant and Buxton were married on April 7, 1998.

7) Buxton's wages were garnished for child support payments throughout the time he worked for Entrada. His bi-monthly net earnings while employed by Entrada were $300 after taxes and the child support garnishment.

8) Complainant had five children at the time she married Buxton.

9) Respondent's business is dependent on the tourist industry and occupancy rates fluctuate considerably during the course of the year. Summer is Respondent's busiest season. The hours worked by housekeepers vary considerably depending on occupancy rates, ranging in 1998 from a low of 98.5 hours between November 1-15, 1998, to a high of 647.5 hours between July 15-31, 1998.[5] The hours worked by housekeepers are directly proportionate to Respondent's occupancy rates.

10) Ritchie was responsible for the scheduling of housekeeper's hours throughout Complainant's employment with Respondent.

11) Complainant's housekeeping duties involved cleaning rooms. Specifically, she made beds, vacuumed, washed bathrooms, cleaned up "stayovers," did some "deep cleaning," and occasionally worked as a leadperson when she was the most senior housekeeper scheduled to work, during which time she assigned rooms to other housekeepers and did laundry.

12) During Complainant's employment, her supervisors filled out semi-monthly time cards showing the hours she and other housekeepers worked. Complainant maintained a contemporaneous record of her own hours on her calendar at home.

13) Complainant's daughter made Complainant's 1998 home calendar. On that calendar, Complainant wrote down significant events as they occurred or were scheduled,[6] as well as her hours

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[5] Ritchie testified, and Respondent's timecards reflect, that housekeeper hours were tracked on a semi-monthly basis for payroll purposes.

[6] For example, February's calendar contains numerous entries showing the specific dates and time Complain-

at work. Based on an inspection of the calendar and Complainant's testimony, the forum finds that Complainant's handwritten entries on the calendar are an accurate, contemporaneous account of events in Complainant's life during the time she worked for Entrada.[7] Where Complainant's testimony concerning dates conflicted with those written on the calendar, the forum has relied on the calendar to determine accurate dates.

14) Ritchie does very little documentation concerning Respondent's housekeepers because there is such a high turnover. Ritchie did not contemporaneously document any of his conversations with Complainant.

15) When Complainant was hired, Entrada already employed four other housekeepers – Jennifer Bliss, Karla Henley, Laurie Knox and Nikke Standley.

16) Complainant learned she was pregnant on January 17, 1998, her first day of work for Entrada, and told Standley, the housekeeping supervisor, that she was pregnant.

17) Sometime in the spring of 1998, Ritchie learned Complainant was pregnant. He assumed she would take 12 weeks of leave when her baby was born.

18) From January 16-31, 1998, Entrada's five[8] housekeepers worked the following hours, for a total of 219.25[9] hours:

Complainant:	51.75
L. Knox:	52.75
J. Bliss:	37.25
N. Standley:	49.75

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ant worked for Respondent, as well as other entries, such as a reference to a legal notice in "The Bulletin," a note to "pay Farmer's Insurance $66.46," a note that Complainant "mailed off tax papers & phone bill payment 83.83," and a note that she had "side" and "back pain" on the 12th and 13th.

[7] Another significant indicator of the calendar's reliability is the fact that the total number of hours recorded on it by Complainant as worked prior to July 27, 1998, is 630.25 hours, whereas the total number of hours on her time cards for that period was 627.50 hours.

[8] In this and subsequent Findings of Fact, the forum has listed the number of housekeepers who actually worked during the specified time period, based on the time cards in Exhibits A-5, A-7, and R-1. In some instances, this total differs from Respondent's summary entitled "Number of Housekeeping Employees Working Per Pay Period (1998)" (Exhibit R-9).

[9] In this and subsequent Findings of Fact, the total number of hours worked by housekeepers was derived from adding together the specific hours listed after each housekeeper. In some instances, this total differs from Respondent's summary of "Total Housekeeper Hours" (Exhibit R-7). The forum has used this method of calculation instead of relying on the hours listed in Exhibit R-7 based on Ritchie's testimony that the hours in Exhibit R-7 were derived from housekeeper's time records in Exhibits A-5, A-7, and R-1.

K. Henley: 27.75

19) Prior to February 1, 1998, Bliss, Henley, and Standley left Entrada's employ. Knox replaced Standley as housekeeping supervisor. Between February 1 and February 15, 1998, Entrada employed two new housekeepers – Ramona Lopez and Angela Rodgers. In that time period, Entrada's four housekeepers worked the following hours, for a total of 110.5 hours:

Complainant: 36.25

L. Knox: 46.75

A. Rodgers: 17

R. Lopez: 10.5

20) Between February 16 and February 28, 1998, Entrada employed three new housekeepers - Lynn Cornell, Holly Luckins and Bobbie Mitchell. In that time period, Entrada's seven housekeepers worked the following hours, for a total of 262 hours:

Complainant: 64.25

L. Knox: 56.25

A. Rodgers: 34.75

R. Lopez: 24

B. Mitchell: 37

L. Cornell: 14.5

H. Luckins: 31.25

21) Prior to March 1, 1998, Cornell and Lopez left Entrada's employ. Between March 1 and March 15, 1998, Entrada employed three new housekeepers - Kimberly Ford, Sammie Garrett, and Jennifer Rafford. In that time period, Entrada's eight housekeepers worked the following hours, for a total of 201.5 hours:

Complainant: 56.75

L. Knox: 73.75

K. Ford: 18.25

A. Rodgers: 2.75

B. Mitchell: 16.5

H. Luckins: 5.5

S. Garrett: 15.25

J. Rafford: 12.75

22) Prior to March 16, 1998, Garrett, Luckins, Rafford, and Rodgers left Entrada's employ. Between March 16 and March 31, 1998, Entrada employed six new housekeepers - Tempie Davis, Wynona Grilley, Darcie Ingram, Tamara Keck, Alicia Lopez and Anna Mort. In that time period, Entrada's 10 housekeepers worked the following hours, for a total of 326.25 hours:

Complainant: 61.5

L. Knox: 52.5

K. Ford: 60.25

B. Mitchell: 31.5

T. Davis: 28.25

D. Ingram: 18.75

A. Lopez: 11.75

W. Grilley: 49

T. Keck: 3.5

A. Mort: 9.25

23) Prior to April 1, 1998, Keck, A. Lopez, Mitchell, and Mort left Entrada's employ. Between

April 1 and 15, 1998, Entrada re-employed one housekeeper – Ramona Lopez. In that time period, Entrada's seven housekeepers worked the following hours, for a total of 231.25 hours:

Complainant: 46.25

L. Knox: 61

K. Ford: 50.75

T. Davis: 26.25

D. Ingram: 25.25

R. Lopez: 1 2

W. Grilley: 9.75

24) Prior to April 16, 1998, Davis and Grilley left Entrada's employ. Between April 16 and 30, 1998, Entrada's five housekeepers worked the following hours, for a total of 192.75 hours:

Complainant: 46.75

L. Knox: 67.25

K. Ford: 53.5

D. Ingram: 19

R. Lopez: 6.25

25) Prior to May 1, 1998, R. Lopez left Entrada's employ. Between May 1 and 15, 1998, Entrada's four housekeepers worked the following hours, for a total of 176.25 hours:

Complainant: 48.5

L. Knox: 59.75

K. Ford: 52.25

D. Ingram: 15.75

26) Between May 16 and 31, 1998, Entrada employed one new housekeeper – Christie Hammell. In that time period, Entrada's five housekeepers worked the following hours, for a total of 228.75 hours:

Complainant: 54.25

L. Knox: 65

K. Ford: 75

D. Ingram: 17.75

C. Hammell: 16.75

27) Prior to June 1, 1998, Hammell and Ingram left Entrada's employ. Between June 1 and 16, 1998, Entrada employed two new housekeepers – Josh Price and Kevin Sibert. In that time period, Entrada's five housekeepers worked the following hours, for a total of 207.75 hours:

Complainant: 48

L. Knox: 60.5

K. Ford: 67.25

K. Sibert: 26

J. Price: 6

28) On June 9, 1998, Complainant's doctor restricted her to light duty. On or about the same day, Complainant presented her light duty note to Ritchie. For the rest of June, Ritchie assigned lighter duty work to Complainant. Starting on June 13, Ritchie assigned laundry duties to Complainant, which Complainant performed through July 26, 1998. The lighter duty and laundry work assigned to Complainant was an accommodation of her light duty restrictions due to her pregnancy.

29) Between June 16 and 30, 1998, Entrada employed four new housekeepers – Reba Balcomb, Janelle Grant, Tara Hunter and Lance Robbins. In that time period, Entrada's nine housekeepers worked the following hours, for a total of 416.50 hours:

Complainant:	53.25
L. Knox:	58.75
K. Ford:	61.75
K. Sibert:	53
J. Price:	63.25
R. Balcomb:	14
J. Grant:	20.5
T. Hunter:	46
L. Robbins:	46

30) Between July 1 and 15, 1998, Entrada employed two new housekeepers – Michelle Miller and Brittney Richman. In that time period, Entrada's 11 housekeepers worked the following hours, for a total of 526.5 hours:

Complainant:	40.75
L. Knox:	75
K. Ford:	62
K. Sibert:	73.75
J. Price:	54
R. Balcomb:	56.25
J. Grant:	50.75
T. Hunter:	48.75
L. Robbins:	58.25
B. Richman:	3.5
M. Miller:	3.5

31) Between July 15 and 31, 1998, Complainant worked 6.25 hours on July 18, 6.75 hours on July 19, and 7.25 hours on July 26. In the same time period, Entrada's 11 housekeepers worked the following hours, for a total of 646.75 hours:

Complainant:	20.25
L. Knox:	94.75
K. Ford:	79.45
K. Sibert:	85.75
J. Price:	71.5
R. Balcomb:	64.5
J. Grant:	61.25
T. Hunter:	21
L. Robbins:	21
B. Richman:	68.5
M. Miller:	50.5

32) On July 27, 1998, Complainant stopped working due to her pregnancy, based on the advice of her physician. Prior to July 27, Complainant told Ritchie that she would be taking maternity leave until her six week checkup after her baby was born and planned to return to work for Respondent at that time. When Complainant told Ritchie she was beginning her leave, Ritchie told her to contact him when she was ready to come back to work.

33) Between January 17, 1998 and July 26, 1998, Com-

plainant worked an average of 23 hours per week.[10]

34) Ritchie considered Complainant to be a "fine" employee at the time her leave commenced and planned to put her back to work when she returned from leave.

35) At the time Complainant's leave commenced, Complainant and her husband were behind in paying their bills.

36) During Complainant's entire period of employment with Respondent, Ritchie said nothing negative regarding Complainant's pregnancy or her anticipated maternity leave. Complainant and Ritchie had a good working relationship.

37) Prior to August 1, 1998, Hunter and Robbins left Entrada's employ. Between August 1 and 15, 1998, Entrada employed one new housekeeper – Robin Rynniewicz. In the same time period, Entrada's 10 housekeepers worked the following hours, for a total of 555.5 hours:

L. Knox:	81.5
K. Ford:	76.75
K. Sibert:	71.5
J. Price:	79
R. Balcomb:	79.75
J. Grant:	38.25
B. Richman:	58.25
M. Miller:	32.25
J. Carroll:	21.5
R. Rynniewicz:	16.75

38) Complainant's child was born on August 20, 1998. Complainant visited Entrada several times to show off her baby. (Testimony of Complainant, Ritchie)

39) Prior to August 1, 1998, Carroll, Grant and Rynniewicz left Entrada's employ. Between August 16 and 31, 1998, Entrada's seven housekeepers worked the following hours, for a total of 414.75 hours:

L. Knox:	61.75
K. Ford:	85.25
K. Sibert:	73.75
J. Price:	75.25
R. Balcomb:	40.5
B. Richman:	52.25
M. Miller:	26

40) Prior to September 1, 1998, Balcomb, Miller, and Richman left Entrada's employ. Between September 1 and 15, 1998, Entrada employed one new housekeeper – Korissa Garfield, whose first day of work was September 15, 1998. Garfield was hired on an as-needed basis. In the same time period, Entrada's five housekeepers worked the fol-

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[10] This figure was reached at by dividing 191 (the number of days in the period of time beginning January 17, 1998 and ending July 26, 1998) by 7 to determine the number of weeks worked by Complainant, then dividing 27.3 (the number of weeks worked by Complainant) into 627.5 (the total number of hours worked by Complainant).

lowing hours, for a total of 239.75 hours:

L. Knox: 13.5

K. Ford: 62.25

K. Sibert: 92.75

J. Price: 65

K. Garfield: 6.25

41) Prior to September 16, 1998, Knox left Entrada's employ. Some time prior to that, Sibert had replaced Knox as housekeeping supervisor. As housekeeping supervisor, he was paid more than Entrada's housekeepers. Between September 16 and 30, 1998, Entrada employed one new housekeeper – Cristina Crain.[11] In the same time period, Entrada's five housekeepers worked the following hours, for a total of 245.25 hours:

K. Ford: 62.25

K. Sibert: 94.25

J. Price: 19

K. Garfield: 30.25

C. Crain: 59.5

42) Garfield's last day of work was September 25, 1998. She worked September 16, 17, 22, 23, 24, and 25, 1998

43) Crain started work on September 17, 1998. She was hired as an "on-call" employee who telephoned Respondent each day to see if work was available. She worked September 17-23 and September 25-30, 1998. From September 25 to September 30, she worked the following hours: September 25 – 5 hours; September 26 – 5 hours, September 27 – 5.5 hours, September 28 – 3.5 hours, September 29 – 4 hours, September 30 – 4 hours, for a total of 27 hours. Complainant was available to work these hours.

44) September 20, 1998, was Price's last day of work.

45) Complainant received no income during the period of her leave, which placed an additional financial stress on her family.

46) On September 21, 1998, Complainant and her husband received a 72-hour eviction notice from their landlord, based on their failure to pay rent, which was due on September 1, 1998. In the same period of time, their electricity was almost shut off. Complainant and her husband called several churches to inquire about financial assistance and eventually got rent assistance from "AFS." There was no evidence presented regarding the amount of rent paid by Complainant and her husband.

47) On September 24, 1998, Complainant visited the office of Dr. Weeks, who had cared for her during her pregnancy and delivery. Complainant was unable to see Dr. Weeks, but told his nurse that she needed to go back to work. Dr. Weeks' nurse told her it

[11] Crain has since married and identified herself as "Christina Marie Crain Delong" during the hearing. To avoid confusion, this Order refers to her by Crain, her name at the time of the alleged discrimination.

was all right for her to return to work. Complainant felt she needed to go back to work at this time because of the financial needs of her family.

48) Later in the day on September 24, 1998, Complainant called Ritchie and told him she was ready to come back to work. Ritchie told her to report back to work on September 26, a Saturday. Ritchie did not ask Complainant to provide a medical release on this or any subsequent occasion.

49) When Complainant told Ritchie that she was ready to come back to work, she anticipated and expected that she would be given the same number of hours she had averaged before going on leave, which she believed was 25 to 30 hours per week.

50) On September 24, Ritchie did not have specific work time commitments to Respondent's other housekeepers.

51) On September 26, Ritchie phoned Complainant and told her not to come to work because he had enough housekeepers for the day.

52) On September 29, Complainant called Ritchie again and asked about work. He told her that business was slow, that he would use her on an as-needed basis, and that he would not take hours away from Siebert and Ford. By this time, Complainant was aware that another housekeeper besides Siebert and Ford was working who had been hired after she went on leave.

53) In September 1998, Ritchie knew that Complainant and her husband had six children, that they needed money, and that any hours assigned to Complainant or her husband would help them.

54) Complainant completed and filed an application for unemployment benefits on October 5, 1998.

55) September 20, 1998, was Price's last day of work. On October 10, 1998, Entrada began offering Complainant hours of housekeeping work. Between October 10 and 15, 1998, Complainant worked 4.5 hours on October 10 and 5.75 hours on October 11, for a total of 10.25 hours. In the same time period, Entrada's other three housekeepers worked the following hours, for a total of 151.75 hours:

K. Ford: 44.75

K. Sibert: 80.0

C. Crain: 16.75

56) Crain's last day of work for Entrada was October 7, 1998. Between October 1 and 7, 1998, Crain worked the following schedule: October 2 – 4.5 hours, October 3 – 4.25 hours, October 4 – 3.75 hours, October 7 – 4.25 hours. Complainant was available to work these hours.

57) Between October 16 and 31, 1998, Complainant worked 5 hours on October 17 and 2.75 hours on October 18, for a total of 7.75 hours. In the same

time period, Entrada's two other housekeepers worked the following hours, for a total of 123.5 hours:

K. Ford: 45

K. Sibert: 70.75

58) If Complainant had not taken leave, her hours would still have been reduced at the point in time when she was restored to work for the reason that Sibert and Ford were still employed by Respondent and they had been working more hours than Complainant at the time Complainant commenced her parental leave.

59) Had Complainant not taken family leave, Respondent would have offered her at least some hours of work beginning September 25, 1998, and throughout the period ending October 7, 1998.

60) Complainant would have worked an additional 43.75 hours if she had been assigned the work that Crain performed on September 25-30, October 2-4, and October 7, 1998. Complainant would have earned $262.50 in gross wages for this work. This would have enabled Complainant and her husband to pay some, but not all, of their outstanding bills.

61) Between September 24 and October 20, 1998, Complainant and her family were under considerable financial stress. Complainant was very worried and scared, and experienced considerable stress because of the lack of hours Ritchie scheduled her to work at Entrada. During this time period, Complainant cried on a number of nights because of her stress, worry and fear. Because of that stress and the financial needs of her family, Complainant began looking for other work after she started back to work for Entrada.[12] On October 20, 1998, Complainant was hired as a housekeeper at the Inn of the Seventh Mountain, working 40 hours per week. Complainant actually started work at the Inn of the Seventh Mountain on October 23, 1998.

62) During her leave from Entrada, Complainant had reserved childcare for her baby at the Growing Tree, a local child care facility. She lost her reservation because she was unable to give the Growing Tree a definite date when she could bring the baby in because of her uncertainty as to when she would be returning to work at Entrada and inability to pay their fee. There was no evidence presented regarding the amount of the fee.

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[12] Complainant did not testify as to the specific date that she began actively seeking other employment. However, Exhibit A-10, which is the "Work Search Record" Complainant completed for the Employment Department after filing her claim for unemployment benefits, shows that she first began searching for other employment on October 15, when she used the Employment Department's computer to look for work and that she applied for two jobs, including a housekeeper position at the Inn of the Seventh Mountain, on October 16.

63) Between November 1 and 15, 1998, Ford and Sibert were Entrada's only housekeepers. In that time period, they worked the following hours, for a total of 98.5 hours:

K. Ford: 44.75

K. Sibert: 53.75

64) Between November 16 and 31, 1998, Ford and Sibert were Entrada's only housekeepers. In that time period, they worked the following hours, for a total of 132.75 hours:

K. Ford: 54

K. Sibert: 78.75

65) Respondent did not hire another housekeeper until December 9, 1998.

66) No evidence was presented concerning the availability of work at Respondent's other Bend facility at material times, except for the fact that housekeepers employed at Entrada sometimes worked there.

67) Respondent had no written policies regarding leaves of absence during Complainant's employment with Respondent. Respondent's general practice was that anyone who left was welcome to come back.

68) Jeffrey Carlson's testimony concerning the operation and procedures of BOLI's mail room was credible in its entirety.

69) Richard Buxton's testimony was not entirely credible. As Complainant's husband, he had an inherent bias. He demonstrated a tendency to exaggerate by testifying that Complainant had worked 37 to 38 hours per week before beginning her leave, and that he and Complainant could have paid their bills, had she worked her regular hours after September 24. In contrast, Respondent's time records, which the forum has found reliable, established that Complainant had worked only 23 hours per week before beginning her leave, and Complainant herself testified that all their bills could not have been paid, even if Complainant had worked her former hours after September 24. His memory was not totally accurate as to dates, as shown by his testimony that Complainant returned to work for Entrada before she applied for unemployment benefits and did not work for Entrada after she filed for unemployment benefits. Consequently, the forum has relied on his testimony only where it is not controverted by other credible evidence.

70) Doug Ritchie's testimony was not entirely credible. He did not contemporaneously document any of his conversations with Complainant. His testimony that Complainant did not contact him to ask about returning to work before October 3, and that he immediately offered Complainant work on October 4, which she declined, is simply not believable. To begin with, his testimony on this point is contrary to the credible testimony of Complainant and her husband. Secondly, it makes no sense that he would offer Crain's October 4

hours to Complainant, but not Crain's October 7 hours. Finally, in a letter to the Agency dated November 10, 1998, in which Ritchie initially responded to Complainant's complaint, Ritchie made no mention of scheduling her to work on October 4. Ritchie's claim that he had problems with Complainant's job performance was likewise was not supported by any evidence other than his own testimony, and was partially controverted by Ritchie's own testimony that Complainant was a "fine employee" and his written statement in the same November 10, 1998 letter to the Agency that he would "love to put her back to work." In addition, Ritchie testified that he had given Kim Ford a raise because she was one of Respondent's better employees, but Ford testified credibly that she was never given a raise. The forum has discredited Ritchie's testimony concerning his testimony that Complainant never asked him to return to work before October 3 and that he scheduled her to work on October 4. The forum has also discredited Ritchie's testimony concerning Complainant's alleged performance problems. The forum has credited the remainder of Ritchie's testimony except where it is controverted by other credible evidence, such as Complainant's calendar.

71) Complainant's testimony was not entirely credible. Like her husband, she showed a tendency to exaggerate. She testified that she sometimes showed up as early as "6:30 to 7:30 a.m." to do laundry, contrary to her time cards and the contemporaneous entries on her calendar. She testified she believed she was a "supervisor" because she sometimes assigned rooms, did laundry, and trained new employees when the housekeeping supervisor was absent, and told the Employment Department in her application for unemployment benefits that she was an "assistant supervisor." However, she also testified that no one ever told her she was a supervisor and that she never got a raise indicating she had been promoted, and her husband testified she was not a supervisor. Her estimate that she worked an average of 25 to 30 hours per week, with the average being closer to 30, was substantially more than the 23 hours per week she actually averaged. Her answers were non-responsive to a number of questions asked on both direct and cross-examination, and she did not seem to understand the substance of a number of questions put to her. On cross-examination, she was defensive, argumentative, and had to be instructed by the ALJ to listen carefully and respond directly to the questions asked of her. On the other hand, her testimony regarding the dates that she contacted Ritchie asking to return to work after her doctor's appointment on September 24 was supported by contemporaneous entries on her calendar that the forum has found to be reliable. The forum has credited Complainant's testimony except where it conflicts with her calendar entries and Re-

spondent's time cards, and has credited her calendar entries in full.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was an Oregon employer that utilized the personal services of 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in both 1997 and 1998.

2) Complainant was employed by Respondent at the Best Western Entrada Lodge from January 17, 1998, through October 19, 1998.

3) Complainant learned she was pregnant on January 17, 1998.

4) On July 27, 1998, Complainant left work due to her pregnancy, based on the advice of her physician. Complainant did not work again for Respondent prior to the birth of her child. More than 180 days elapsed between January 17, 1998, and July 27, 1998. Prior to July 27, Complainant worked an average of 23 hours per week for Respondent.

5) Complainant's child was born on August 20, 1998. She did not immediately return to work, but remained on leave.

6) During Complainant's absence, Respondent hired two housekeepers, Korissa Garfield and Christina Crain, on an as-needed basis to perform work that Complainant would have performed, had she not been off work on parental leave.[13]

7) On September 24, 1998, Complainant called Douglas Ritchie, Respondent's general manager, and told him she was ready to come back to work. Complainant's position as housekeeper still existed at that time.

8) Complainant anticipated being scheduled for 25 to 30 hours of work per week upon her return to work.

9) Respondent did not offer any work hours to Complainant from September 25 through October 7, 1998. During that period, Garfield and Crain worked a total of 27 hours that Complainant was available to work. Had Complainant not taken family leave, Respondent would have offered her at least some hours of work beginning September 25, 1998, and throughout that period.

10) Complainant suffered $262.50 in lost gross wages as a result of Respondent's failure to restore her to her housekeeping position until October 10, 1998.

11) Complainant experienced mental suffering as a result of Respondent's failure to restore her to her housekeeping position between September 24, 1998, and October 10, 1998.

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[13] The forum refers to Complainant's leave after the birth of her child on August 20, 1998 as "parental" leave, noting that "parental" leave is a particular type of "family" leave. *See former* OAR 839-009-0200(1).

12) Complainant left Respondent's employment on October 20, 1998, to take a full-time job as a housekeeper, earning more than she would have earned had she continued to work for Respondent. She left because of financial hardship that she and her family were experiencing and additional financial stress she anticipated based on Respondent's failure to schedule her to work 25 to 30 hours per week. Some of this financial hardship was caused by her loss of wages that she would have earned between September 25 and October 7, 1998, had Respondent restored her to her former position upon her request. A significant part of the financial hardship was due to the fact that Complainant earned no wages during her leave.

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."

Respondent was a "covered employer." *Former* ORS 659.470(1); *former* ORS 659.472(1).

2) The actions and motivations of Douglas Ritchie, Respondent's general manager, are properly imputed to Respondent.

3) *Former* ORS 659.474(1) provided in pertinent part:

> "All 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: * * * (b) An employee who worked an average of fewer than 25 hours per week for the covered employer during the 180 days immediately preceding the date on which the family leave would commence."

Former OAR 839-009-0210(2)(a) further explained that "Eligible employee" means:

> "(a) For the purpose of parental leave, an employee who has worked for a covered employer for at least 180 calendar days immediately preceding the date on which family leave begins.
>
> "(b) For all other leave purposes, an employee who has worked for a covered employer for an average of at least 25 hours per week for the 180 calendar days immediately preceding the date on which family leave begins."

Former OAR 839-009-0200 provided in pertinent part:

> "The 1995 Oregon Family Leave Act, hereinafter referred to as OFLA, provides leave:
>
> "(1) To care for an employee's newborn * * * child.

These rules refer to this type of leave as parental leave.

"(2) For an employee's own serious health condition or to care for a family member with a serious health condition, including pregnancy related conditions. These rules refer to this type of leave as serious health condition leave."

Complainant worked at least 180 calendar days immediately preceding July 27, 1998, the date on which she stopped working because of her pregnancy-related serious health condition leave began on July 27, 1998, but did not work an average of at least 25 hours per week for Respondent immediately prior to that date and was therefore not eligible for serious health condition leave. Complainant did work for Respondent at least 180 calendar days immediately preceding August 20, 1998, the date her parental leave commenced, and was an "eligible employee" for parental leave.

4) *Former* ORS 659.476(1)(a) provided:

"(1) Family leave under ORS 659.470 to 659.494 may be taken by an eligible employee for any of the following purposes:

"(a) To care for an infant * * * ."

Former ORS 659.478 provided, 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."

Complainant was entitled to take up to 12 weeks of family leave to care for her infant.

5) *Former* ORS 659.484 provided, in pertinent part:

"(1) After returning to work after taking family leave under the provisions of ORS 659.470 to 659.494, an eligible employee is entitled to be restored to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave. If the position held by the employee at the time family leave commenced no longer exists, the employee is entitled to be restored to any available equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. If any equivalent position is not available at the job site of the employee's former position, the employee may be offered an equivalent position at a job site located within 20 miles of the job site of the employee's former position.

"* * * * *

"(3) This section does not entitle any employee to:

"* * * * *

> "(b) Any right, benefit or position of employment other than the rights, benefits and position that the employee would have been entitled to had the employee not taken the family leave."

Former OAR 839-009-0270 provided, in pertinent part:

> "(1) The employer must return the employee to the employee's former position if the job still exists even if it has been filled during the employee's family leave unless the employee would have been bumped or displaced if the employee had not taken leave. The former position is the position held by the employee when family leave began, regardless of whether the job has been renamed or reclassified. * * *
>
> "(2) If the position held by the employee at the time family leave began has in fact been eliminated and not merely renamed or reclassified, the employer must restore the employee to any available, equivalent position.
>
> "(a) An available position is a position which is vacant or not permanently filled.
>
> "(b) An equivalent position is a position which is the same as the former position in as many aspects as possible. If an equivalent position is not available at the employee's former job site the employee may be restored to an equivalent position within 20 miles of the former job site."
>
> "* * * * *
>
> (10) An employer may not use the provisions of this section as a subterfuge to avoid the employer's responsibilities under OFLA."

Complainant took family leave from July 27, 1998, to September 24, 1998, on which date she asked Respondent to be restored to her job. Complainant's position as housekeeper still existed and Respondent did not restore her to work until October 10, 1998. Respondent violated *former* ORS 659.484 by failing to restore Complainant to her position before October 10, 1998.

6) *Former* ORS 659.492 (1) provided:

> "(1) "A covered employer who denies family leave to an eligible employee in the manner required by ORS 659.470 to 659.494 commits an unlawful employment practice."

Respondent committed an unlawful employment practice in violation of *former* ORS 659.492(1) by failing to restore Complainant to the position of employment she held when her leave commenced. Respondent did not constructively discharge Complainant.

7) *Former* ORS 659.492(2) provided:

> "(2) Any employee claiming to be aggrieved by a violation of ORS 659.470 to 659.494

> may file a complaint with the Commissioner of the Bureau of Labor and Industries in the manner provided by ORS 659.040. The Commissioner of the Bureau of Labor and Industries shall enforce the provisions of ORS 659.470 to 659.494 in the manner provided in ORS 659.010 to 659.110 for the enforcement of other unlawful employment practices."

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 659A.183; ORS 659A.820(1); ORS 659A.835; ORS 659A.845, ORS 659A.850.

OPINION

INTRODUCTION

In its Specific Charges, the Agency alleged that Respondent violated Oregon's Family Leave Act by: (1) failing to restore Complainant to the position she held at the time she commenced her family leave, and (2) constructively discharging Complainant. The Agency sought $1,000 in back pay and $15,000 mental suffering damages to compensate Complainant for Respondent's unlawful acts.

FAILURE TO RESTORE COMPLAINANT TO THE POSITION SHE HELD AT THE TIME SHE COMMENCED HER PARENTAL LEAVE

To establish a prima facie case that an employer committed an unlawful employment practice by failing to restore an employee to the position she held at the time she commenced her family/parental leave, the agency must prove:

> 1. The employer was a "covered employer" as defined in *former* ORS 659.470(1) and *former* ORS 659.472;
>
> 2. The employee was an "eligible employee" for family/parental leave – *i.e*., she was employed by a "covered employer" and worked for the employer at least 180 calendar days immediately preceding the date on which her parental leave began [*former* ORS 659.474; *former* OAR 839-009-0210(2)(a)];
>
> 3. The employee took up to 12 weeks of family/parental leave [*former* ORS 659.476(1)(a), ORS 659.478];
>
> 4. The employee attempted to return to work after taking family/parental leave and was denied or refused restoration to the position of employment held by the employee when the leave commenced [*former* ORS 659.484(1); *former* OAR 839-009-0270(1) & (2)].

The first and third elements of the Agency's prima facie case are undisputed.

The second element, although undisputed regarding whether or not Complainant had worked 180 days for Respondent prior to taking parental leave, requires additional discussion because of

the particular circumstances of Complainant's leave. When Complainant left work on July 27, she had worked for Respondent for 180 days "immediately preceding" her leave, but only worked an average of 23 hours per week, two hours less than the minimum average of 25 hours per week required for eligibility for the purpose of taking a "serious health condition" leave due to her pregnancy related condition. *See former* OAR 839-009-0210(2)(b). Eligibility for parental leave, on the other hand, requires only that the employee worked for the employer at least 180 calendar days immediately preceding the date on which her parental leave began. There was no evidence presented showing that Complainant's employment relationship with Respondent was in any way severed between July 27 and August 20, 1998. In contrast, Ritchie's testimony was that he expected Complainant to return to her housekeeping duties after her leave. Consequently, because Complainant never stopped being Respondent's employee, the forum concludes that Complainant satisfied the requirement of working for Respondent "at least 180 calendar days immediately preceding" August 20, 1998 and was an "eligible employee" for parental leave as defined in *former* ORS 659.474(2) and *former* OAR 839-009-0210(2)(a). This satisfies the second element of the Agency's prima facie case.

COMPLAINANT WAS DENIED RESTORATION TO THE POSITION OF EMPLOYMENT SHE HELD WHEN HER LEAVE COMMENCED

The original Final Order determined that Crain and Garfield had been hired as "replacement workers" for Complainant under *former* ORS 659.484(1) and that Respondent had violated OFLA by failing to give Complainant the opportunity to work all the hours that her "replacement worker[s] would have otherwise been scheduled to work." On appeal, the Oregon Court of Appeals reversed and remanded the Order for reconsideration, holding that the Commissioner's Order erroneously focused "on the status of the employees who were hired while complainant was on family leave." *Entrada Lodge v. Bureau of Labor and Industries,* 184 Or App 315, 56 P3d 444, 446 (2002). The Court held that "the determination of whether an employee has violated the reinstatement right of an employee under [OFLA] requires a determination of the employment advantages that the employee would have enjoyed with the employer if she had not taken family leave. Those advantages must then be compared with the advantages that the employee actually enjoyed on her return to employment. If the employment advantages enjoyed by the employee on her return fall short of those that she would have enjoyed had she not taken family leave, then the employer has failed to restore the employee to her employment position as required by [OFLA]." *Id.* at 446-447.

The forum revises its evaluation of the fourth element of the Agency's prima facie case to conform to the test articulated by the Court. Complainant's credible testimony, corroborated by her calendar notes, established that Complainant attempted to return to work on September 24, 1998, when she told Ritchie that she was ready to return to work. As stated above, whether or not Respondent failed to restore Complainant to her employment position requires a determination of the employment advantages that Complainant would have enjoyed with Respondent had she not taken family leave, and a comparison of those advantages with the advantages that Complainant actually enjoyed upon her return to employment. In this case, the "advantages" that the forum examines are limited to the number of hours Complainant was scheduled to work, as there were no other benefits to Complainant's job.

Complainant's work hours varied considerably prior to her parental leave. She began work for Respondent on January 17, 1998. Between January 17 and February 15, Complainant worked 88 hours, or 27% of the total hours worked by housekeepers. Only Laurie Knox, who worked 99.5 hours, worked more hours than Complainant. Between February 16 and May 31, Complainant worked 378.25 hours, or 23% of the total hours worked by housekeepers. Only Knox, who worked 435.5 hours, worked more hours than Complainant. Kimberly Ford, who was hired in early March, worked 310 hours during the same time period. Between June 1 and July 15, Complainant worked 142 hours, or 12.4% of the total hours worked by housekeepers. Ford worked 191 hours, or 16.6% of the total hours worked by housekeepers. Knox worked 194.25 hours, or 16.9% of the total hours worked by housekeepers. Complainant left on parental leave partway through the next pay period, and the forum does not consider her hours worked during that time period as representative of her "employment position" at the time of her parental leave. Overall, between January 15 and July 15, 1998, Complainant worked a total of 608.25 hours out of a possible 3,099.25 hours, or 19.6% of total hours available for housekeepers.

When Complainant left on parental leave, Respondent considered her a "fine" employee and planned to put her back to work when her leave ended. Complainant asked to be returned to work on September 24. At that time, eight of the 10 housekeepers (excluding Complainant) who were employed when Complainant began her leave had left Respondent's employ. The remaining two were Ford and Kevin Sibert, housekeeper supervisor. In addition, Respondent had hired Korissa Garfield on September 15 and Cristina Crain on September 17, and Josh Price, another housekeeping employee, had just left Respondent's employ on September 20. Garfield was hired to perform work as needed and

Crain was hired with the instruction to call in each day to see if there was work for her. Garfield's last day of work was September 25, leaving only Sibert, Ford, and Crain as housekeeping employees between September 26 and October 10. Crain's last day was October 7.

Under these circumstances, the forum considers whether Respondent's failure to offer Complainant any work hours from September 25 until October 10, 1998, constituted a failure to restore Complainant to the housekeeper position that she held before taking family leave. Again, the forum focuses on whether Complainant would have been limited to these work hours, had she not taken family leave.

At the time Complainant began her family leave, she had worked continuously for Respondent from January 17 to July 26, 1998. Although her work hours varied, as did those of every housekeeping employee, she consistently worked between 12% and 27% of total available housekeeping hours. She was considered a "fine" employee at the time she began her leave and there is no credible evidence that her hours would have been cut for any reason other than Respondent's seasonal decline in business.

Had Complainant not taken family leave, by September 24 she would have been Respondent's housekeeping employee with the longest continuous service. She would have been available for work on September 15 and 17, the dates Respondent hired Garfield and Crain, two employees who were hired to work on a day-to-day basis, with no expectation of a specific number of work hours or a specific work schedule. She would have been available for work after September 20, Price's last day of work. The forum infers that Garfield and Crain were hired to perform available work other than the work that Ford, Sibert, and Price performed or were available to perform. Had Complainant not taken family leave, she would have been available to perform this work and Respondent would have had no need to hire both Garfield and Crain.[14]

As stated above in the findings of fact and ultimate findings of fact, the forum has found that had Complainant not taken family leave, Respondent would have offered her at least some hours of work beginning September 25, 1998, and throughout the period ending October 7, 1998. The forum has so found based on an inference from the following facts: Complainant had consistently worked between 12 percent and 27 percent of total available housekeeping hours; she was considered a "fine" employee at

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[14] Crain and Garfield both worked on September 17, 22, 23, and 25. September 25 is the only day on which Garfield and Crain both worked after Complainant asked to return to work. Had Complainant not taken family leave, she would have been available to work one of the shifts worked by Crain or Garfield.

the time she began her leave; there is no credible evidence that her hours would have been cut for any reason other than Respondent's seasonal decline in business; and had she not taken family leave, she would have been available to perform work other than the work that Ford, Sibert, and Price performed or were available to perform, leaving Respondent with no need to hire both Garfield and Crain.

Thus, the key "employment advantage" that Complainant would have enjoyed with Respondent had she not taken family leave is the opportunity to be offered some hours of work on September 25, 1998, and throughout the period ending October 7, 1998. Respondent, however, did not offer her any hours of work during that period. Consequently, the employment advantages enjoyed by Complainant on her return fell short of those that she would have enjoyed had she not taken family leave.

For these reasons, the forum concludes that in failing to offer Complainant any hours of work from September 25 to October 10, 1998, Respondent failed to restore her to the position of employment she held when her leave commenced. That failure violated Complainant's rights under *former* ORS 659.484(1).

RESPONDENT'S DEFENSES

Once the Agency has established its prima facie case, there is a rebuttable presumption that Respondent refused to give effect to Complainant's entitlement to job restoration. *In the Matter of TJX Companies, Inc*., 19 BOLI 97, 101 (1999). No motive or intent need be proved. *Cf. In the Matter of Roseburg Forest Products*, 20 BOLI 8, 28 (2000). Respondent may negate that presumption by coming forward with evidence of one or more of the following:

> 1. The position of employment held by the employee when the leave commenced no longer existed when the employee attempted to return to work; and no available equivalent position existed [ORS 659.484(1); OAR 839-009-0270(1) & (2)];
>
> 2. The employee gave unequivocal notice of intent not to return to work [OAR 839-009-0270(8)];
>
> 3. The employee would have been bumped or displaced if the employee had not taken leave [OAR 839-009-0270(1)].

Respondent presented no evidence in support of "2" or "3," but argued that evidence it presented established that Complainant's position no longer existed when she attempted to return to work and no available equivalent position existed.

In this case, Respondent's primary proffered defense relates to the undisputed temporal nature of its housekeeping positions. It runs something like this: (1) All housekeeping positions are temporary and all housekeepers work on an as-needed basis, subject to hours that fluctuate based on oc-

cupancy rates; (2) Because housekeeping positions are temporary, there are no distinctive, identifiable positions – merely an as-needed, variable amount of work to be performed; (3) Complainant was a housekeeper and therefore did not occupy an identifiable position; (4) Because Complainant did not occupy an identifiable position, it is impossible that her "former" position could still exist for the reason that she never had a "position" to start with; (5) Because Complainant did not occupy an identifiable position, Respondent could not have filled her position, during her family leave, with a replacement worker; (6) Because Complainant did not occupy an identifiable position, Respondent was not obligated to schedule Complainant, after her request to return to work, for any additional hours other than the as-needed hours that she actually worked.

The forum disagrees with Respondent's contentions. Those contentions rest on the notion that the statutory term "position," as used in *former* ORS 659.484, requires the level of specificity exhibited in, for instance, jobs with some public-sector employers, in which each "position" is identified by a unique multi-digit number or similar identifier. The forum sees no indication from the statutory text or context that the legislature intended the term "position" to incorporate such a requirement. OFLA applies to every eligible employee of every "covered employer" in the State of Oregon. An employee is eligible for parental leave if he or she worked for the employer at least 180 calendar days immediately preceding the date on which her parental leave began. *Former* ORS 659.474. "Covered employers" are 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." *Former* ORS 659.472(1). That language shows that the legislature intended OFLA to have extremely broad coverage. No language in OFLA purports to restrict that coverage to employers that have rigidly and uniquely identified "positions" in the sense that Respondent's argument posits. Rather, OFLA appears to use "position" in its ordinary, nontechnical sense in this context to mean a job. *See Webster's Third New Int'l Dictionary* 1769 (unabridged ed 1993) (defining "position," in this context, as "the group of tasks and responsibilities making up the duties of an employee").

The "group of tasks and responsibilities making up [complainant's] duties" when she began her leave were housekeeping duties. The key "employment advantage" Complainant held before her family leave was the routine assignment of work hours within a range of 12 to 27 percent of total available housekeeping hours. To state the point another way, Complainant worked housekeeping hours other than those worked by other housekeepers

who worked for Respondent at the time she began her family leave. In this context, her "position" should be viewed no more technically than that.

As of September 25, 1998, when Complainant was ready to return to work, Respondent had hours of housekeeping work that were not being assigned to those other workers, who had been reduced by attrition to Ford and Sibert. Accordingly, at that time, Respondent had at least one additional "position of employment" in existence. *Former* ORS 659.484(1) entitled Complainant to be restored to that position "without regard to whether the employer filled the position with a replacement worker during the period of family leave." Therefore, whether or not Crain or Garfield could be considered to be a "replacement worker" for Complainant Donovan — and this forum explicitly declines to decide that issue — Complainant was entitled to be restored to that position. As stated above, Respondent failed to restore her to that position from September 25 until October 10, 1998. That failure violated her rights under the statute. Respondent presented three other defenses that merit minimal discussion: first, that Complainant never presented a medical release to return to work; second, that Complainant was given all the work that was available; and third, that Complainant did not attempt to return to work until October 3 and turned down Ritchie's offer of work on October 4. None of these defenses have any merit. First, the medical release is a red herring, in that it is undisputed that Ritchie never asked Complainant to present such a release.[15] Second, the argument that Complainant was given all available work has already been resolved in favor of the Agency. Third, based on an assessment of Ritchie's credibility, the forum has rejected Ritchie's claim that Complainant failed to contact him about work until October 3 and that she subsequently turned down his offer for work on October 4.

BACK PAY

The Agency sought $1,000 in back pay in the Specific Charges. Had Complainant been restored to her pre-family leave employment advantages after she asked to come back to work, she would have started working on September 25, 1998. The forum determines the wages she would have earned, had she been restored for her former employment advantages on September 25, by looking at the wages Crain earned from September 25-October 7. The forum uses Crain's hours as a measuring stick instead of Garfield's for the reason that Crain was employed continuously through that period of time. The forum infers that, at a minimum, had Complainant not taken family leave, she would have worked the hours worked by Crain because Respondent would have had no need to hire Crain and Complain-

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[15] *See former* OAR 839-009-0270(5).

ant wanted to work as many hours as she could. [16] This inference is supported by the fact that, after October 7, 1998, Ritchie did not use Crain again and scheduled Complainant for all the hours not worked by Ford or Sibert. Those gross wages amount to $262.50, calculated at 43.75 hours x $6 per hour.

CONSTRUCTIVE DISCHARGE

A prima facie case of constructive discharge resulting from an unlawful employment practice consists of the following elements:

> (1) The respondent must have intentionally created or intentionally maintained discriminatory working condition(s) 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 that complainant was certain, or substantially certain, to leave employment as a result of those working conditions; and
>
> (4) The complainant did leave the employment as a result of those working conditions.

In the Matter of James Breslin, 16 BOLI 200, 217 (1997), *aff'd without opinion, Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999).

A. Did Respondent intentionally create or intentionally maintain discriminatory working condition(s) related to Complainant's protected class status?

Complainant's protected class was that of a worker returning from family leave who was entitled to be restored to her former position of housekeeper, which included being scheduled for any hours that a "replacement worker" would otherwise perform. The evidence shows that Ritchie intentionally failed to schedule Complainant for the hours that Garfield and Crain worked be-

[16] The Agency implied, during the presentation of its case, that Complainant should have been entitled to a prorated share of Ford's and Sibert's hours after she attempted to return to work. The comparison to Sibert is not appropriate because he occupied a different position than Complainant. If the evidence had established an objective, quantifiable methodology consistently used by Ritchie to determine the specific number of hours he assigned individual housekeepers to work *and* the Agency proved that use of that methodology would have resulted in Complainant being scheduled for some of Ford's hours after October 7, the Agency's argument may have prevailed. Absent such evidence, the forum will not speculate as to what portion of Ford's hours, if any, Complainant would have been scheduled to work, had she not taken family leave.

tween September 25 and October 7, 1998, in violation of ORS 659.484(1). Ritchie's intentional and discriminatory failure to schedule Complainant for any hours between September 25 and October 7 satisfies the first element of the Agency's prima facie case.

B. Were the discriminatory working conditions so intolerable that a reasonable person in the Complainant's position would have resigned because of them?

The forum has found that Complainant's discriminatory working conditions ended on October 7, 1998, Crain's last day of work. After October 7, Complainant was scheduled to work but the number of hours clashed with her expectation that she would be assigned to work 25 to 30 hours per week. However, the low number of hours that she worked was directly attributable to Respondent's low occupancy rate, not unlawful discrimination. Because of her economic need, she began seeking alternative employment on October 15, a week *after* her discriminatory working conditions had ceased to exist. On October 20, she effectively resigned from employment with Respondent by accepting a higher paying, fulltime job.

Based on the fact that discriminatory working conditions no longer existed when Complainant made her decision to seek alternative employment or when she resigned, the Agency has failed to satisfy the second element of its prima facie case. Consequently, the forum need not consider whether the third and fourth elements are satisfied, and the Agency's claim of constructive discharge must fail.

MENTAL SUFFERING

The Agency sought an award of $15,000 to compensate Complainant for the mental suffering she experienced due to Respondent's unlawful discrimination. The forum has concluded that Respondent unlawfully failed to restore Complainant to her prior position by failing to give Complainant the opportunity to work any hours between September 25 and October 7, 1998. Therefore, Complainant is entitled to damages to compensate her for any mental suffering she experienced as a result of Respondent's failure to restore her as required by law.

In determining mental distress awards, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. *In the Matter of James Breslin*, 16 BOLI 200, 219 (1997), *aff'd without opinion*, *Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999). 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 Sears, Roebuck and Company, 18 BOLI 47, 77 (1999).

In this case, Complainant attempted to return to work on September 24, 1998, after taking family leave. At the time, her family was experiencing acute financial distress, largely as a result of her lack of earnings while on family leave. This financial situation, which caused Complainant and her husband to experience considerable stress, is the primary reason she attempted to return to work on September 24, several days earlier than planned. Although Respondent is not responsible for Complainant's distress caused by her lack of earnings during her family leave, this forum has held that that "employers must take employees as they find them." *In the Matter of Loyal Order of Moose*, 13 BOLI 1, 12-13 (1994); *In the Matter of Allied Computerized Credit & Collections*, 9 BOLI 206, 217-18 (1991). Here, Complainant was already experiencing considerable stress at the time of Respondent's violation of *former* ORS 659.484(1). However, Complainant and her husband credibly testified that Complainant experienced a heightened stress level between September 25 and October 20, 1998, which manifested itself in the form of Complainant being very worried and scared, and crying frequently because Ritchie had not scheduled her for any hours for the first two and one-half weeks after she attempted to return to work, further exacerbating her family's financial distress.

This forum has previously held that financial insecurity and anxiety caused by an unlawful employment practice is compensable. *In the Matter of Katari, Inc.*, 16 BOLI 149, 161 (1997), *aff'd without opinion, Katari, Inc. v. Bureau of Labor and Industries*, 154 Or App 192, 957 P2d 1231, *rev den* 327 Or 583 (1998). In *Katari*, the commissioner awarded Complainant $15,000 in mental suffering damages based on circumstances equivalent to what Complainant experienced in this case. Accordingly, the forum concludes that the $15,000 sought by the Agency to compensate Complainant for her mental suffering is an appropriate award. In making this award, the forum is mindful that the Agency prayer for $15,000 was based on a failure to restore Complainant to her position, which was proven, and constructive discharge, which was not proven. However, the commissioner's authority to award monetary damages is only limited as to the total amount sought in the Specific Charges or subsequent amendments. *In the Matter of Kenneth Williams*, 14 BOLI 16, 26 (1995). For the reasons discussed, the forum finds that $15,000 is an appropriate award for Complainant's mental suffering for the violation found.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(4), and to eliminate the effects of Respondent's violation of *former* ORS 659.484(1) and *former* ORS 659.492(1), and in payment of the

damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **ENTRADA LODGE, INC**. to:

1) 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 Cheryl Donovan in the amount of**:[1]

a) FIFTEEN THOUSAND DOLLARS ($15,000.00), representing compensatory damages for mental suffering suffered by Cheryl **Donovan** as a result of Respondent's unlawful practices found herein, plus

b) TWO HUNDRED SIXTY-TWO DOLLARS AND FIFTY CENTS ($262.50), less lawful deductions, representing wages lost by Cheryl Donovan between September 25, 1998 and October 7, 1998, as a result of Respondent's unlawful practices found herein, plus

c) Interest at the legal rate on the sum of $262.50 from October 8, 1998, until paid, plus

d) Interest at the legal rate on the sum of $15,000 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 use of the Oregon Family Leave Act.

[1] On December 28, 2000, Respondent submitted a check to BOLI in the amount of $15,854.73, representing $15,000 in mental suffering damages, $262.50 in back pay, and accrued interest to date. That sum, less the 12% collection fee charged to BOLI by the Oregon Department of Revenue, is currently held in BOLI's trust account. Consequently, Respondent is not required by this Order to pay any additional sums.

In the Matter of

VENUS VINCENT, Keith Johnson, and Bernard Woodard

Case No. 26-02

Final Order of Commissioner Dan Gardner

Issued February 25, 2003

SYNOPSIS

North American Construction & Consulting, Inc. ("NACC") intentionally failed to pay the prevailing wage rate on two public works projects in violation of ORS 279.350(1) and the prime contractors on both projects paid the unpaid wages to NACC's workers on NACC's behalf. Venus Vincent, NACC's corporate president and secretary, and Keith Johnson, NACC's corporate vice president and construction manager, were responsible for NACC's failure to pay the prevailing wage rate. The Commissioner placed Vincent and Johnson on the list of contractors or subcontractors ineligible to re-

ceive any contract or subcontract for public works for three years. ORS 279.350(1) and (4), ORS 279.361(1) and (2); OAR 839-016-0033, OAR 839-016-0035, OAR 839-016-0040, OAR 839-016-0085.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 22, 2003, at the Eugene office of the Bureau of Labor and Industries, located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. Attorney at law Joyce Sobel appeared on behalf of Bernard Woodard ("Woodard"), who did not appear. Respondents Venus Vincent ("Vincent") and Keith Johnson ("Johnson") did not appear and were held in default.

The Agency called Tyrone Jones, Wage and Hour Division Compliance Specialist, as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-8 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-34, A-36 through A-40 (submitted prior to hearing), and A-41 through A-45 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On March 4, 2002, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in which it made the following charges against Respondents Woodard, Vincent, and Johnson, as well as Respondents North American Construction & Consulting, Inc. ("NACC"), and Magic Numbers Estimating, Inc:

> a) NACC was a subcontractor on the Sweet Home Justice Facility Project ("Sweet Home Project"), a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay five employees – Wayne Chaffin, Shane Harris, Jerry Johnson, Gary Elsemore, and Matthew Woodard -- the prevailing wage rate, intentionally failed to post the prevailing wage rates in a conspicuous and accessible place on the Sweet Home Project, and failed to file complete and accurate certified payroll reports for the work

it performed on the Sweet Home Project. The Agency sought a $40,000 civil penalty from NACC for these violations.

b) NACC was a subcontractor on the Deschutes County Health & Human Services Building project ("Deschutes Project"), a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay nine employees the prevailing wage rate, intentionally failed to post the prevailing wage rates in a conspicuous and accessible place on the Deschutes Project. The Agency sought a $42,000 civil penalty from NACC for these violations.

c) NACC failed to provide the Agency with records necessary to determine if the prevailing rate of wage was paid to its employees on the Sweet Home and Deschutes Projects. The Agency sought a $5,000 civil penalty from NACC for this alleged violation.

d) Respondents Woodard, Vincent, and Johnson were NACC's corporate officers or corporate agents responsible for NACC's intentional failure and refusal to pay the prevailing wage rate on the Sweet Home and Deschutes County projects.

e) The Agency asked that Respondents NACC, Magic Numbers Estimating, Inc., Woodard, Vincent, and Johnson and any firm, corporation, partnership or association in which they had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works ("List of Ineligibles") for a period of three years.

2) The Notice of Intent instructed Respondents that they were required to make a written request for a contested case hearing within 20 days of the date on which they received the Notice, if they wished to exercise their right to a hearing.

3) Respondents NACC and Magic Numbers Estimating, Inc. did not file an answer and request for hearing and the Wage and Hour Division issued a Final Order on Default against them.

4) Respondents Woodard, Vincent, and Johnson individually filed answers and requests for hearing on March 27, 2002, in which they denied all of the Agency's allegations.

5) The Agency filed a request for hearing with the Hearings Unit on May 8, 2002.

6) On October 9, 2002, the Hearings Unit served Respondents Woodard, Vincent, and Johnson with: a) a Notice of Hearing in Case Number 26-02 that set the hearing for January 22, 2003; 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 re-

garding the contested case hearing process; and d) a copy of the Notice of Intent.

7) On November 4, 2002, the ALJ mailed copies of the Notice of Hearing and its enclosures to Venus Vincent at her correct mailing address.

8) On November 4, 2002, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by January 8, 2003, and notified them of the possible sanctions for failure to comply with the case summary order.

9) The Agency filed its case summary on January 8, 2003. (Exhibit X-7)

10) Just prior to hearing on January 22, 2003, Joyce Sobel, attorney at law, filed a notice stating that she represented Respondent Woodard in this matter.

11) At the outset of the hearing, Respondents Vincent and Johnson did not appear. The ALJ waited 30 minutes before commencing the hearing and declared them to be in default. Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and counsel for Respondent Woodard of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) Prior to the Agency's opening statement, the Agency moved to dismiss the Notice of Intent against Bernard Woodard. Woodard's counsel did not object and the ALJ granted the motion. That ruling is affirmed.

13) On February 3, 2003, the ALJ issued a Proposed Order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On February 11, 2003, Respondents Vincent and Johnson filed exceptions. Respondents' exceptions become part of the record, but are not considered by the forum because of Respondents' default. *In the Matter of Dandelion Enterprises, Inc.,* 14 BOLI 133, 148 (1995).

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent NACC was an Oregon corporation engaged in the construction business.

2) At all times material herein, Respondent Venus Vincent was NACC's corporate president and secretary and Keith Johnson was NACC's vice president and construction manager.

3) At all times material herein, Johnson was responsible for the information on NACC's payroll.

4) At all times material herein, Vincent signed NACC's paychecks.

5) On February 2, 2000, the City of Sweet Home first advertised for bid the contract specifications on the Sweet Home Police Facility Project ("Sweet Home Project"). On March 13, 2000, the contract was awarded to Wayne Anderson Construction, Inc. ("Anderson Construction"), in the amount of $1,613,572. The Sweet Home Project was a public works project that was not subject to the Davis-Bacon Act and was subject to regulation under Oregon's prevailing wage rate laws (ORS 279.348 *et seq.*).

6) The prevailing wage rates published in BOLI's January 1, 2000, prevailing wage rate book applied to the Sweet Home Project.

7) NACC subcontracted with Anderson Construction to perform drywall and painting work on the Sweet Home Project.

8) NACC employed Wayne Chaffin, Gary Elsemore, Matthew Woodard, Shane Harris, and Jerry Johnson to perform painting or drywall on the Sweet Home Project from January to March 2001. As of March 6, 2001, NACC owed at least $8,820.31 in unpaid, due and owing wages to these five workers. On that date, an unsigned letter on NACC letterhead was sent to Anderson Construction acknowledging these unpaid wages. The letter was also stated "Keith Johnson has asked me to get together a list of unpaid labor from the men and get it to you. The wages have not been paid starting on February 5, 2001 through the present date."

9) On March 13, 2001, BOLI received wage claims from Elsemore and Harris alleging they had not been paid wages due and owing from NACC on the Sweet Home Project. On March 14, 2001, BOLI received a wage claim from Chaffin alleging he had not been paid wages due and owing from NACC on the Sweet Home Project.

10) On April 18, 2001, BOLI received three checks from Anderson Construction to pay wages owed by NACC to Elsemore, Chaffin, and Harris. The checks were for the following amounts: Elsemore ($2,563.52), Harris ($4,493.78), and Chaffin ($3,853.04).

11) Anderson Construction had made progress payments to NACC while NACC's workers worked on the Sweet Home Project. At the time Anderson sent its checks for Elsemore, Harris, and Chaffin to BOLI, Anderson had already paid NACC most the money that NACC should have used to pay its workers. As a result, Anderson had to pay these workers, in part, from funds other than those set aside for its subcontract with NACC.

12) On September 28, 1999, Deschutes County first advertised for bid the contract specifications on its Health and Human Services Building Project ("Deschutes Project"). On November 11, 1999, the contract was awarded to Merrill Contractors, Inc. ("Merrill"), in the amount of $3,247,172. The Deschutes Project was a public works project that was not subject

to the Davis-Bacon Act and was subject to regulation under Oregon's prevailing wage rate laws (ORS 279.348 *et seq.*).

13) NACC subcontracted with Merrill to perform drywall work on the Deschutes Project. In order to perform the job, Keith Johnson, on behalf of NACC, was required to sign a "Carpenter's Compliance Agreement" with the United Brotherhood of Carpenters and Joiners of America, Local Union No. 36 ("Local No. 36"). In the Agreement, NACC agreed to "be bound by the Agreements governing, and to make contributions to the Oregon/Washington Carpenters-Employers Health & Welfare, Dental, Pension, Apprenticeship & Training, and Vacation-Savings Trust Funds * * *."

14) NACC employed 21 workers to perform drywall work on the Deschutes Project and did not pay all wages and fringe benefits due to them. As a result, Merrill was required to pay approximately $60,000 to Local No. 36 to cover the fringe benefits that NACC owed but did not pay to its workers.

15) Jones was assigned to investigate the complaints made to BOLI regarding NACC's failure to pay the prevailing wage rate to its workers on the Sweet Home and Deschutes Projects. On November 17, 2000, as part of his investigation of NACC's alleged violations of Oregon's prevailing wage rate laws, Jones issued a subpoena to Vincent requiring her to provide records that showed, among other things, the names, addresses, and phone numbers of NACC's employees from January 1, 1999, to November 17, 2000, and any hours worked by those employees, wages paid to those employees, deductions made from the employee's paychecks, and W-2 and 1099 forms provided to those employees. The subpoena required Vincent, who lived in Cottage Grove, Oregon, to bring these records to BOLI's Eugene office and present them to Jones on December 7, 2001, at 1 p.m. Jones sought these records because of his conclusion that they were necessary for him to determine whether or not NACC's workers had been paid the applicable prevailing wage rates.

16) The subpoena was served on Vincent on December 5, 2000. On December 5, 2000, Vincent faxed a letter to Jones in which she refused to honor the subpoena. She enclosed a letter from Johnson in which Johnson stated "No information will be given to you directly unless we are the Prime General Contractor on a project, which we are not at this time." Johnson said he would only meet with Jones if the "interested General Contractor [was] involved" and accused Jones of slandering NACC.

17) On December 7, 2000, Vincent hand-delivered a letter to Jones that she had signed. The letter stated that Johnson had the requested records at his "home-office" located at Welches, Oregon. Vincent stated that the requested records "would be available for inspection during

normal business hours and, upon request made a reasonable time in advance at the Welches, Or. location."

18) On March 14, 2001, Johnson met with Jones at BOLI's Portland office and provided NACC's payroll records, including the paycheck stubs and certified payroll statements sought in Jones's subpoena. This included records for the Sweet Home and Deschutes Projects. The certified payroll statements were all signed by Johnson and state the correct prevailing wage rate for the majority of NACC's workers.

19) A subcontractor's failure to pay the applicable prevailing wage rates and fringe benefits on a public works project works a hardship on the workers and families of the workers who are not paid correctly. It defeats the legislative policy of creating a "level playing field" for contractors and subcontractors by enabling dishonest subcontractors to obtain an unfair advantage in competitive bids and to obtain an unfair profit by taking advantage of its workers. It puts a hardship on prime contractors who are liable for any prevailing wages that the subcontractor does not pay its workers. Finally, it denies workers the right to a fair living wage.

20) Johnson has been involved with Bernard Woodard on other public works projects in the past where Woodard's company did not pay the prevailing wage rate and the prime contractor had to pay Woodard's workers, after having already paid Woodard.

21) Tyrone Jones has worked as a compliance specialist for BOLI's Prevailing Wage Unit for the last five years. During that time, he has spoken to Johnson on multiple prior occasions where Johnson was a foreman on a public works project. On those occasions, Jones has spent considerable time educating Johnson about Oregon's prevailing wage rate laws and discussing those laws with Johnson. Johnson is aware of the circumstances that led to Bernard Woodard's three-year placement on the List of Ineligibles, starting on December 6, 1999.

22) Jones spent approximately 75 hours in his investigation of whether or not NACC's workers had been paid the prevailing wage rate on the FRC, Sweet Home, and Deschutes Projects, including efforts to ensure that they were paid.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, NACC was an Oregon corporation engaged in the construction business. Respondent Venus Vincent was NACC's corporate president and secretary and Keith Johnson was NACC's vice president and construction manager.

2) On February 2, 2000, the City of Sweet Home first advertised for bid the contract specifications on the Sweet Home Police Facility Project ("Sweet Home Project"). On March 13, 2000, the contract was awarded to Wayne Anderson Construction,

Inc. ("Anderson Construction"), in the amount of $1,613,572. The Sweet Home Project was a public works project that was not subject to the Davis-Bacon Act and was subject to regulation under Oregon's prevailing wage rate laws (ORS 279.348 *et seq.*).

3) NACC subcontracted with Anderson Construction to perform drywall and painting work on the Sweet Home Project and employed at least five workers on that project. NACC failed to pay all wages due and owing to these workers and Anderson Construction paid the wages that BOLI determined NACC owed to its workers.

4) On September 28, 1999, Deschutes County first advertised for bid the contract specifications on its Health and Human Services Building Project ("Deschutes Project"). On November 11, 1999, the contract was awarded to Merrill Contractors, Inc. ("Merrill"), in the amount of $3,247,172. The Deschutes Project was a public works project that was not subject to the Davis-Bacon Act and was subject to regulation under Oregon's prevailing wage rate laws (ORS 279.348 *et seq.*).

5) NACC subcontracted with Merrill to perform drywall work on the Deschutes Project. NACC employed 21 workers to perform drywall work on the Deschutes Project and did not pay all wages and fringe benefits due to them. As a result, Merrill paid approximately $60,000 to Local No. 36 to cover the fringe benefits that NACC owed but did not pay to its workers.

6) Respondent Johnson supervised NACC's construction projects and was responsible for the information on NACC's payroll, and Respondent Vincent signed NACC's paychecks.

CONCLUSIONS OF LAW

1) NACC was a subcontractor that employed workers on the Sweet Home and Deschutes Projects, both public works projects whose contract price exceeded $25,000, that were not regulated by the Davis-Bacon Act, and that used public agency funds.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 279 .348 to 279.380.

3) NACC intentionally failed to pay its workers the applicable prevailing wage rate on the Sweet Home and Deschutes Projects in violation of ORS 279.350(1).

4) Respondent Johnson and Respondent Vincent were responsible for NACC's intentional failure to pay the applicable prevailing wage rate to NACC's workers on the Sweet Home and Deschutes Projects that resulted in Anderson Construction and Merrill paying NACC's workers on NACC's behalf. Pursuant to ORS 279.361(1) and (2), the Commissioner is required to place Respondents Johnson and Vincent on the list of contractors and subcontractors 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 the list.

5) The Commissioner's decision to place Respondents Vincent and Johnson on the List of Ineligibles for a period of three years based on their responsibility for NACC's intentional violations of ORS 279.350(1) is an appropriate exercise of his discretion. ORS 279.361(1) and (2); OAR 839-016-0085.

OPINION

INTRODUCTION

A Final Order on Default was issued earlier against Respondents NACC and Magic Numbers Estimating, Inc., based on their failure to file an answer and request for hearing. The charges against Respondent Woodard were dismissed at the outset of the hearing. The only charges remaining relate to the Agency's proposal to place Respondents Vincent and Johnson on the Commissioner's List of Ineligibles for three years. Both Vincent and Johnson failed to appear at hearing and the forum held them in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Belanger General Contracting*, 19 BOLI 17, 25 (1999). To establish its prima facie case, the Agency must present reliable evidence that NACC intentionally failed to pay its workers the prevailing rate of wage on the Sweet Home or Deschutes Projects or that Anderson Construction and Merrill paid wages required by ORS 279.350 on NACC's behalf, and that Respondents Vincent and Johnson were each responsible for one or more of these failures.

NACC FAILED TO PAY THE PREVAILING RATE OF WAGE

To establish a violation of ORS 279.350(1), which requires payment of the prevailing rate of wage on public works contracts, the Agency must prove: (1) the projects at issue were public works, as that term is defined in ORS 279.348(3); (2) NACC was a subcontractor that employed workers on the public works project whose duties were manual or physical in nature; and (3) NACC failed to pay those workers at least the prevailing rate of wage for each hour worked on the project. *In the Matter of Keith Testerman,* 20 BOLI 112, 126-27 (2000).

Undisputed testimony by Jones and documentary evidence consisting of WH-81 forms[2] filed by the City of Sweet Home and Deschutes County established that both the Sweet Home and Deschutes Projects were public works not subject to the Davis-Bacon Act. Testimony by Jones and certified payroll statements submitted by NACC established that NACC employed workers on

[2] The WH-81 form is BOLI's "Notice of Award of Public Works Contract" form that public agencies use to comply with ORS 279.363.

both Projects to perform painting and drywall work, both involving duties that are manual or physical in nature. The Agency established that NACC failed to pay its workers at least the prevailing rate of wage for each hour worked on the Sweet Home Project by NACC's admission,[3] Jones's testimony concerning the results of his investigation, and by evidence that Anderson Construction, the prime contractor on the Project, paid the wages that should have been paid by NACC. On the Deschutes Project, the Agency established NACC's failure to pay its workers at least the prevailing rate of wage through Jones's testimony concerning the results of his investigation, including his testimony that Merrill, the prime contractor on that Project, was forced to pay at least $60,000 in unpaid fringe benefits to the local carpenter's union on behalf of NACC's workers.

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to place Respondents Vincent and Johnson on the List of Ineligibles based on their alleged responsibility for NACC's failure to pay the prevailing rate of wage to its workers on the Sweet Home and Deschutes Projects and payment of wages required by ORS 279.350 by Anderson Construction and Merrill on NACC's behalf.

ORS 279.361(1) provides that a subcontractor shall be placed on the List of Ineligibles when the Commissioner determines that the subcontractor "has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works" or "a subcontractor has failed to pay its employees amounts required by ORS 279.350 and the contractor has paid those amounts on the subcontractor's behalf." ORS 279.361(1) further provides that "any corporate officer or corporate agent who is responsible for the failure or refusal to pay * * * or the failure to pay to a subcontractor's employees amounts required by ORS 279.350 that are paid by the contractor on the subcontractor's behalf" shall also be placed on the List of Ineligibles.

In the context of a prevailing wage rate debarment, this forum considers "intentional" as being synonymous with "willful." *In the Matter of Loren Malcom*, 6 BOLI 1, 9-10 (1986). In *Malcom*, the forum also adopted the Oregon Supreme Court's interpretation of "willful" set out in *Sabin v. Willamette Western Corporation*, 276 Or 1083 (1976). "Willful," the court said, "amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." *Id*. at 1093. On both the Sweet Home and Deschutes Projects, all the relevant evidence presented by the Agency indicates that NACC, through its agent Johnson, knew the prevailing rate of wage and that the Projects were public works, knew what it

[3] *See* Finding of Fact 8 – The Merits, *supra*.

was paying its workers, intended to pay its workers the amounts it paid to them, and was a free agent in these actions. There is no evidence to the contrary, and the forum concludes that NACC's failures to pay the prevailing rate of wage on the Sweet Home and Deschutes Projects were "intentional" and requires the Commissioner to place NACC on the List of Ineligibles.[4]

The Agency presented reliable evidence that Anderson Construction and Merrill, the prime contractors on the Sweet Home and Deschutes Projects, paid a substantial amount of wages to NACC's workers on NACC's behalf because of NACC's failure to pay the prevailing rate of wage to its workers. This payment of wages by the two prime contractors of wages required by ORS 279.350 that were owed by NACC also requires the Commissioner to place NACC on the List of Ineligibles.[5]

In order for Vincent and Johnson to be placed on the List of Ineligibles, the evidence must show that they were responsible for NACC's failure to pay the prevailing wage rate to its workers on the Sweet Home and Deschutes Projects. ORS 279.361(2). Vincent, as NACC's corporate president and secretary, and Johnson, NACC's corporate vice president and construction manager, were "responsible" if they "knew or should have known the amount of the applicable prevailing wages." OAR 839-016-0085(3)(a).

As a starting point, the forum notes that Vincent was NACC's corporate president and secretary, Johnson was NACC's corporate vice president and construction manager, and there was no evidence that anyone else, with the possible exception of Bernard Woodard, had any authority to act on NACC's behalf.

The forum concludes that Johnson knew the amount of prevailing wage rates applicable to NACC's workers on the Sweet Home and Deschutes Projects based on his position as construction and payroll supervisor on those Projects, his extensive conversations with Jones concerning Oregon's prevailing wage rate laws, and his signature on NACC's certified statements that correctly note the prevailing wage rate for the majority of NACC's workers.

There is no evidence that Vincent had actual knowledge of the amounts of the applicable prevailing wage rate on the Sweet Home or Deschutes Projects. Whether Vincent "should have known" is a different story. The phrase "should have known" is synonymous with constructive knowledge or notice. In the case of *In the*

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[4] The Commissioner has already ordered NACC to be placed on the List of Ineligibles through a Final Order on Default issued after NACC failed to file an answer and request for hearing in response to the Notice of Intent in this case. *See* Finding of Fact 3 – Procedural, *supra*.

[5] *Id.*

Matter of Jet Insulation, Inc., 7 BOLI 133, 140 (1988), the forum relied on an Oregon Supreme Court decision, *American Surety Co. of New York v. Multnomah County*, 171 Or 287 (1943), for a definition of "constructive notice." The forum stated "The general rule that pervades the whole doctrine of notice is that, whenever sufficient facts exist to put a person of common prudence upon inquiry, he is charged with constructive notice of everything to which that inquiry, if prosecuted with proper diligence, would have led." *Jet* at 140. *See also In the Matter of Larson Construction Co., Inc.,* 22 BOLI 118, 164-65 (2001).

Here, Vincent was NACC's corporate president and secretary and signed the paychecks for NACC's workers. Her corporate responsibilities were such that a person of common prudence would have inquired into the type of jobs NACC was performing and the wage rates to which NACC's workers were entitled on the Sweet Home and Deschutes Projects. Under the *Jet* standard of constructive notice, it does not matter whether Vincent actually made these inquiries and the forum concludes that she "should have known" the amount of the prevailing wage rate applicable to NACC's workers on the Sweet Home and Deschutes Projects.

Based on the foregoing, the forum concludes that Vincent and Johnson were both "responsible" for NACC's failure to pay wages required by ORS 279.350 on the Sweet Home and Anderson Projects that were subsequently paid by Anderson Construction and Merrill on NACC's behalf. The only remaining question is the length of time Vincent's and Johnson's names should remain on the List of Ineligibles.

ORS 279.361 provides that debarment shall be for "a period not to exceed three years." Although that statute and the Agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the entire three-year period allowed by law. *In the Matter of Labor Ready Northwest, Inc.,* 23 BOLI 156, 219 (2002). Aggravating factors may also be considered. *Testerman*, 20 BOLI at 129. The aggravating circumstances considered may include those set forth in OAR 839-016-0520(1). *Labor Ready* at 219.

In this case, there are no mitigating factors.

Vincent and Johnson's responsibility for NACC's intentional violations is aggravated by several factors.

First, they both knew or should have known that NACC had not paid its workers the prevailing wage rate on the Sweet Home and Deschutes Projects. OAR 839-016-0520(1)(e).

Second, Johnson and Vincent could have kept NACC in compliance with ORS 279.350(1) simply by paying NACC's workers the money that Anderson Construction and Merrill had paid to NACC for NACC's work on the Projects. OAR 839-016-0520(1)(c).

Third, NACC's violations were serious. OAR 839-016-0520(1)(d). The seriousness is underscored by the legislative policy behind Oregon's prevailing wage rates laws and the penalty for violations. ORS 279.349 includes the following relevant language:

> "The Legislative Assembly declares that the purposes of the prevailing wage law are:
>
> "(1) To ensure that contractors compete on the ability to perform work competently and efficiently while maintaining community established compensation standards.
>
> "(2) To recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards.
>
> "* * * * *
>
> "(4) To encourage employers to use funds allocated for employee fringe benefits for the actual purchase of those benefits."

The legislature has deemed that a subcontractor's intentional failure to pay the prevailing wage rate is so serious that it has *required* the Commissioner to debar[6] any subcontractor who intentionally fails to pay the prevailing wage rate. BOLI Compliance Specialist Jones articulated additional reasons why these violations were so serious. First, a subcontractor's failure to pay the applicable prevailing wage rates and fringe benefits on a public works project works a hardship on the workers and families of the workers who are not paid correctly. Second, it defeats the legislative policy of creating a "level playing field" for contractors and subcontractors by enabling dishonest subcontractors to obtain an unfair advantage in competitive bids and to obtain an unfair profit by taking advantage of its workers. Third, it puts a hardship on prime contractors who are liable for any prevailing wages that the subcontractor does not pay its workers. Fourth, it denies workers the right to a fair living wage.

Finally, NACC's violations were of considerable magnitude. OAR 839-016-0520(1)(d). NACC's workers did not receive their full wages for several months after those wages became due. There were at least 26 workers involved on the Sweet Home and Deschutes Projects. NACC underpaid its workers approximately $70,000, and Anderson Construction and Merrill lost substantial

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[6] "Debar" and "debarment" are terms used by the Agency to refer to placement on the Commissioner's List of Ineligibles.

sums of money because they had to pay wages and fringe benefits to NACC's workers that it had already paid, in whole or in part, to NACC. Finally, Jones, a BOLI employee, had to spend 75 hours of investigatory time in resolving this matter.

Under these circumstances, three years is an appropriate period of debarment for both Vincent and Johnson.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, and as a result of North American Construction & Consulting, Inc.'s intentional violation of ORS 279.350(1) and the payment of amounts owed by North American Construction & Consulting, Inc. pursuant to ORS 279.350(1) by two contractors on behalf of North American Construction & Consulting, Inc., the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents **Keith Johnson** and **Venus Vincent** and any firm, corporation, partnership or association in which they have an interest shall be ineligible to receive any contract or subcontract for public work for a period of three years from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

In the Matter of

HAROLD E. CARLSON and Ruth B. Carlson

Supplemental Final Order of Commissioner Bill Stevenson Issued June 2, 1975[1]

SYNOPSIS

In his original Final Order, the Commissioner determined that Respondents had refused to sell Complainant real property on the basis of her race and color. The Commissioner ordered Respondents to sell the property to Complainant. Subsequently, Respondents sold the property to a third party. The Commissioner held a supplemental hearing and ordered alternative damages for Complainant.

The above entitled matter having come on regularly for hearing before Russell M. Heath, desig-

[1] This Final Order was recently discovered. The original Final Order was issued on January 3, 1975, was never published in this reporter, and no copy is known to exist. On April 7, 1975, a supplemental hearing was held for the purpose of determining the facts surrounding Respondents actions that made certain remedies contained in the Final Order unavailable and the necessity, if any, of a supplemental Final Order. This Final Order does not have a case number. ED: February 2003.

nated Presiding Officer by the Commissioner of the Oregon Bureau of Labor; the hearing being convened and held in Room 669 State Office Building, Portland, Oregon at approximately 9:00 a.m. on April 7, 1975; the Agency and Complainant having been represented by Thomas N. Trotta, Assistant Attorney General and Counsel; Respondent, Harold E. Carlson having been present, both he and his wife, Respondent Ruth B. Carlson who was not present, having been represented by T. Leonard O'Byrne, Attorney; the Presiding Officer being at all times present, having heard the witnesses called by the parties and having considered their exhibits duly received and arguments of counsel and being fully advised in the premises made and issued Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order from which both Respondents and the Agency and Complainant excepted. Having considered the record in its entirety I hereby enter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

Background And Procedure

I find as fact the following:

1. That on or about March 25, 1974, Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order in the above captioned matter, were submitted to the Commissioner of Labor, hereinafter referred to as "Commissioner," and served on the Respondents and the Agency and Complainant by and through their respective counsel.

2. That the aforementioned Proposed Findings of Fact and Proposed Conclusions of Law were to the effect that the Respondents, and each of them, had unlawfully discriminated against Eleanor Gregory, hereinafter referred to as "Complainant" because of her race and color in refusing to sell to her the unimproved real property known variously as either 6557 S. E. Morrison or 6561 S. E. Morrison and hereinafter referred to as "Lot." Further that the said Complainant suffered substantial injury as effects of Respondents' unlawful practices.

3. That in accordance the aforementioned and paraphrased Proposed Findings of Fact and Proposed Conclusions of Law, the Proposed Order set forth remedies to eliminate the effects on the Complainant of Respondents' unlawful practices which in pertinent part provided as follows:

> (2) Respondents shall, within thirty (30) days of the date of this order, convey to Eleanor Gregory by registered mail, with a copy directed to the Commissioner of Labor, a formal offer to sell the subject real estate known and referred to as 6561 S. E. Morrison Street, Portland, Oregon, for the amount of $6,750.00. Said offer shall provide by its terms that acceptance by Mrs. Gregory may be effected within thirty (30) days thereafter. Such acceptance by Mrs.

Gregory shall be formal and be registered mail directed to Respondents with a copy thereof directed to the Commissioner of Labor.

(3) In the event Mrs. Gregory purchases the aforementioned lot within the specified time period and within 180 days from the date of purchase, she (1) secures a twenty-five year mortgage loan for an amount not less than $27,500.00 at not less than 8 ½ percentage interest rate and (2) commences construction of a single-family dwelling of not less than $28,000.00 in value, Respondents shall within thirty (30) days following the date construction commences, deliver to the aforementioned Oregon Bureau of Labor office, a cashier's check or money order payable to Eleanor Gregory in the amount of $12,611.00. (See page #6 Proposed Order).

4. That on or about January 3, 1975, the Commissioner issued and served on Respondents and the Agency and Complainant his Findings of Fact, Conclusions of Law and Order which in pertinent part provides as follows:

(2) Respondents shall within thirty (30) days of the date of this order convey to Eleanor Gregory by registered mail, with a copy directed to the Commissioner of Labor, a formal offer to sell the subject real estate known and referred to as 6561 S. E. Morrison Street, Portland, Oregon for the amount of $6,750.00. Said offer shall provide by its terms that acceptance and payment by Mrs. Gregory may be effected within thirty (30) days thereafter. Such acceptance by Mrs. Gregory shall be by registered mail directed to Respondents with a copy thereof directed to the Commissioner of Labor.

In the event that Eleanor Gregory accepts the aforesaid offer and further in the event that the Respondents have not complied with the provisions of paragraph (1), requiring their payment of $7,000.00 to Eleanor Gregory, by such time as Eleanor Gregory, pursuant to the terms of the offer is required to pay the purchase price, such lot shall be immediately conveyed by the Carlsons to Eleanor Gregory by Warranty Deed in consideration of a setoff of $6,750.00 applied as a credit to the $7,000.00 damages indebtedness referred to in paragraph (1), reducing that damage indebtedness to $250.00. The Carlsons shall deliver the Warranty Deed and title insurance policy for the lot to the Oregon Bureau of Labor, Room 438, State Office Building, Portland, Oregon 97201.

In the event that Respondents have complied with the provisions of paragraph (1) and have paid the $7,000.00 by the time Eleanor Gregory accepts the offer, then Eleanor Gregory shall tender the purchase price

of $6,750.00 to a recognized escrow company with instructions to remit the funds to the Carlsons upon receipt of a Warranty Deed to the lot in question properly executed by the Carlsons and receipt of title insurance. A copy of these instructions shall be sent by registered mail to the Carlsons and the Oregon Bureau of Labor. Upon receipt of the escrow instructions the Carlsons shall immediately convey the lot by Warranty Deed to Eleanor Gregory and shall deliver the deed and a title insurance policy for the lot to the escrow company.

It is the intent of this order that if Mrs. Gregory elects to accept the offer to purchase the aforesaid lot, that the Respondents shall deliver a Warranty Deed and title insurance policy for the said land to the escrow company selected by Mrs. Gregory within seven (7) days of notice of acceptance.

(3) In the event Mrs. Gregory purchases the aforementioned lot and receives a deed thereto and within 180 days from the date of receipt of the deed commences construction on the lot of a single-family dwelling of not less than $32,500.00 in value, Respondents shall within thirty (30) days following the date construction commences, deliver to the aforementioned Oregon Bureau of Labor Office a cashier's check or money order payable to Eleanor Gregory in the amount of $4,500.00 to compensate her for the increased cost of construction.

(4) In the event that Eleanor Gregory complies with each of the conditions set out in the paragraph above and within thirty (30) days of securing a twenty-five-year home loan for an amount not less than $27,500.00 she shall direct the lending institution loaning such funds to communicate the agreed rate of interest of that loan to the Oregon Bureau of Labor. The Respondents within thirty (30) days of their notification by the Bureau of Labor of the rate of interest at which the loan has been obtained, shall deliver to the aforementioned Bureau of Labor Office a cashier's check or money order payable to Eleanor Gregory in the amount of 50% of the difference between total interest cost of a 7% twenty-five-year $27,500.00 loan and the total interest cost of the twenty-five-year $27,500.00 loan obtained by Mrs. Gregory. However, in no case should the differential be computed on an interest rate greater than 8½%.

I make this award taking into consideration all the factors in this case, including the difficulty in supervising compliance for a long period of time, and feel that such an award will best carry out the intent of the law.

(5) Within ten (10) day[s] of the date of this order, Respondents, and each of them, shall deliver to the aforementioned Oregon Bureau of Labor office a letter directed to Mrs. Gregory and containing an apology for having unlawfully discriminated against the said Mrs. Gregory because of her race and color. (See page #38 thru (sic) 41, Order).

(8) The office of the Commissioner of the Oregon Bureau of Labor, or its successor, shall retain jurisdiction in this matter and if for any reason not specified herein new facts should develop which would affect any of the remedies provided herein, or the discriminatory conduct of either of the Respondents should continue, or any person or party affected thereby contends that any of the provisions of these orders are ambiguous or need to be interpreted, the Complainant, any person similarly situated, the Administrator of the Civil Rights Division, the Respondents, or any of them, may petition the Labor Commissioner for a supplementary order and relief which would interpret provisions of the order, or provide an adequate remedy for the Complainant, or other persons similarly situated, to carry out the purposes of the civil rights laws and eliminate the effects of the unlawful practices found to exist. (See page #42, Order).

5. That subsequent to the issuance and service of the aforementioned Findings of Fact, Conclusions of Law and Order, the Commissioner was informed that the Lot had been conveyed to a third party and that therefore certain remedies contained within his Order were unavailable.

6. That the Commissioner, upon request by counsel for the Agency and Complainant, thereafter deemed it necessary to direct his Presiding Officer to convene a supplemental hearing, as provided for in paragraph 8 above, for the purpose of determining both the facts surrounding Respondents' conveyance of the Lot and the necessity, if any, of a supplemental Order.

Substantive

1. Undisputed evidence clearly established and I find that Respondents, on or about June 4, 1974, a date subsequent to issuance by the Presiding Officer of his Proposed Order (See Background & Procedure Finding #3) and prior to issuance of the Commissioner's Final Order (See Background and Procedure Findings #4), conveyed the Lot to their daughter, Shirley Carlson, a member of their household. I further find that both Respondents and Shirley Carlson effected the conveyance of the lot with knowledge of the aforementioned Proposed Order.

2. Shirley Carlson admitted and I find that within a matter of a few weeks following her purchase of the Lot from her parents, she

placed the Lot on the market for sale and that on or about July 26, 1974 the said Shirley Carlson conveyed the Lot to one Ronald Johnston. Ample evidence was received to the effect and I find that Harold E. Carlson aided and assisted his daughter Shirley Carlson in matters attendant to her conveyance of the Lot to Mr. Johnston and further, that both Harold E. Carlson and his daughter Shirley Carlson effected this second conveyance with knowledge of the aforementioned Order.

3. Based on Mr. Johnston's undisputed testimony, I find that during the time herein material, he had no knowledge of the Complainant's charge of unlawful discrimination with respect to her attempts to purchase the Lot nor the fact that a Proposed Order had been issued affecting the disposition of the Lot. I further find that subsequent to his purchase of the Lot for $7,250.00, Mr. Johnston, a building contractor by trade, constructed a single-family dwelling thereon and that as of April 7, 195, the said dwelling had not been sold by Mr. Johnston.

4. Both Mr. Carlson and his daugh[t]er Shirley Carlson testified that neither Respondents' conveyance of the Lot to Shirley Carlson were for the purpose or with the intention of depriving the complainant of remedies ordered by the Commissioner. Mr. Carlson's testimony was to the more specific effect that Respondents conveyed the Lot to their daughter because they could not afford the financial expense of retaining ownership of the Lot. Shirley Carlson testified both that she purchased the Lot "* * * so that my parents could pay their back taxes and see that they wouldn't lose the Lot." (Tr. 32), and that she purchased the Lot with the desire of eventually building a home for herself thereon. In assessing the credibility of Mr. Carlson and Shirley Carlson in their testimony paraphrased above, I accord weight to the following:

a. Although testifying to have feared forfeiture due to tax delinquency, Mr. Carlson admitted and I find that Respondents' received no notification of foreclosure or intended foreclosure respecting the Lot.

b. Although testifying to have feared her parents would lose the Lot because of back taxes, Shirley Carlson borrowed in excess of $5,000.00 and purchased the Lot rather than merely borrow the approximately $600.00 necessary to pay the back taxes. In addition although testifying to have desired retaining the Lot in the family and eventually building a home thereon, Shirley Carlson admittedly placed the Lot on the market for sale two or three weeks after her purchase thereof.

c. Although testifying to an inability to financially afford the expense of retaining the Lot and a desire to put their finances in order because of recently discovered health problems, Mr. Carlson requested and was given as a condition to Mr. Johnston's purchase of the Lot an oral option

to purchase the dwelling to be built by Mr. Johnston thereon. In addition the only specific testimony concerning Mr. Carlson's health condition was that he had a heart examination sometime in the early part of 1975 over 6 months after the conveyance of the Lot to his daughter Shirley Carlson.

d. Mr. C actively aided and assisted his daughter Shirley Carlson in first purchasing the Lot and then selling the Lot to Mr. Johnston.

e. During the time Shirley Carlson was seeking financing for her purchase of the Lot from Respondents, Respondents' Attorney was preparing exceptions to the Proposed Order, including a provision for conveyance to the Lot to the Complainant.

f. Neither of the Carlsons informed the Labor Commissioner nor any of his agents prior to January 3, 1975 that a transfer of the Lot in question would take place or did take place.

I find that during all times material Shirley Carlson was fully aware of these proceedings and the fact that the Proposed Order had been issued providing for the transfer of the property and that although title passed to Shirley Carlson, based upon the facts found, I conclude the purpose of this conveyance was to render the Lot unavailable to Mrs. Gregory in accordance with the Proposed Order and the anticipated Final Order.

Based on all the facts found and recited hereinabove, with particular emphasis on those revealing the timing, sequence and substance of Respondents' activities following issuance of the Proposed Order, I infer, find and conclude that Respondents, and each of them aided and assisted their daughter, Shirley Carlson, in conveying the Lot to Mr. Johnston for the purpose of frustrating the Commissioner's Order and thereby depriving the Complainant of remedies for injuries resulting from Respondents' discriminatory activities.

That Respondents, and each of them, by purposely frustrating the Commissioner's Orders providing remedies for the Complainant, further discriminated against the said Complainant because of her race and color.

5. The fair market value of the Lot at the time it was conveyed to Mr. Johnston was at least $7,250.00 and in order for Mrs. Gregory to purchase a comparable lot she will suffer additional damages of at least $500.00.

CONCLUSIONS OF LAW

In accordance with the facts found and recited hereinabove, I conclude as a matter of Law the following:

1. That the Commissioner acted within his authority as provided by ORS 659.010(2) in issuing on January 3, 1975, Rulings, Findings of Fact, Conclusions of Law and Order In The Matter of Alleged Unlawful Practices Based Upon Race and Color in Selling Real Property by

Harold E. Carlson and Ruth B. Carlson.

2. That prior to issuance of the Commissioner's Order on January 3, 1975, but subsequent to the duly issued Proposed Order, Respondents, and each of them aided and assisted in conveying the Lot to Ronald Johnston, a bona fide purchaser and thereby made moot those provisions contained in paragraph 2, 3 and 4 of the Commissioner's Order contrary to ORS 659.022(3).

3. That Respondents, and each of them engaged in practices violative of ORS 659.010 to 659.110, by aiding and assisting in conveying the Lot to Ronald Johnston, a bona fide purchaser, and making moot significant provisions of the Commissioner's Order, which aid and assistance in the conveyance constituted further discrimination against the Complainant because of her race and color.

4. That the Commissioner having retained jurisdiction in this matter, is empowered by ORS 659.010 to 659.110 to issue a Supplementary Order providing substitute remedies for those made moot by Respondents further unlawful practices.

5. That an appropriate supplemental remedy to those provided in the original Order would by payment by the Respondents, and each of them to the Complainant of the sum of $500.00 representing increased costs of the purchase of a comparable lot.

ORDER

Based upon the Findings of Fact, Conclusions of Law in this matter, it is hereby ordered that[;]

1. Paragraph of the Commissioner's Order dated January 3, 1975 is deleted.

2. Within 10 days of the date of this Order the Respondents and each of them shall deliver to the Oregon Bureau of Labor Room 479 State Office Building, 1400 S. W. 5th Avenue, Portland, Oregon 97201 a cashier's check or money order payable to Eleanor Gregory in the sum of $500.00.

3. In the event within 180 days of the date of this supplemental Order Mrs. Gregory purchases a substitute lot and receives a deed thereto and within 180 days from the date of receipt of the deed commences construction on the lot of a single-family dwelling of not less than $32,500.00 in value, Respondents shall within thirty (30) following the date construction commences, deliver to the aforementioned Oregon Bureau of Labor Office a cashier's check or money order payable to Eleanor Gregory in the amount of $4,500.00 to compensate her for the increased cost of construction.

4. Except as expressly provided above, the Commissioner's Order dated January 3, 1975 remains in full force and effect.

In the Matter of

RECREATIONAL PROPERTIES, INC.

Case No. 26-80

Final Order of Commissioner Mary Roberts

Issued May 26, 1982[1]

SYNOPSIS

Complainant, a white real estate salesperson, was discharged from employment because his wife was black. The Commissioner awarded Complainant $3,570 in back wages. The Commissioner did not award damages for emotional distress based on evidence any post-termination distress suffered by Complainant was based on his pre-existing financial difficulties.

The above-entitled case came on regularly for hearing before Michael J. O'Brien, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on May 30, 1980, in room 108 of the United States Courthouse, 620 S. W. Main Street, Portland, Oregon, and concluded on June 13, 1980, in the same location.

The Bureau of Labor and Industries was represented by Douglas R. Andres, Assistant Attorney General. The Respondent, Recreational Properties, Inc., was represented by Phillip C. Querin, Attorney at Law. The Agency called as witnesses the Complainant, George M. Hennessey; Shirley Hennessey, Complainant's wife; and Howard McComber, former salesperson for R. Respondent called as witnesses Raymond Johnson, Crooked River Ranch property owner; Jim Palmer, former salesperson for Respondent; Lloyd Donnally, engineer; Frank G. Ihly, Respondent's Manager; James B. O'Hearn, Respondent's Broker; Robert Lord, Respondent's Sales Coordinator; John L. Whittaker, Respondent's President; W. R. MacPherson, Crooked River Ranch Developer and Dorothy L. McDowell, former "PR" for R.

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

FINDINGS OF FACT – PROCEDURAL

1) On May 21, 1975, George M. Hennessey filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been discriminated against in connection with his employment

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[1] This Final Order was recently discovered. The original Final Order was issued on May 26, 1982, and has not been previously published in this reporter. This order is being published for purposes of completeness of agency orders. ED: February 2003.

by Respondent because of the race of a person with whom he associated.

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

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

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a duly organized corporation engaging in the business of selling real property for residential development in the State of Oregon.

2) Complainant is a white male whose spouse and family are black.

3) Starting in August 1974, Complainant was employed by Respondent as a sales representative.

4) At all times material, the general duties of Respondent's sales representatives were to:

a) Seek out prospective buyers for lots on the Crooked River Ranch by attending trade shows and similar functions at several locations in Oregon;

b) Organize "amenities tours" designed to show groups of potential purchasers the available sites and related amenities at Crooked River Ranch in Jefferson and Deschutes Counties, Oregon. Such tours generally lasted from one to two hours, although longer and shorter tours were not unusual;

c) Recruit and supervise a public relations staff (hereinafter referred to as "person") to assist sales representatives in identifying potential purchasers and organizing "amenities tours;"

d) Attend sales meetings with other sales representatives and other PRs. Failure to attend such meetings could result in the imposition of a fine;

e) "Qualify" potential buyers by determining their financial eligibility to contract for real property at the Crooked River Ranch;

f) Negotiate and execute sales agreements with potential buyers;

g) Appear according to a rotating "uplist," at the Crooked River Ranch during the prime selling season (May through September). The sales representative at the top of the "uplist" was required to organize and conduct amenities tours for non-scheduled groups (or "drop-ins). "Uplist" duty was preferred by sales representatives because of the higher percentage of sales to non-scheduled groups;

h) Report for "floor time" at one of Respondent's branch offices during the off season in accordance with a schedule set by the branch office managers.

5) At all times material the sales representative position was characterized by the following relationship to Respondent:

a) Each sales representative was independently licensed to sell real property, as required by Oregon law;

b) Sales representatives were obligated to work for no other real estate broker during the course of their relationship with Respondent, as required by Oregon law;

c) Sales representatives were compensated exclusively by commissions which varied from 7% to 10% based upon the amount of the down payment in each sale;

d) Although, sales representatives recruited their own "PRs", the PRs were compensated directly by Respondent on a commission basis and office space and supplies were provided and allocated by Respondent;

e) Respondent consistently and uniformly defined the general duties of sales representatives as described in Findings 4 (a) to 4 (h), above;

f) Sales representatives were responsible for generating purchasers to participate in their "amenities tours," although Respondent maintained an intensive advertising program to stimulate public interest in the Crooked River Ranch development;

g) Respondent allowed sales representatives to develop selling techniques through "role playing" among themselves and other devices;

h) Respondent subjected sales representatives to various degrees of managerial supervision with respect to sales techniques and the length and extent of "amenities tours;"

i) At no time did Respondent require sales representatives to pay office rent, utilities, supplies or office equipment;

j) Respondent withheld state taxes from Complainant's earnings during 1975.

6) Complainant had approximately 20 years of experience in various sales positions prior to his employment with Respondent.

7) In February 1975, Complainant and his spouse attended a "kick-off meeting" at which Complainant received a sales award at a Portland restaurant. The dinner meeting was designed to prepare Respondent's staff for the coming selling season. The meeting was attended by approximately 50 to 75 sales personnel, "PRs" and members of management.

8) At the close of the above mentioned "kick-off meeting," Complainant and his spouse were in a receiving line in order to introduce Ms. Hennessey to two of Respondent's managers, Robert Lord and John Whittaker. When Ms. Hennessey was approximately ten to fifteen feet away from Messrs. Lord and Whittaker, the two managers turned to talk to other guests and no introductions were made as the Hennesseys left the reception area. The managers continued to greet other persons in the receiving line, but were not introduced to Ms. Hennessey. Ms. Hennessey perceived this behavior as a snub that occurred due to her race. There is no substantial evidence that this perception was reasonable.

9) Complainant mentioned the perceived snub to Howard McComber, but he did not discuss it with Respondent's management or make further efforts to introduce his spouse at Respondent's social occasions.

10) During a visit in July 1975 by Complainant's[2] family to the Crooked River Ranch, Ms. Hennessey saw Messrs. Lord and Whittaker on the stairs of the Clubhouse, said "Hello," and received no reply.

11) During the course of his employment with Respondent, Complainant and his family visited the Crooked River Ranch on three or four occasions. During these visits, the family resided in a mobile home reserved for the families of sales staff. Complainant's family was not denied the use of any facilities or amenities at the Crooked River Ranch during these visits.

12) On at least two occasions, members of Respondent's managerial staff made statements to other white employees to the effect that the presence of black persons at the Crooked River Ranch was "bad for business."

13) Despite the racial comments described, there is no evidence that Respondent had a policy or practice of discriminating on the basis of race against buyers or potential buyers of properties at the Crooked River Ranch. The evidence indicates that black persons were routinely given "amenities tours," and that lots were sold to black families.

14) During the summer of 1975, Complainant's "PR" staff in Respondent's Salem and Portland branch offices experienced substantial turnover as a result of various operational changes instituted by Howard E. McComber. The so-called "PR revolt" was not caused by any dereliction or misconduct by Complainant.

15) Prior to May 16, 1976, Respondent had allowed a sales representative to live in available housing at the Crooked River Ranch. This was usually done on a temporary basis during the win-

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[2] The original text reads "Respondent's family." From the text of the order, it appears that it should have said "Complainant's family."

ter months so that someone associated with Respondent would be on the ranch year-around.

16) On May 16, 1976, Complainant verbally requested that Respondent allow his family to reside in a residence at the Crooked River Ranch which had been vacated by the family of another sales representative. The sales representative and his family were white. Respondent's manager advised Complainant that the matter would be considered at a manager's meeting scheduled for May 17, 1976.

17) On May 18, 1976, Respondent advised Complainant by letter that the "Administrative Board for the sales organization has voted unanimously to terminate your employment as a sales representative for the following stated reasons:

"1) The Board feels that your qualifying methods are not sound and that you have blown many tours which perhaps would have been buyers if they had not been pre-qualified so abruptly.

"2) You failed to do a good job in building rapport and confidence for both yourself and the developer in your tours.

"3) You have had difficulties throughout the sales company in building a sound working relationship with our Public Relations staff. In fact, you have developed great animosity with a number of these people.

"4) In addition, you have not developed a feeling of confidence within the Sales Administration or within the Crooked River Ranch Administration.

(Signed)

Bob Lord, Sales Coordinator

James B. O'Hearn, Broker

Frank Ihly, Manager

John Whittaker, President

18) At the time of Complainant's request for housing, Respondent had already made arrangements to rent the residence sought by complainant to an independent contractor commencing in July 1976. Mr. MacPherson knew the house was not available, however the record does not indicate that he conveyed this information to any other members of his staff.

19) In 1975, Complainant was one of Respondent's top five sales representatives in dollar volume of sales. His gross sales for 1975 totaled $216,000.

20) Between January 1 and May 31, 1976, Complainant gave 58 tours compared to a staff average of 49 to potential buyers. Complainant completed five sales resulting from these tours. Each of his sales cost Respondent $1667.87 in expenses, compared to an average staff cost per sale of about $1071.28.

21) Respondent states that Complainant's "closing ratio" between January 1 and May 31, 1976, of 8.62% was, in itself, un-

acceptable. This forum finds that this closing ratio resulted in a higher cost per sale to Respondent.

22) Only five sales representatives had lower "closing ratios" (Number of sales closed compared to the number of tours given) than Complainant from January 1 to May 31, 1978. Of these five, two were terminated in 1976 for reasons which do not appear on the record and three continued their employment with Respondent until 1979 or 1980.

23) All five of Complainant's "closed sales" in 1976 occurred between April 22 and May 28. Two sales were consummated on May 14, 1976, four days prior to Complainant's discharge. An additional sale was closed on May 28, 1976.

24) Complainant requested and received the following amounts from Mr. McPherson as "draw" on commissions: $756.35, in December 1975; $821.69, January 1976; $899.98 in February 1976; $1588.88 in March 1976; $776.68 in April 1976; and $464.77 in May 1976. Respondent occasionally allowed such "draws" to salespersons who were experiencing financial difficulty.

25) Complainant failed to report and pay quarterly income tax withholdings which amounted to a tax liability of over $2,000 by the time of his termination.

26) Complainant's earnings of j$1,511.52 in May 1976 exceeded his earnings in May 1975 by approximately $220.00.

27) Management perceived Complainant to be aloof and "a longer."

28) "Amenities tours" of 45 minutes or less ("short tours") were given on numerous occasions by Respondent's sales representatives, particularly where tour members were either financially ineligible or not sincerely interested in purchasing property. There is no evidence that Respondent reprimanded, disciplined or discharged any sales representative for giving "short tours."

29) Two weeks after his discharge by Respondent, Complainant was employed as a residential real estate salesperson by Mr. McComber at a Century 21 franchise Mr. McComber had purchased in May 1975. McComber testified and this forum finds that a reasonable transition time to adapt from selling recreational property and acquire the skills necessary to sell residential property is ninety days.

30) For the one year period June 1975 through May 1976, Complainant's average earnings were $1020 per month. This figure is computed by adding $9366, Complainant's 1975 monthly average of $1338 multiplied by seven months, and $28,74, Complainant's total earnings from Respondent during 1976; and dividing the sum by twelve months.

31) As a result of his discharge by Respondent, Complainant sustained lost earnings from May 19, 1976, to August 31, 1976. This time period repre-

sents the two weeks Complainant was unemployed and the ninety days necessary to adapt his skills to his new position. Complainant's damages for this three and one half month period are $3570, his $1020 average monthly earnings multiplied by 3.5 months.

32) As a result of his financial difficulties Complainant experienced fear, loss of dignity, humiliation and substantial emotional distress.

ULTIMATE FINDINGS OF FACT

1) Respondent engages the service o[f] one or more employees in the State of Oregon, reserving the right to control the means by which such service is performed.

2) The black race of Complainant's spouse and family played a key role in Respondent's decision to discharge Complainant on May 18, 1976.

3) Respondent's contention that Complainant was discharged for poor sales performance during 1976 is pretextual, because other sales representatives of Respondent were neither discharged nor disciplined for comparable or poorer sales performances.

4) The housing Complainant requested on May 16, 1976, was not available for his use because Respondent had already committed the property to an independent contractor. The record is not clear if supervisory persons who made the decision to discharge Complainant had been advised of this commitment.

5) Corroborated and credible evidence in this case shows that some members of Respondent's managerial staff at the Crooked River Ranch made derogatory comments concerning black persons on two occasions. Such evidence supports the inference that Complainant was discharged because the presence of his interracial family as residents at the Crooked River Ranch were perceived to be bad for business.

6) There is no evidence that Respondent maintained a policy or practice of discriminating on the basis of race against buyers or potential buyers of real property at the Crooked River Ranch.

7) Complainant sustained lost earnings in the amount of $3570 as a result of Respondent's unlawful conduct. This amount is the forum's estimate of what his earnings would have been from May 19, 1976, to August 31, 1976, based on his average monthly earnings for the previous twelve months.

CONCLUSIONS OF LAW

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

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

3) This matter is properly brought under the provisions of ORS 659.030(1)(a), which prohibits an employer, "* * * because of the race [or] color * * * of any

other person [with] whom an individual associates * * *, to discriminate against such individual in compensation or in the terms, conditions or privileges of employment." Complainant is a member of a class of persons protected by this section.

4) ORS 659.033 prohibits in the sale or rental of real property, and is inapplicable to this matter. The definition of "purchaser" set forth in ORS 659.031 includes only "an occupant, prospective occupant, lessee, prospective lessee, buyer or potential buyer." Complainant was none of these and therefore not a purchaser under ORS 659.031. Furthermore, the availability of housing to Complainant was contemplated as a "term, condition or privilege of employment" as defined in ORS 659.030(1)(a). The statutory scheme contemplates that a claim relating to the terms and conditions of employment be brought under ORS 659.030.

5) The described actions and motivations of Messrs. Lord, Ihly, O'Hearn, and Whittaker are properly imputed to R.

6) Respondent unlawfully discriminated against Complainant in violation of ORS 659.030(1)(a) by discharging him on the basis of his association with his black spouse and family.

7) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and the sum awarded as damages in the Order below are an appropriate and proper award.

OPINION

I. THE EMPLOYMENT RELATIONSHIP

Respondent contends that Complainant's claim of discrimination is not cognizable under ORS Chapter 659 in that it is not an "employer" as defined by ORS 659.010(6), which provides as follows:

> "'Employer' means any person * * * who in this state, directly or through an agent, 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."

The basic characteristics of Respondent's relationship to its sales representatives are set forth in Findings of Fact 4 and 5, above.

In determining whether an employer/employee relationship exists several factors must be considered. These factors are all determinative of the key consideration, which is whether Respondent had the right to detail how Complainant performed his work or whether Complainant was allowed to use his own work methods with Respondent having no right to control, except as to the ultimate result.

The record in this case indicates not only that Respondent reserved the theoretical "right" to control the mans by which ser-

vices were to be performed, but that it in fact did exercise such control in a number of ways.

The "right to control" generally refers to the right of an employer to interfere with the manner and method of accomplishing a particular result. *Harris v. State Ind. Acc. Commissioner.* 191 Or 254, 230 P2d 175 (1951). In this case, Respondent actively involved itself in a number of matters directly affecting its sales representatives in the performance of their work. Respondent's termination letter to Complainant indicates not only a right to terminate his "employment," but also includes a detailed analysis and critique of Complainant's "manner and method" of doing his work. Respondent's criticism of Complainant's alleged "short tours" indicates a degree of supervision which is incompatible with the relationship of an independent contractor.

Other factors indicative of an employer/employee relationship are:

1) Whether the Respondent retained the Complainant for an indefinite period of time or on a job-by-job basis and on a full or part time basis?

The parties clearly contemplated a continuing relationship of no fixed duration and Complainant worked fulltime for Respondent.

2) Could Complainant employ workers to perform, or help perform, his work for Respondent?

Although Complainant recruited "PRs" to assist in finding potential purchasers for tours, these "PRs" were paid by Respondent, which also provided their office space and supplies. The record is clear that regardless of who may have recruited a "PR," the "PR" was employed by Respondent.

3) Could Complainant perform work for others while working for the Respondent?

Pursuant to Oregon law, Complainant could not work for any other real estate brokerage while employed by Respondent.

4) Who furnished the equipment and materials use by Complainant to perform the work?

Respondent provided Complainant with the necessary office space and equipment.

5) Who determined Complainant's particular hours of work?

Respondent determined at least some of Complainant's particular hours of work via the "uplist," floor time requirements and mandatory Saturday morning sales meetings.

The manner of Complainant's discharge indicates conclusively that Respondent reserved the unrestricted right to terminate his service whenever it chose to do so without regard to the final result of the work and without liability for breach of contract. Such right to discharge is a significant factor in evaluating the employment relationship. *Carlile v. Greeninger,* 35 Or App 51, 580 P2d 588, *rev den* 283 Or 235 (1978); *Collins v. An-*

derson, 40 Or App 765, 596 P2d 100 (1979).

Respondent correctly maintains that compensation by commission is generally evidence of independent contractor status. However, this claim is not conclusive in light of the above discussion of employment factors which lead to the conclusion that an employer/employee relationship existed.

The record as a whole amply supports the conclusion that Respondent is an "employer" for purposes of ORS 659.010(6).

II. THE MERITS

Complainant, a white male, alleges that Respondent unlawfully discriminated against him on the basis of his association with his black spouse and family. In support of this claim, Complainant alleges:

1) That he and his spouse were deliberately ignored or "snubbed" in the reception line at a "kickoff dinner" by two of Respondent's managers in February 1975.

Respondent vehemently denies that any such "snub" occurred. The Bureau's version of this incident is supported by the testimony of Complainant and Ms. Hennessey. However, only the fact that Ms. Hennessey perceived this incident as a snub to her race is substantiated by the evidence as a whole.

2) That Complainant's spouse was again ignored or "snubbed" by two of Respondent's managers during a visit to the Crooked River Ranch in July 1975.

Respondent again claims that no such incident occurred or, in any event, that no "snub" was intended. In this matter, I am inclined to agree. It is plausible that Respondent's managers may not have recognized Ms. Hennessey on this occasion, or that they may have been preoccupied with other matters. In any case, the Bureau's version of this alleged incident is not supported by corroborated evidence. (See Finding of Fact 10)

3) That Respondent's managers at the Crooked River Ranch on at least two occasions made racially insulting and derogatory comments.

Such allegations are supported by credible, corroborated testimony. While some members of management perceived the presence of blacks as "bad for business," this attitude was not reflected in Respondent's sales policies.

4) That Complainant was discharged on May 18, 1976, following his request for on-site housing because of the race of his spouse and family.

Viewing the evidence as a whole, the clear implication of this allegation is that Respondent's managers perceived the "permanent" presence of an interracial family at the Crooked River Ranch as a potential embarrassment to the company and, ultimately, as a deterrent to potential buyers of property.

I find that the Bureau's interpretation of events conforms to the evidence in this case, except as otherwise noted.

The evidence suggests that an interracial family was suddenly perceived as a threat to Respondent's business when Complainant requested to move himself and his family to the Crooked River Ranch. Apparently such a threat was deemed unacceptable, for Complainant was immediately discharged.

In response to Complainant's allegations, Respondent contends that its decision to discharge Complainant was based solely on the four factors enumerated in its letter of May 18, 1976. Respondent's claimed legitimate nondiscriminatory reasons for such discharge may be summarized as follows:

1) Complainant was unable to work effectively with management and his support staff, thus undermining Respondent's confidence in his abilities.

As stated previously, Complainant was repeatedly described by Respondent as "aloof" and "a loner." However, Complainant received no criticism for his failure to attend Respondent's social functions nor was it alleged that such activities were in any way a job requirement.

The so-called "PR revolt" alluded to in Respondent's termination letter was not caused by any misconduct on Complainant's part. This forum, therefore, finds that this stated ground for Complainant's discharge is spurious and pretextual.

2. Complainant's sales performance in 1976 deteriorated significantly, to the extent that his continued employment had become a business liability.

It is uncontested that Complainant's sales performance in 1975 was excellent. He was among the top five sales representatives in dollar volume. He received an award from Respondent for his productivity. It is also uncontested, however, that his sales declined markedly between January and May 1976. The questions to be resolved are: 1) whether Complainant's deteriorating production was significant enough to justify discharge; and, 2) whether other sales representatives with equal or inferior production who did not have interracial families were similarly treated by Respondent.

While the record clearly documents the extent of Complainant's sales 'slump," it also indicates that he was undergoing an impressive recovery at precisely the time he was discharged. In fact, two of his sales were "closed" on May 14, just four days before his discharge. At worst, Complainant's earlier decline in productivity may have been grounds for concern or even some form of discipline. His increased sales during the month prior to his discharge should have alleviated many of Respondent's concerns, particularly in view of Complainant's solid performance in 1975. Finally, the drastic measure of discharge at the very

beginning of the summer selling season does not appear to be a reasonable business decision under the circumstances of this case.

Respondent offers a "cost analysis" which purports to show that Complainant's "closing ratio" of 8.62% in 1976 was unacceptable in that it caused a net loss to the business. However, there is no convincing showing that such a "closing ratio" somehow violates an objective standard of profitability. At most, Respondent's analysis reveals that less productive sales representatives are more costly to the company than others, since the company must bear the full cost of "amenities tours."

The record clearly establishes that other sales representatives with equal or inferior sales records were not discharged by Respondent in 1976. If the inexorable logic of profitability had been the sole criterion for continued employment, Complainant's discharge would not have been unique.

3) Housing was not available for use by sales staff at the time of Complainant's request on May 16, 1976.

Although there is conflicting evidence on this issue, I am inclined to agree with Respondent's claim that the housing sought by Complainant was previously committed for use by an independent contractor commencing in July 1976. However, it should be emphasized that the mere availability of housing on-site is not a central issue in this case.

The timing of Complainant's discharge is extremely suspect. The decision by Respondent's Administrative board was made only one day after Complainant indicated this desire to take up residence with his family at the Crooked River Ranch. Considered along with the fact that Respondent saw no need to immediately dismiss other poor performers who also would be costly to retain, Respondent's actions support the inference that Complainant was discharged because he and his family were perceived to be an actual or potential "embarrassment."

In summary, this forum finds that the allegations in the Specific Charges are supported by credible and corroborated evidence. Respondent's articulated reasons for its decision to discharge Complainant lack meaningful support in the evidence, and this forum finds such stated reasons to be pretextual except where otherwise noted.

In considering damages for loss of human dignity in this case, great weight should be given to Complainant's and Ms. Hennessey's testimony. Their testimony clearly establishes that any emotional distress Complainant experienced was a direct result of severe household budget problems. There is ample evidence that Complainant's financial difficulties began long before his termination by Respondent. Both his failure to pay quarterly income

tax withholding and the "draws made from December 1975 through May 1976 (totaling $5308.35) demonstrate the severity of Complainant's economic problems and serve to show that they did not occur as a direct result of Respondent's unlawful conduct. No award should be allowed for pain and suffering on the basis of Complainant's financial difficulties subsequent to his dismissal by Respondent because the cause of these difficulties occurred before the dismissal.

Interest on the award shall be calculated as follows:

a) six percent per annum compounded annually for the period May 19, 1976 until July 25, 1979; and,

b) nine percent per annum compounded annually for the period July 26, 1979, until paid.

ORDER

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

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries in trust for George M. Hennessey in the amount of FIVE THOUSAND THREE HUNDRED TWENTY NINE DOLLARS AND EIGHTY-SIX CENTS ($5,329.86). Three Thousand Five Hundred Seventy Dollars ($3,570) represents damages for lost commissions plus One Thousand Seven Hundred Fifty-Nine Dollars and Eighty-Six cents ($1,759.86) which represents interest computed to June 1, 1982, at the rates specified in the Opinion above. Interest will continue until paid.

2) Amend Complainant's employment records to reflect the fact that he was not discharged for misconduct or unsatisfactory performance.

3) Cease and desist from discriminating on the basis of the race of persons with whom employees associate.

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In the Matter of

DEVON PETERSON, dba Denz Auto Salon

Case No. 68-02

Final Order of Commissioner Dan Gardner

Issued April 1, 2003

SYNOPSIS

Respondent willfully failed to pay two wage claimants their earned wages. The Commissioner ordered Respondent to pay claimants $1,835.44 in unpaid wages and $3,482 in penalty wages. ORS 652.140, *former* ORS 652.150, ORS 653.025, *former* OAR 839-001-0470.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 11, 2003, at the Eugene offices of the Bureau of Labor and Industries, located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, an employee of the Agency. Seth Courtright and Chris Mercer, wage claimants, were present throughout the hearing and not represented by counsel. Respondent Devon Peterson was present throughout the hearing and was represented by Russell Bevans, attorney at law.

The Agency called the following witnesses: Seth Courtright, wage claimant; Chris Mercer, wage claimant; Roy Harris II (telephonic); Stephen Moe (telephonic); Eric Albanese (telephonic); and Daniel Morris.

Respondent called the following witnesses: Devon Peterson, Respondent; Ryan Brooks (telephonic), Respondent's former employee; Derek Becker (telephonic), Respondent's former employee; Stephen Benge (telephonic); and Becky Wing, Respondent's girlfriend.

The forum received into evidence:

a) Administrative exhibits X-1 through X-15 (submitted or generated prior to hearing);

b) Agency exhibits A-1, A-2 (pp. 1-3 only); A-5, A-6 (pp. 1-3, 5-7) (submitted prior to hearing), and A-11 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On November 2, 2001, Claimant Courtright filed a wage claim with the Agency alleging that Respondent Devon Peterson, dba Denz Auto Salon, had employed him and failed to pay wages earned and due to him.

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

3) On January 4, 2002, Claimant Mercer filed a wage claim with the Agency alleging that Respondent Devon Peterson, dba Denz Auto Salon, had employed him and failed to pay wages earned and due to him.

4) At the time he filed his wage claim, Claimant Mercer assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Mercer, all wages due from Respondent.

5) On February 15, 2002, the Agency issued Order of Determination No. 01-4962 based upon the wage claims filed by Claimants Mercer and Courtright. The Order of Determination alleged that Respondents "Devon Peterson and Caverear Denz, partners, dba Denz Auto Salon, Employers," owed a total of $2,115.75 in unpaid wages[1] and $3,357.60 in civil penalty wages,[2] plus interest, and required that, within 20 days, Respondents 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.

6) On February 5, 2002, Respondent Devon Peterson filed an answer and request for hearing.

7) On December 6, 2002, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and the Claimants stating the time and place of the hearing as January 7, 2003, at 1400 Executive Parkway, Eugene, Oregon.

8) On January 2, 2003, Respondent, through counsel Bevans, filed a motion to postpone the hearing, based on the assertion that Bevans had not been notified of the hearing date until January 2, 2003, and had a scheduling conflict on January 7, 2003. The Agency did not object and the ALJ reset the hearing for February 11, 2003.

9) At the start 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.

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[1] The Agency alleged that Courtright was entitled to $867.75 and Mercer was entitled to $1,248 in unpaid wages.

[2] The Agency alleged that Courtright was entitled to $1,636.80 and Mercer was entitled to $1,720.80 in penalty wages.

10) At the conclusion of the ALJ's advisory statement, the Agency moved to dismiss Caverear Denz as a Respondent from the Order of Determination based on Respondent's representation that Caverear Denz was not an actual person. The Agency's motion was granted.

11) On March 11, 2003, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Devon Peterson owned and operated an auto body and paint shop under the assumed business name of Denz Auto Salon and employed one or more individuals in Oregon. Denz Auto Salon occupied a space the size of two or three basketball gymnasiums.

2) Respondent hired Claimant Courtright in August 2001 to do clean up and prep work. Respondent told Claimant Courtright he would be paid $6.00 per hour.

3) Claimant Courtright worked for Respondent from August 29 through September 18, 2001. He did clean-up, sanded cars, and other prep work to prepare cars for painting, using Respondent's tools to perform his work. He quit Respondent's employment on September 18, 2001.

4) Claimant Courtright worked Monday through Saturday, taking half an hour for lunch each day. He created and maintained a contemporaneous log of the time he arrived at and left work each day.

5) Claimant Courtright worked 24.5 hours from August 29-31, 46.25 hours the week of September 3-9, 51.5 hours the week of September 10-16, and 11.75 hours on September 17-18, 2001. In all, he worked 116.25 straight time[3] hours and 17.75 overtime hours, for a total of 128 hours. Computed at $6.50 per hour, he earned $755.63 for his straight time hours. Computed at $9.75 per hour, he earned $173.06 for his overtime hours,[4] for total earnings of $928.69 in gross wages.

6) As of the date of hearing, Claimant Courtright had not been paid any wages by Respondent.

7) Penalty wages for Claimant Courtright, computed in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1)(d), equal $1,742 ($928.69 gross earnings ÷ 128 hours worked = $7.26 per hour x 8 hours = $58.08 x 30 days = $1742).

8) Claimant Mercer is a car enthusiast and an experienced car mechanic. In November 2001, before Respondent hired him, he

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[3] Straight time hours are all hours worked that do not exceed 40 in a given workweek.

[4] Overtime hours are all hours worked in excess of 40 in a given workweek. OAR 839-020-0030(1).

installed a timing belt and water pump in Respondent's car in exchange for a custom muffler that Respondent had in stock.

9) On November 21, 2001, Respondent hired Claimant Mercer to do clean up, prep work for cars in the shop to be painted, and mechanical work as needed. Respondent told Mercer he would be paid a salary of $1200 per month, plus commissions on parts installed.

10) Claimant Mercer worked for Respondent from November 21 through December 18, 2001. He quit Respondent's employment on December 18, 2001. He initially used Respondent's tools, then brought his own hand tools and used Respondent's power tools and his own hand tools for the rest of his employment with Respondent.

11) Claimant Mercer worked Monday through Saturday while employed by Respondent. He worked from 8 a.m. to 6 p.m. on weekdays, with 30 minutes off for lunch. Each Saturday, he worked a total of 7 hours.

12) Some of Claimant Mercer's friends brought their cars to Respondent's shop to be worked on while Mercer worked for Respondent. Mercer's friends paid Respondent for the work that Mercer performed on their cars.

13) Respondent was paid for the mechanical work that Claimant Mercer performed on vehicles in Respondent's shop during Mercer's employment.

14) Claimant Mercer worked 7 hours on November 21, 54.5 hours from November 26-December 1, 54.5 hours from December 10-15, and 9 hours on December 17. In all, he worked 96 straight time hours and 29 overtime hours, for a total of 125 hours. Computed at $6.50 per hour, he earned $624 for his straight time hours. Computed at $9.75 per hour, he earned $282.75 for his overtime hours, for total earnings of $906.75 in gross wages.

15) As of the date of hearing, Claimant Mercer had not been paid any wages by Respondent.

16) Penalty wages for Claimant Mercer, computed in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1)(d), equal $1,742 ($906.75 gross earnings ÷ 125 hours worked = $7.25 per hour x 8 hours = $58 x 30 days = $1740).

17) Claimants Courtright and Mercer met for the first time during the summer of 2002.

18) In 2001, Respondent paid his other two employees $1200 per month in salary, with bonuses.

19) In 2001, Respondent did not keep a record of the total hours worked by his employees and kept no record of the hours worked by Claimants Courtright and Mercer.

CREDIBILITY FINDINGS

20) Claimant Courtright was a credible witness. He responded

forthrightly to questions on direct and cross-examination. He described with particularity the work he performed on four vehicles while in Respondent's employ, and Respondent did not impeach his testimony on this key point.

21) Claimant Mercer was a credible witness. He testified in a forthright manner, responding directly to questions on direct and cross-examination. He testified in convincing detail about each of the five cars that he worked on during Respondent's employment and the work he performed on each car. His testimony about the salary that Respondent promised to pay him was consistent with the amount of salary Respondent paid to his other employees.

22) Devon Peterson was not a credible witness. His testimony was glib and his self-portrait as an honest businessman being taken advantage of by unscrupulous youths was unconvincing. A prime example of this testimony was the following statement: "I wasn't prepared today because I never thought these lies and allegations would make it this far." He theorized that Claimant Mercer filed a wage claim because he heard about Claimant Courtright's claim and thought he could profit from it, but provided no evidence to back up this speculation. He attempted to paint Claimant Courtright as mentally deficient. He claimed that Claimant Courtright's father came to Respondent's shop and demanded that Courtright be paid or he would have Respondent "fucking killed" and described other threats that Courtright's father made, then testified that he "never thought about it again until this trial." He denied that Claimant Mercer ever worked for him, then acknowledged that Mercer asked him for and was given a place to work in Respondent's shop. He had no explanation for allowing this privilege to Mercer. Based on the above, the forum has disbelieved Respondent's testimony whenever it conflicted with the testimony of Courtright or Mercer and has only credited it where it was corroborated by other credible evidence.

23) Stephen Moe was called as a witness for the Agency. He testified that he observed Claimant Courtright at work on several occasions when he went to Respondent's shop to look at his son-in-law's car. However, in a written statement dated October 31, 2001, he stated that he observed Claimant Courtright at Respondent's business and "subsequently learned that my son-in-law had his car painted at Denz's and that Seth did most of the sanding on the vehicle." These statements are irreconcilable. Because of this major contradiction, the forum has not credited any of Moe's testimony concerning Claimant Courtright.

24) Stephen Benge was called by Respondent as a witness. He testified that he worked at Respondent's business for "work experience" credit from his high school during November and December 2001 and that Claimant Mercer did not work for Respon-

dent. Benge signed a written statement on behalf of Mercer on January 2, 2002. That statement read:

> "Chris Mercer worked with me and others for Devon Peterson at Denz Auto Salon between the dates of November 21, 2001 and December 18, 2001. I heard Mr. Peterson refer to Chris as his employee. I also heard him tell Chris he would pay him his wages due on several occasions but I never saw him do this."

Benge testified that the original statement was untrue, and that he only signed it because Claimant Mercer promised to fix his car for free if Benge signed the statement. Benge testified that he decided to recant his written statement when Mercer started being rude to him and demonstrated a hostile attitude towards Mercer in his testimony. Based on Benge's demeanor and bias against Mercer, the forum concludes that Benge was either lying when he signed the original statement, or he told the truth in the original statement and lied during his testimony. Either way, the forum finds his testimony unreliable and has not credited any of it regarding Claimant Mercer.

25) Eric Albanese was called by the Agency as a rebuttal witness. He testified that Respondent had "ruined" his car and demonstrated an extremely hostile attitude towards Respondent in the manner and contents of his testimony. His testimony against Respondent was exaggerated and slanted towards Claimant Mercer. Based on his demeanor and clear bias against Respondent, the forum has not credited any of his testimony.

26) Becky Wing, Respondent's girlfriend of five years, testified on behalf of Respondent. She characterized Respondent's business as "our business" and clearly had a strong financial interest in the outcome of this case. Despite her testimony that she was at Respondent's business every workday in 2001, she claimed she never saw Claimant Courtright at Respondent's business in August or September 2001, a claim that contradicted the testimony of Respondent, Brooks, Decker, and Courtright. She also testified inconsistently that Claimant Mercer "came in a lot and did his own thing" and that she only "saw him there a couple times." The forum has discredited all of her testimony regarding Claimants Courtright and Mercer.

27) Daniel Morris, a former customer of Respondent's, testified in person on behalf of the Agency. He exhibited a calm, serious demeanor and gave thoughtful, responsive answers on direct and cross-examination. He readily admitted that he did not recall certain facts and testified with specificity concerning his observations at Respondent's shop. He did not have a bias for or against either Respondent or Claimants Courtright or Mercer. The forum has credited his testimony in its entirety.

28) Ryan Brooks is a former employee of Respondent who was called as a witness for Respondent. Brooks did not appear to have a bias against either Respondent or Claimants Courtright and Mercer. The forum has credited his testimony concerning the employment of Claimant Courtright because it corroborates Courtright's credible testimony. In addition, it was partially corroborated by Becker, who testified that although he did not understand that Courtright was an employee, Courtright was repeatedly on Respondent's premises. The forum has not credited Brooks's testimony concerning the employment of Claimant Mercer because it was contradicted by the more credible testimony of Mercer and Decker.

29) Derek Becker is a former employee of Respondent who was called as a witness for Respondent. He testified that he is a friend of Respondent, but did not demonstrate a bias in favor of Respondent in his demeanor or testimony. The forum has credited his testimony concerning the employment of Claimant Mercer because it is consistent with Mercer's credible testimony. The forum has not credited his testimony that he did not understand that Claimant Courtright was an employee of Respondent's for the reason that it is inconsistent with the more credible testimony of Brooks and Claimant Courtright and because Respondent's business occupied such a large space and was run so loosely that Courtright could have been Respondent's employee and Becker would not have known it.[5]

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Devon Peterson owned and operated an auto body and paint shop under the assumed business name of Denz Auto Salon and employed one or more individuals in Oregon.

2) Respondent hired Claimant Courtright in August 2001 to do clean up and prep work. Claimant Courtright worked for Respondent from August 29 through September 18, 2001, doing clean up, sanding, and other prep work to prepare cars for painting. He quit Respondent's employment on September 18, 2001.

3) Claimant Courtright worked 116.25 straight time hours and 17.75 overtime hours while employed by Respondent. Computed at $6.50 per hour, he earned $755.63 for his straight time hours. Computed at $9.75 per hour, he earned $173.06 for his overtime hours, for total earnings of $928.69 in gross wages.

4) As of the date of hearing, Claimant Courtright had not been

[5] For example, Albanese and Morris both testified that they worked on their own cars in Respondent's shop to try and save some money. Also, it was clear to the forum that Benge worked for Respondent for at least a few weeks during Becker's employment gaining "work experience," yet Decker also testified that he did not recall Benge.

paid any wages by Respondent. (Testimony of Courtright)

5) Respondent willfully failed to pay Claimant Courtright and Claimant Courtright is entitled to penalty wages in the amount of $1,742.

6) On November 21, 2001, Respondent hired Claimant Mercer to do clean up, prep work for cars in the shop to be painted, and mechanical work as needed. Respondent told Mercer he would be paid a salary of $1200 per month, plus commission on parts installed.

7) Claimant Mercer worked for Respondent from November 21 through December 18, 2001. He quit Respondent's employment on December 18, 2001.

8) Claimant Mercer worked 96 straight time hours and 29 overtime hours, for a total of 125 hours while employed by Respondent. Computed at $6.50 per hour, he earned $624 for his straight time hours. Computed at $9.75 per hour, he earned $282.75 for his overtime hours, for total earnings of $906.75 in gross wages.

9) As of the date of hearing, Claimant Mercer had not been paid any wages by Respondent.

10) Respondent willfully failed to pay Claimant Mercer and Claimant Mercer is entitled to penalty wages in the amount of $1,740.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer who suffered or permitted Claimants Courtright and Mercer to work. ORS 653.010(3) & (4).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent. ORS 652.310 to ORS 652.332, ORS 653.040, ORS 653.261.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant Courtright all wages earned and unpaid by September 25, 2001, five days after he voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes Claimant Courtright $928.69 in unpaid, due and owing wages.

4) Respondent is liable for $1,742 in penalty wages to Claimant Courtright. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

5) Respondent violated ORS 652.140(2) by failing to pay Claimant Mercer all wages earned and unpaid by December 26, 2001, five days after he voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes Claimant Mercer $906.75 in unpaid, due and owing wages.

6) Respondent is liable for $1,740 in penalty wages to Claimant Mercer. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

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 Claimants their earned, unpaid, due and payable wages, and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

INTRODUCTION

This case involves wage claims by Claimants Seth Courtright and Chris Mercer, two persons whom the Agency alleges worked at Respondent's auto body and paint shop. Respondent denies that it employed either claimant. In order to prevail in this matter, the Agency is required to prove, by a preponderance of the evidence, the following four elements: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed, if it exceeded the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondent. *In the Matter of Barbara Coleman,* 19 BOLI 230, 262-63 (2000).

CLAIMANT COURTRIGHT

A. Respondent employed Claimant Courtright.

Claimant Courtright testified that Respondent hired him and promised to pay him $6.00 per hour. He testified as to particular cars that he worked on and the work that he performed on those cars, and that he worked for about three weeks. Ryan Brooks, one of Respondent's regular employees, testified that Courtright worked for about a month and that Courtright scrubbed and sanded on cars to prepare them for painting. The forum has found the testimony of Courtright and Brooks credible with regard to the circumstances of Courtright's employment. In contrast, the forum found the testimony of all of Respondent's other witnesses on this issue to be unreliable. This is sufficient evidence to prove the first element of the Agency's case with respect to Claimant Courtright.

B. Claimant Courtright was entitled to Oregon's minimum wage.

Claimant Courtright testified that Respondent agreed to pay him $6.00 per hour. The minimum wage in Oregon in 2001 was $6.50 per hour, and employers are prohibited from paying their employees a lesser wage. ORS 653.025. *See In the Matter of Leslie Elmer DeHart,* 18 BOLI 199, 208 (1999). Respondent was required by law to pay Courtright $6.50 per hour for straight time hours and $9.75 per hour for all overtime hours worked.

C. Claimant Courtright performed work for which he was not properly compensated.

The forum has already concluded that Claimant Courtright

was Respondent's employee and performed some work for Respondent. It is undisputed that Courtright has been paid nothing by Respondent. This satisfies the third element of the Agency's case.

D. <u>Respondent owes Claimant Courtright $928.69 in unpaid wages.</u>

ORS 653.045 requires an employer to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. *In the Matter of Diran Barber*, 16 BOLI 190 (1997), *quoting Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

Where the employer produces no records, the Commissioner may rely on 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 then may award damages to the employee, even though the result be only approximate. *In the Matter of Usra A. Vargas*, 22 BOLI 212, 221 (2001). This forum will accept testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work -- where that testimony is credible. *In the Matter of Graciela Vargas*, 16 BOLI 246, 254 (1998). In this case, Respondent produced no records and rested its defense on the claim that he never employed Claimant Courtright. In contrast, Courtright credibly testified as to the dates and hours that he worked and produced a contemporaneous record of his work hours. The forum bases its award of unpaid wages and penalty wage calculations on that record. The forum arrived at its total of hours worked by Courtright[6] by subtracting his 30-minute lunch break from Courtright's record showing his arrival and departure time at work each day. For example, Courtright's calendar shows that he arrived at work at 8:15 a.m. and left work at 8:45 p.m. on August 29. Courtright was credited with 12 hours work time on that day (12/5 hours - .5 hours). The forum did not subtract 30 minutes from August 31 for the reason that Courtright was only at work three hours, from 9 a.m. until noon, on that day. In total, Courtright is entitled to $928.69 in unpaid, due and owing wages.[7]

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[6] *See* Finding of Fact 5 – The Merits, *supra*.

[7] Although the Agency only sought $867.75 in unpaid wages in its Order of Determination, the Commissioner has the authority to award unpaid wages and penalty wages exceeding those sought in an Order of Determination where the wages are awarded as compensation for statutory violations alleged in the Agency's Order of Determination. *In the Matter of Contractor's Plumbing Service, Inc.,* 20 BOLI 257, 273 (2000).

CLAIMANT MERCER

A. Respondent employed Claimant Mercer.

Claimant Mercer credibly testified that Respondent hired him and promised to pay him $1200 per month, plus commissions in convincing detail about the cars he worked on while in Respondent's employ. Derek Becker, one of Respondent's regular employees, also credibly testified that Mercer worked for Respondent and described the work Mercer performed. Respondent claimed that all work performed by Mercer was as an independent contractor, but provided no reliable evidence to back up this claim. This is sufficient evidence to prove the first element of the Agency's case with respect to Claimant Courtright.

B. Claimant Mercer was entitled to Oregon's minimum wage.

In its Order of Determination, the Agency sought unpaid wages for Claimant Mercer at the rate of $6.50 per hour. At hearing, Mercer credibly testified that Respondent agreed to pay him $1200 per month, plus commissions. However, no evidence was presented as to the number of hours of work per week this salary was intended to cover, which makes it impossible to calculate Mercer's regular hourly rate of pay based on a salary of $1200.[8] Respondent was required to pay Mercer at least the minimum wage of $6.50 per hour, and the forum has calculated Mercer's unpaid wages at that rate. Unpaid wages for hours worked in excess of 40 each workweek have been calculated at $9.75 per hour.

C. Claimant Mercer performed work for which he was not properly compensated.

The forum has already concluded that Claimant Mercer was Respondent's employee and performed some work for Respondent. It is undisputed that Respondent has paid Mercer nothing. This satisfies the third element of the Agency's case.

D. Respondent owes Claimant Mercer $906.75 in unpaid wages.

ORS 653.045 requires an employer to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and

[8] Where a wage claimant is paid a salary, the claimant's regular hourly rate of pay can only be computed where there is evidence of the agreed number of hours the salary is intended to cover per week or, where hours per week fluctuate, where there is evidence of a "clear mutual understanding of the parties that the fixed salary is compensation for the hours worked each work week, whatever their number[.]" OAR 839-020-0030(3)(e), (f), and (g).

wages involved. *Barber*, 16 BOLI at 190.

Where the employer produces no records, the Commissioner may rely on 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 then may award damages to the employee, even though the result be only approximate. *Usra Vargas*, 22 BOLI at 212. This forum will accept testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work -- where that testimony is credible. *Graciela Vargas*, 16 BOLI at 254. Respondent produced no records and rested its defense on the claim that he never employed Claimant Mercer. In contrast, Mercer credibly testified as to the dates and hours that he worked. The forum bases its award of unpaid wages and penalty wage calculations on Mercer's credible testimony. The forum arrived at its total of hours worked by Mercer[9] by subtracting his 30-minute lunch break from the ten hours (8 a.m. to 6 p.m.) that Mercer was at work each day and crediting him with seven hours on both Saturdays that he worked. In total, Mercer is entitled to $906.75 in unpaid, due and owing wages.

PENALTY WAGES

An award of 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 employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Because Respondent hired Claimants and was usually present at Denz Auto Salon during business hours, the forum concludes that he knew Courtright and Mercer's hours of work. There was no evidence that Respondent acted other than voluntarily or as a free agent in not paying Courtright and Mercer for the work they performed during the wage claim periods. The evidence shows that he simply chose not to pay them. Therefore, both wage claimants are entitled to penalty wages.

Claimants both voluntarily quit, and their wages became due five days after the dates they quit, not counting weekends and holidays. More than 30 days have elapsed since that date. Penalty wages are therefore assessed and calculated pursuant to *former* ORS 652.150 and *former* OAR 839-001-0470(1). Claimant Courtright is entitled to $1,742 in penalty wages, and Claimant Mercer is

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[9] *See* Finding of Fact 14 – The Merits, *supra*.

entitled to $1,740 in penalty wages.[1]

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and penalty wages he owes as a result of his violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Devon Peterson** 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 Seth Courtright in the amount of TWO THOUSAND SIX HUNDRED SEVENTY NINE DOLLARS AND SIXTY NINE CENTS ($2,679.69), less appropriate lawful deductions, representing $928.69 in gross earned, unpaid, due, and payable wages and $1,742 in penalty wages, plus interest at the legal rate on the sum of $928.69 from October 1, 2001, until paid, and interest at the legal rate on the sum of $1,742 from November 1, 2001, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Chris Mercer in the amount of TWO THOUSAND SIX HUNDRED FORTY SIX DOLLARS AND SEVENTY FIVE CENTS ($2,646.75), less appropriate lawful deductions, representing $906.75 in gross earned, unpaid, due, and payable wages and $1,740 in penalty wages, plus interest at the legal rate on the sum of $906.75 from January 1, 2002, until paid, and interest at the legal rate on the sum of $1,740 from February 1, 2002, until paid.

[1] In these circumstances, the Commissioner has the authority to award both wage claimants more than was sought in the Agency's Order of Determination. *See* fn. 7, *supra.*

In the Matter of

RODRIGO AYALA OCHOA
and
Ochoas' Greens, Inc.
Case No. 142-01
Final Order on Reconsideration of Commissioner Dan Gardner

Issued June 5, 2003

SYNOPSIS

Respondents, an individual and his corporation, while acting jointly as a farm labor contractor, failed to file complete and accurate certified true copies of payroll reports on four USFS contracts, in violation of ORS 658.417(3). Respondents also made misrepresentations and willfully concealed information on their joint farm labor contractor license application, in violation of ORS 658.440(3)(a). Respondent Ochoas' Greens, Inc. issued 106

paychecks to 29 of its employees and failed to provide the employees with itemized statements of earnings, in violation of ORS 653.045(1). Respondent Ochoas' Greens, Inc. also failed to make and retain required employment records for its 29 employees, in violation of ORS 653.045(3). The Agency failed to establish that Respondents, while acting jointly in the capacity of farm labor contractor, failed to pay an employee wages when due with money entrusted to Respondents for that purpose, in violation of ORS 658.440(1)(c). The Agency also failed to prove that Respondents, while acting jointly in the capacity of farm labor contractor, failed to comply with lawful contracts, in violation of ORS 658.440(1)(d). The forum ordered Respondents Ochoas' Greens, Inc. and Rodrigo Ayala Ochoa to pay civil penalties of $1000 for each violation of ORS 658.417(3), and $2,000 for the violation of ORS 658.440(3)(a), for a total of $10,000. The forum ordered Respondent Ochoas' Greens, Inc. to pay $150 for each violation of ORS 653.045(1), and $200 for each violation of ORS 653.045(3), for a total of $21,700. The forum further found that Respondents lacked the character, competence and reliability to act as farm labor contractors and denied them a license pursuant to ORS 658.420. ORS 658.417; ORS 658.440; ORS 653.045; ORS 658.453; ORS 653.256; OAR 839-015-0300; OAR 839-015-0508; OAR 839-015-0520; OAR 839-020-1010; and OAR 839-015-0140.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, *former* Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 26, 2002, in the Bureau of Labor and Industries hearing room located at 800 NE Oregon Street, Portland, Oregon.

David Gerstenfeld, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Richard W. Todd, Attorney at Law, represented Ochoas' Greens, Inc. and Rodrigo Ayala Ochoa. Respondent Ochoa was present throughout the hearing on behalf of himself and Respondent Ochoas' Greens, Inc.

The Agency called as witnesses: Julye Robertson, BOLI Farm Labor Unit Administrative Specialist; Bernadine Murphy, Special Forest Products Coordinator, Timber Department, USDA Deschutes National Forest; Katy Bayless, BOLI Farm Labor Unit Compliance Specialist; and Rodrigo Ayala Ochoa, Respondent.

In addition to Respondent Ochoa, Respondents called Stephanie Wing and Beatrice Boden, Respondent's daughters, as witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-12;

b) Agency exhibits A-1 through A-33 (filed with the Agency's case summary) and A-35 (submitted during the hearing);

c) Respondent exhibits R-1 and R-7 through R-10 (submitted with Respondents' case summary).

On September 6, 2002, after fully considering the entire record in this matter, Jack Roberts, then-Commissioner of the Bureau of Labor and Industries, issued the Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order in this case. After Respondents timely sought judicial review in the Oregon Court of Appeals on May 6, 2003, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, filed a Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals. Having reconsidered the final order, I hereby issue this Final Order on Reconsideration.

FINDINGS OF FACT – PROCEDURAL

1) On June 26, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties and Rejection of Farm Labor Contractor License Application ("Notice") to Respondents. The Notice informed Respondents that the Commissioner: a) intended to deny Respondents' farm labor license application, pursuant to ORS 658.425; and b) intended to assess civil penalties against Respondents, jointly and severally, totaling $45,900, pursuant to ORS 653.256 and 658.453. The Notice cited the following bases for the Agency's actions: Respondents' failure to file certified payroll records in accordance with ORS chapter 658 and applicable rules (8 violations); Respondents' failure to pay wages when due (2 violations); Respondents' failure to comply with a lawful contract (2 violations); Respondents' failure to provide pay stubs to employees (106 violations); Respondents' failure to make and retain required records (30 violations); and Respondents' intentional misrepresentations, false certifications, and willful concealment of information on a farm labor license application (one violation). The Notice was served on Respondents on July 2, 2001.

2) On August 17, 2001, Respondents, through counsel, filed a timely answer to the Notice and requested a hearing.

3) On September 12, 2001, the Agency requested a hearing and on October 25, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on March 19, 2002. With the Notice of Hearing, the forum included a copy of the Notice of Intent to Assess Civil Penalties, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

4) On January 8, 2002, the forum issued a case summary order requiring the Agency and Respondents to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondents only); a statement of any agreed or stipulated facts; and any penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by March 8, 2002, and advised them of the possible sanctions for failure to comply with the case summary order. The Agency and Respondents filed timely case summaries.

5) On January 15, 2002, the Agency moved for a discovery order requiring Respondents to produce eight categories of documents. Respondents did not file a response to the Agency's motion and on January 24, 2002, the forum granted the Agency's motion.

6) On February 6, 2002, the Agency moved to amend its Notice to correct a typographical error. Respondents did not file a response to the Agency's motion and the forum granted the Agency's motion to amend the Notice.

7) On February 20, 2002, Respondents moved for a postponement of the hearing date. The Agency advised the Hearings Unit that it did not intend to file a response to the motion. On February 26, 2002, the forum granted Respondents' motion and the hearing was rescheduled to commence on March 26, 2002. The case summary due date was changed to March 15, 2002.

8) On February 28, 2002, the forum issued a notice that advised Respondents of changes in the contested case hearing rules, which took effect February 15, 2002. The notice included a summary of the changes, a copy of the administrative rules, and a revised copy of the Summary of Contested Case Rights and Procedures.

9) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally 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) At the start of the hearing, the Agency and Respondents orally stipulated to the following facts:

a) One bushel is the equivalent of approximately 9.31 gallons.

b) Respondents did not provide paystubs with any of the 106 payments they made to people who gathered pine cones for them in May through August 2000.

c) Respondents did not make nor retain records regarding the number of hours worked each day, week and pay period for the 30 persons who gathered pine cones in approximately May through August 2000.

11) At the start of the hearing, Respondents withdrew their "Third Affirmative Defense" that alleged "[o]n numerous of the allegations contained in the [Notice] the State of Oregon lacks jurisdiction to oversee the alleged activities."

12) At the start of and during the hearing, the ALJ made rulings on certain motions of the participants that are set out in a separate section of this order.

13) On July 23, 2002 the ALJ issued a proposed order and notified the participants they were entitled to file exceptions to the proposed order. The Agency did not file exceptions. Respondent timely filed exceptions, which are addressed in the Opinion section of this Final Order on Reconsideration.

RULINGS ON MOTIONS

AGENCY'S MOTIONS TO AMEND CHARGING DOCUMENT

1) At the start of hearing, the Agency moved to amend the Notice to correct a typographical error, changing the reference in paragraph 10, page 4, from ORS chapter 659 to ORS chapter 658. Over Respondents' objection, and finding the interest of justice so required, the forum granted the Agency's motion. That ruling is hereby confirmed.

2) At the close of hearing, the Agency moved to amend the Notice to include five additional violations of ORS 653.045(1) which requires employers to "make and keep available to the Commissioner * * * for not less than two years, a record or records containing * * * [t]he actual hours worked each week and each pay period by each employee." The Agency based its motion on Respondent Ochoa's daughter's testimony that she had "shredded" her copies of employees' hours worked after she filled out the certified payroll records in her charge. Respondent objected on the ground that the witness testimony alone did not support the allegation that Respondents failed to make and keep available records of hours worked by each employee. The forum denied the Agency's motion. That ruling is hereby confirmed.

RESPONDENT'S MOTION TO AMEND ANSWER

During their closing argument, Respondents moved to amend their answer to conform to evidence Respondents contend was presented during the hearing showing that in May 2000 Respondent corporation engaged "independent contractors," rather than employed workers, to harvest cones on federal and private land. The Agency objected to the motion based on Respondents' failure to raise the defense in its initial pleading and asserted that there was no evidence introduced in support of the proposed amended pleading. The forum deferred ruling on the motion until issuance of the proposed order.

OAR 839-050-0140(2)(a) allows amendment of pleadings to conform to the evidence under the following circumstances:

> "After commencement of the hearing, issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is express 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. Any participant raising new issues must move the administrative law judge to amend its pleading to conform to the evidence and to reflect issues presented."

Thus, a pleading may be amended to conform to the evidence only where a new issue has been litigated at the hearing through the express or implied consent of the participants.

In this case, that did not occur with respect to the issue of whether the workers in question were independent contractors. Respondent did not attempt to introduce that issue until closing argument. Even if, as Respondents argue, the record contains evidence relevant to that issue – an assertion the forum views as dubious at best – it cannot be said that the "independent contractor" issue was "introduce[ed]" or "address[ed]" during the evidentiary portion of the hearing so as to be litigated by the participants' express or implied consent.

The forum rejects the notion that the "independent contractor" issue was implicitly raised by Respondents' general denial in their answer that the workers were employees. Contrary to Respondents' apparent understanding, employees and independent contractors do not occupy the entire universe. That is, it is possible for an individual to be neither an employee nor an independent contractor. For instance, to place the matter in the context of this case, the individual could be someone who merely sold items to Respondents without being either an employee or an independent contractor. Thus, Respondents did not raise the "independent contractor" issue merely by denying that the workers were employees.

Because the "independent contractor" issue was not tried by the participants' express or implied consent, OAR 839-050-0140(2)(a) does not permit amendment of Respondents' answer. The forum therefore denies Respondents' motion to amend their answer to allege that the workers in question were independent contractors.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Rodrigo Ayala Ochoa was corporate president of Respondent Ochoas' Greens, Inc. Respondent Ochoa started a family landscape nursery business in 1985. The business incorporated in 1994 as Ochoas' Greens, Inc. Respondent Ochoa's wife is the corporate secretary. Respondent Ochoa and his wife have been the only shareholders since incorporation. The Ochoas have four

children and at least three of them work for the business.

2) As part of its nursery business, OGI cultivates plants such as rhododendrons, blooming forsythia, and several kinds of willows. OGI employs workers to work in the nursery and to assemble wreaths during the winter. The workers are paid hourly or sometimes on a piece rate basis.

3) Rather than lay off workers during the nursery's slow season, OGI offers the nursery crew the opportunity to harvest cones in Central Oregon when cones are abundant. OGI uses most of the cones for making wreaths and some of the cones are "boxed" for sale during the winter. Some workers go home to Mexico or Guatemala during the slow season and others choose to earn extra money by harvesting cones for OGI.

4) OGI harvests cones on federal and private land. The business is required to obtain a "special use permit" and pay a fee to harvest cones on federal land. OGI does not have to pay a fee to harvest cones on private land, but it always obtains oral or written permission from landowners before collecting cones from private property.

5) The U.S. Forest Service ("USFS") permits cone harvesting on federal land subject to certain terms and conditions. Anyone can obtain a special use permit but some form of identification is required before a permit is issued. Persons seeking a permit decide how many bushels they want to purchase and that number is recorded on the "Forest Product Contract and Cash Receipt" that the "purchasers" sign after they have paid a fee. The number of bushels "purchased" determines the fee. The USFS designates the cone harvest area covered by the permit and provides a "Sale Area" map to the purchaser. The location of the "Sale Area" and the estimated acreage are indicated on the face of the permit. The purchaser agrees to record on the permit the dates and quantity of cones removed. The purchaser also agrees to harvest only those cones that are on the ground; climbing trees for cones is prohibited. Purchasers are not guaranteed the number of cones purchased and the designated harvest area is open to other permit holders subject to the same conditions. The Ranger District's "field officers" regularly patrol the forest and randomly inspect permits if cone harvesters are present in the patrolled area.

6) In May 2000, OGI obtained two special use permits for cone harvesting in the Bend Fort Rock Ranger District. The permits were issued on May 5, 2000, to Respondent Ochoa and Raul Barrera Barrera, OGI's employee, and permitted cone harvesting in a designated area outside of Bend covering 125,000 acres. The permits were valid until July 31, 2000. The total fee for both permits was $2,500, assessed at .25 per bushel for 10,000 bushels of cones. OGI paid the fee for both permits.

7) In May 2000, OGI agreed to pay workers $1.55 per "bag" of cones collected during the harvest season. OGI's nursery crew comprised about half of the workers and the rest were either friends of the nursery workers or workers in labor camps in Central Oregon who wanted to make extra money before the berry-picking season started. After the cone harvest, OGI's regular workers went back into the nursery to work and others either went to work elsewhere or went back to Mexico or Guatemala. Some workers harvested cones the full season and others harvested for awhile and then left for other work or went home.

8) During the 2000 harvest, OGI used at least three vans, owned by either OGI or its president, Respondent Ochoa, to transport workers who lived outside the Bend area to the cone harvest site. OGI also provided two or three camping trailers for workers to live in during the harvest season. OGI provided the workers with 33-gallon plastic bags, approximately 16.5" in diameter and 16.5" high, to collect the cones. The workers brought full bags of cones to a site in the forest where the cones were loaded in a truck for transport back to OGI's nursery business. Respondent Ochoa, on behalf of OGI, rejected cones that were broken, sun bleached or otherwise not suitable for OGI's use.

9) Respondent Ochoa was not present during most of the cone harvest season, but at least one foreman employed by OGI was on site monitoring the cone harvest. The workers did not harvest cones on rainy days due to the effects of water on the quality of the cones. The workers harvested cones on federal and private land.

10) OGI issued a total of 106 checks on May 15, May 25, June 2, June 6-7, June 14, June 20, June 29-30, and August 4, 2000, to a total of 29 workers for cones collected during that period. Individual checks ranged from a minimum of $117.80 for 76 bags to $1,295.80 for 836 bags of cones. Some workers received several checks and others received one check. (Testimony of Respondent Ochoa; Exhibit A-20)

11) Workers collected approximately 75,000 bushels and OGI paid $59,785.95 to its workers for all of the cones collected during the May-August 2000 season.

12) The USFS did not cite OGI or terminate OGI's permits for breach of terms and conditions, nor did it ever determine that OGI collected more cones than permitted under the special use permits.

13) OGI did not provide any of the 29 workers with an itemized statement of earnings with the checks that were handed out May-August 2000.

14) The only record OGI maintained for the 29 workers between May and August 2000, was an "Ochoas' Greens, Inc. Account Quick Report" for the "cost of goods" that listed the payment method (check), the date the

check issued, the check number, the workers' names, the number of bags collected and the rate per bag per worker, and the total amount paid each worker. OGI did not make and maintain a record of the number of hours each worker worked between May and August 2000.

15) In June 2000, in response to a verbal complaint made by OGI employee Jacobo Ramirez-Escobar to compliance specialist Katy Bayless, the Agency requested that Respondents produce Ramirez-Escobar's pay stub for the pay period April 28 to June 11, 2000, for inspection. The pay stub that was provided shows OGI issued a paycheck to Ramirez-Escobar on May 12, 2000, and that he worked 21 hours at $6.50 per hour for a total of $136.50 for the pay period April 28 to June 11, 2000. The itemized deductions include required withholdings and $55 for rain gear. The year to date ("YTD") column reflects two deductions for rain gear for a total of $110. Respondents did not provide the Agency with a written authorization for the deductions. The pay stub does not include information about the nature of the work performed during the pay period or whether OGI paid the employee from monies entrusted by another to OGI for the purpose of paying employees.

16) Before 1994, Respondent Ochoa held an Oregon farm labor contractor license. OGI and its president, Respondent Ochoa, jointly held a farm labor contractor license after Respondent Ochoa incorporated sometime in 1994.

17) In 1992, Respondent Ochoa signed a "Settlement of Claims" document wherein Respondent Ochoa agreed to pay - and did pay - $8,000 to seven workers for wage claims arising out of:

"a) work for the 1991 Christmas tree season for which the workers were recruited, employed or supplied by Rodrigo Ochoa in his capacity as a farm labor contractor; and

"b) work performed by the workers from December 1991 until March 1992 at the nursery owned by Rodrigo Ochoa, Rodrigo Ochoa Greens."

Respondent Ochoa acknowledged that the claims arose "from his alleged violations of the [Fair Labor Standards Act, the Migrant and Seasonal Worker Protection Act, ORS 658.405, *et. seq*., and Oregon's wage and hour laws], and he agree[d] that hereinafter he [would] abide by these laws."

18) In December 1994, Oregon Legal Services obtained a Consent Judgment against "Rodrigo Ochoa, Patricia Ochoa dba Rodrigo Ochoa Greens, Defendants" wherein the defendants were ordered by a federal judge to comply with the requirements of the Migrant and Seasonal Agricultural Worker Protection Act, ORS 658.705, et. seq., and Oregon wage and hour statutes, including "to provide itemized written statements at each payday with the information required by [*former*

ORS 658.440(1)(h)]" and "to pay applicable minimum wage and overtime wage for every hour worked, as required by [*former* ORS 653.025(2) and 653.261]." The amount Respondents agreed to pay under the consent judgment was described as "confidential."

19) In February 1999, as a result of the Agency's Notice of Intent to Assess Civil Penalties issued December 31, 1998, Respondents Ochoa and Ochoas' Greens, Inc. signed a "Stipulation and Consent Final Order" that stated, in pertinent part:

> "(3) Respondents admit, and the Commissioner finds, that Respondents failed to file certified true copies of payroll records with the Bureau of Labor and Industries until August 24, 1998, for work their employees performed on the Contract between approximately August 16 and September 12, 1997. This is in violation of ORS 658.417(3) and OAR 839-015-0300.
>
> "(4) Respondents admit, and the Commissioner finds, that the payroll report for the Contract Respondents submitted to the Bureau of Labor and Industries for the time period August 5 through August 19, 1998, was incomplete in not listing the wage rate paid to employees, the contract number and location, the owner of the land where the work was being performed and not being certified. This is in violation of ORS 658.417(3) and OAR 839-015-0300."

In accordance with the Stipulation and Consent Final Order, Respondents were assessed and paid to the Agency $4,000 in civil penalties.

20) Between June 21 and July 22, 2000, Respondents employed workers to plant trees on USFS contract number 43-05K3-0-0073 ("0073"). On August 7, 2000,[2] Respondents submitted a payroll report to the Agency for the payroll period, June 21, 2000. The payroll report was not certified, but included an hourly rate of pay per employee and the number of hours worked by each employee. On March 20, 2001, Respondents resubmitted the report and Stephanie Wing, Respondent Ochoa's daughter and Respondents' secretary, certified that the report was "correct and complete," that the wage rates paid met the applicable minimum wage standards, and that each employee had been paid all wages earned.[3]

21) On August 21, 2000, Respondents submitted a second

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[2] In its charging document, the Agency alleged the payroll report was filed on August 4, 2000, but the document submitted shows the Agency date stamped the payroll report "Aug 7, 2000."

[3] Although OGI employed the workers, under the applicable statute both OGI and Respondent Ochoa are jointly responsible for the filing the requisite payroll reports.

payroll report to the Agency pertaining to contract number 0073 for the payroll period, July 14–22, 2000. The payroll report was not certified, but included an hourly rate of pay per employee and the number of hours worked by each employee. On March 20, 2001, Respondents resubmitted the report and Wing certified that the report was "correct and complete," that the wage rates paid met the applicable minimum wage standards, and that each employee had been paid all wages earned.

22) Between July 24 and July 28, 2000, Respondents employed workers to thin trees on USFS contract number 43-05K3-9-0078. Respondents submitted a payroll report to the Agency that was date stamped August 21, 2000, indicating Respondents' employees had been paid $30 per acre for the payroll period July 24-28, 2000. The report did not include the number of hours worked by each employee and it was not certified. Respondents resubmitted the report, which was date stamped by the Agency on October 19, 2000, and Wing included and certified the number of hours each employee worked, including overtime hours. The resubmitted report did not include an hourly rate of pay for each employee. Respondents submitted an additional payroll report that was date stamped by the Agency on November 1, 2000 and similar to that which was filed on October 19, except that it showed different hours than those previously reported and it was not certified.

23) Between August 1 and August 14, 2000, Respondents employed workers to thin trees on USFS contract number 43-05K3-9-0092. On August 21, 2000, Respondents submitted a payroll report to the Agency indicating Respondents' employees had been paid $50 per acre for the payroll period August 1-7, 2000. The report did not include the number of hours worked by each employee. On November 1, 2000, Respondents resubmitted the report, which included the number of hours each employee worked and Wing's certification. In March 2001, Respondents filed an additional report pertaining to the same contract purporting to cover the time period of August 1–14, 2000. Wing certified that the report was "correct and complete," that the wage rates paid met the applicable minimum wage standards, and that each employee had been paid all wages earned.

24) Between November 12 and November 17, 2000, Respondents provided workers to thin and prune trees on USFS contract number 43-05K3-9-0078. Respondents submitted a certified payroll report to the Agency for the payroll period November 12-13, 2000, indicating Respondents' employees had been paid $50 per acre for pruning. The Agency date stamped the report January 3, 2001. Wing certified that the report was "correct and complete," that the wage rates paid met the applicable minimum wage standards, and that each employee had been paid all wages owed.

The report included the number of hours worked by each employee.

25) Respondents submitted a payroll report to the Agency for the payroll period November 17, 2000, indicating Respondents' employees had been paid at varying rates per acre for thinning and pruning trees on USFS contract number 43-05K3-9-0078. The Agency date stamped the report January 3, 2001. The report did not include the number of hours worked and was not dated or certified.

26) Respondents submitted a payroll report to the Agency that was date stamped January 3, 2001, indicating Respondents' employees had been paid $32 per acre for thinning trees on a USFS contract located in "St. Helens." The payroll period was for December 6, 2000. The report did not include the contract number or the number of hours worked by each employee and was not certified. On March 20, 2001, Respondents resubmitted the payroll report, which certified Respondents' workers had each worked 3.4 hours on December 6, 2000. Wing also certified that the report was "correct and complete," that the wage rates paid met the applicable minimum wage standards, and that each employee had been paid all wages owed.

27) During times material, the Agency's practice was to return defective payroll record submissions to the farm labor contractor licensee with a cover letter and checklist indicating the areas in which the payroll record needed correction. On October 17, 2000, the Agency returned Respondents' payroll record submission with the customary checklist and cover letter stating, in pertinent part:

> "The enclosed certified payroll report(s) you filed with the Bureau are not in compliance because they are incomplete in the areas checked below. OAR 8339-15-300(2) [*sic*] requires you to submit certified payroll reports **at least once every thirty five (35) days** if payroll is generated as a result of reforestation work performed by Oregon workers. You must **complete and resubmit** the enclosed reports to the **Portland office** no later than 5 p.m. **October 30, 2000**.
>
> " * * * * *
>
> "**Your reports must contain all the elements listed above**, as shown on Certified Payroll Report (WH-14) form, enclosed for your convenience. * * *."

The letter included a checkmark next to a statement indicating that Respondents omitted the "total hours worked during [the applicable] pay period" from the payroll records they submitted.[4]

28) The Agency presented no evidence to show the applicable minimum wage rate for tree planting, thinning, or pruning as

[4] There is no evidence in the record showing the payroll records subject to the October 2000 letter.

determined by the U.S. Forest Service.

29) On May 14, 2001, Respondents applied for a farm labor contractor license. At the time he filled out the application, Respondent Ochoa believed he owned 50 percent of OGI and he stated that on the application. When asked to list the names of those who have a financial interest in the business, Respondent Ochoa responded "N.A." and indicated that "no other persons have a financial interest" in the business. Respondent Ochoa also certified that there were "no judgments or administrative orders of record against [Respondents]." Respondent Ochoa certified that all of the information provided in the application was true and correct.

30) In June 2001, in response to the Agency's request for additional information, Respondent Ochoa provided a letter to the Agency that stated, in pertinent part:

> "Ochoas Greens, Inc. does not have 20 or more employees at any one given time. When Ochoas does forestry work for the state of Washington we bring our employees that we have working for us at that time. We have not done any Reforestation work for the past three years in Oregon.
>
> "And I, Rodrigo Ochoa am 51% owner of Ochoas Greens, Inc."

31) Respondent Ochoa's testimony was not entirely credible. His memory was unreliable and selective. On several disputed issues of fact, his testimony was inconsistent with statements he made previously to the Agency. For instance, he reported on a previous farm labor license application that his wife held a 25 percent interest in the corporation they jointly own. On his pending application, he stated he and his wife share "50/50" ownership of the corporation and his testimony at hearing was that he always thought that division to be true. However, he also acknowledged that he later told his daughter and the Agency that he was the majority shareholder, owning 51 percent of the shares, only after he found out that the "50/50" division imposed liabilities upon his wife. Respondent Ochoa's testimony was believed only when it was logically credible, a statement against interest, or when other credible evidence supported it.

32) Wing's testimony was not wholly credible. She had a poor memory and her bias as Respondent Ochoa's daughter was reflected in her demeanor and her statements minimizing her role as the corporation's payroll person. Despite her signature on every payroll record submitted to the Agency, Wing blamed a payroll company hired by Respondents for the certified payroll problems. Wing's testimony was believed only when corroborated by other credible evidence.

33) Robertson, Boden and Bayless were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, OGI did business in Oregon and engaged the personal services of one or more employees in Oregon. Respondent Ochoa was a majority shareholder and OGI's president. Respondent Ochoa's wife was a shareholder and OGI's corporate secretary.

2) Between August 1-7, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-9-0092. OGI paid its employees directly and submitted to the Commissioner deficient payroll records on three separate occasions.

3) Between July 24-28, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-9-0078. OGI paid its employees directly and submitted to the Commissioner deficient payroll records on two separate occasions. Respondents filed a third payroll record that contradicted the number of hours reported in the first and second submission.

4) Between November 12-13, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-9-0078. OGI paid its employees directly and did not timely provide the Commissioner with certified copies of all payroll records.

5) On November 17, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-9-0078. OGI paid its employees directly and submitted to the Commissioner two sets of payroll records that were not timely filed, did not include the number of hours each employee worked, and were not properly certified.

6) On June 21, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-0-0073. OGI paid its employees directly and submitted to the Commissioner payroll records that were not timely filed and were not properly certified.

7) Between July 14-22, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on USFS contract number 43-05K3-0-0073. OGI paid its employees directly and submitted to the Commissioner payroll records that were not timely filed and were not properly certified.

8) On December 6, 2000, Respondents employed Oregon workers to perform forestation or reforestation labor on a USFS contract in St. Helens. OGI paid its employees directly and submitted to the Commissioner payroll records that did not include a contract number, the number of hours each employee worked and were not properly certified.

9) Respondents knew or should have known that they were legally required to file timely, complete, and accurate certified

true copies of all payroll reports. Respondents' failure to do so was willful.

10) The Agency did not waive or renounce its authority to bring an action against Respondents for violations of ORS 658.417(3) by returning deficient payroll records to Respondents for correction.

11) In or about April and May 2000, Respondents were not acting jointly as a farm labor contractor when they deducted money from an employee's paycheck without his written authorization, and were not entrusted with money by a third party for the purpose of paying said employee or employees.

12) In May 2000, Ochoas' Greens, Inc. did not fail to comply with lawful contracts in its capacity as a farm labor contractor. OGI purchased special use permits from the USFS to harvest cones on federal land, but did not purchase the permits in its capacity as a farm labor contractor. The USFS did not cite OGI or terminate its permits for breach of the terms and conditions of the permits.

13) OGI employed workers to gather cones for Respondent's business from May through August 2000. During that time, OGI issued 106 checks to 29 of its employees and failed to supply each employee with itemized statements that showed the amounts and purposes of deductions as required by statute.

14) OGI did not make or keep available to the Commissioner of the Bureau of Labor and Industries a record containing the actual hours worked by 29 employees who worked from May until August 2000.

15) In May 2001, Respondents applied for a farm labor contractor license and made an assertion that no other person, other than Respondent Ochoa, had a financial interest in OGI. That assertion was not in accord with the facts and Respondents knew or should have known that Respondent Ochoa's wife, who owned shares in OGI, was a person with a financial interest in the corporation. Respondents did not make the assertion with the intent to mislead or deceive the Agency.

16) Information about whether other persons have a financial interest in a license applicant's business is a substantive matter that is influential in the Commissioner's decision to grant or deny a license.

17) In May 2001, Respondents applied for a farm labor contractor license and withheld the name, address, and phone number of Respondent Ochoa's wife, who had a financial interest in Respondents' business. Respondents knew Respondent Ochoa's wife had a financial interest in the business and had a duty to reveal her identity.

18) Failure to disclose the identity of persons with a financial interest in a license applicant's business is a substantive matter

that is influential in the Commissioner's decision to grant or deny a license.

19) There is no evidence showing Respondents' assertion that Respondent Ochoa owns 50 percent of the corporation is incorrect as it is stated on the farm labor contractor license application.

20) There is no evidence showing Respondents' assertion that Respondents have no judgments against them is incorrect as stated on the farm labor contractor license application.

21) In May 2001, Respondents applied for a farm labor contractor license and certified that the information contained therein was true and correct. Respondents knew or should have known that they were not giving correct information when responding to questions about the financial composition of their business.

22) A farm labor contractor's truthfulness is a substantive matter that is influential in the Commissioner's decision to grant or deny a license.

23) Respondents' character, competence and reliability make them unfit to act as farm labor contractors.

CONCLUSIONS OF LAW

1) The Commissioner of the Oregon Bureau of Labor and Industries has jurisdiction over the subject matter and of the Respondents herein. ORS 658.405 to 658.503 and ORS 653.305 to 653.370.

2) ORS 658.405 provides in pertinent part:

> "As used in ORS 658.405 to 658.503 * * * unless the context requires otherwise:
>
> "(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands * * *."

OAR 839-015-0004 provides, in pertinent part:

> "(13) '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; * * *
>
> "(14) 'Forestation or reforestation of lands' includes, but is not limited to:
>
> "(a) The planting, transplanting, tubing, pre-commercial thinning, and thinning of trees and seedlings; * * *."

As a person acting as a farm labor contractor in Oregon with regard to the forestation or reforestation of lands, Respondent Ochoas' Greens, Inc. was and is subject to the provisions of ORS 658.405 to 658.503. As a majority shareholder of a corporation so acting, Respondent Ochoa was and is

subject to the provisions of ORS 658.405 to 658.503.

3) ORS 653.010 provides, in pertinent part:

> "As used in ORS 653.010 to 653.261, unless the context requires otherwise:
>
> " * * * * *
>
> "(3) 'Employ' includes to suffer or permit to work; however, 'employ' does not include voluntary or donated services performed for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer * * * or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws.
>
> "(4) 'Employer' means any person who employs another person * * *."

At all times material herein, Respondent Ochoas' Greens, Inc. was an employer and employed workers in Oregon. As an Oregon employer, Respondent Ochoas' Greens, Inc. was subject to the provisions of ORS 653.305 to 653.370 and the administrative rules adopted thereunder.

4) The actions, inaction, and statements of Respondent Ochoa, Respondent Ochoas' Greens, Inc.'s president and a majority shareholder, are properly imputed to Respondent Ochoas' Greens, Inc.

5) 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, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:
>
> " * * * * *
>
> "(3) Provide to the commissioner 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."

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;

"(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.

"(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."

Respondents violated ORS 658.417(3) and OAR 839-015-0300 by failing to submit timely, complete and accurate certified true copies of payroll reports for eight separate payroll periods on four USFS contracts.

6) ORS 658.440(1) provides:

"Each person acting as a farm labor contractor shall:

" * * * * *

"(c) Pay or distribute promptly, when due, to the individuals entitled thereto all money or other things of value entrusted to the labor contractor by any person for that purpose.

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

Respondents did not violate ORS 658.440(1)(c) or (d).

7) ORS 658.440(3) provides in pertinent part:

"No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

"(a) Make any misrepresentation, false statement or willful concealment in the application for a license."

Respondents violated ORS 658.440(3)(a) by making misrepresentations and willfully concealing information on their farm labor contractor's license application.

8) ORS 653.045 provides, in pertinent part:

"(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall

make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:

"(a) The name, address and occupation of each of the employer's employees.

"(b) The actual hours worked each week and each pay period by each employee.

"(c) Such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder.

"(2) Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time."

OAR 839-020-0080 provides, in pertinent part:

"(1) Every employer regulated under ORS 653.010 to 653.261 must maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom the law applies:

"(a) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;

"(b) Home address, including zip code;

"(c) Date of birth, if under 19;

"(d) Sex and occupation in which employed. (Sex may be indicated by use of the prefixes Mr., Mrs., Miss, or Ms.);

"(e) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole work force or establishment will suffice;

"(f) Regular hourly rate of pay for any workweek in which overtime compensation is due, and an explanation of the basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and the amount and nature of each payment which, pursuant to ORS 653.261(1) is excluded from the "regular rate of pay". (These records may be in the form of vouchers or other payment data.);

"(g) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 con-

secutive hours and a "work-week" is any fixed and regularly recurring period of seven consecutive workdays);

"(h) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or work-week, exclusive of premium overtime compensation;

"(i) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under subsection (h) of this section;

"(j) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions;

"(k) Total wages paid each pay period;

"(l) Date of payment and the pay period covered by payment."

Respondent Ochoas' Greens, Inc. violated ORS 653.045(1) and OAR 839-020-0080 by failing to make and keep available records of the number of hours worked by 29 of its employees.

9) ORS 653.045(3) provides:

"Every employer of one or more employees covered by ORS 653.010 to 653.261 shall supply each of the employer's employees with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610."

OAR 839-020-0012 provides in pertinent part:

"(1) Except for employees who are otherwise specifically exempt under ORS 653.020, employers must furnish each employee, each time the employee receives a compensation payment from the employer, a written itemized statement of earnings. The written itemized statement must include:

"(a) The total gross payment being made;

"(b) The amount and a brief description of each and every deduction from the gross payment;

"(c) The total number of hours worked during the time covered by the gross payment;

"(d) The rate of pay;

"(e) If the worker is paid on a piece rate, the number of pieces done and the rate of pay per piece done;

"(f) The net amount paid after any deductions;

"(g) The employer's name, address and telephone number;

"(h) The pay period for which the payment is made.

"(2) When a compensation payment is a draw or advance against future earnings, and no deductions are being made

from the payment, the written itemized statement must include the information required in section (1)(a), (g) and (h) of this rule. The employee must be provided with a statement containing all of the information required by section (1) of this rule at the employee's next regular payday, even if the employee is not entitled to payment of any further wages at that time."

Respondent Ochoas' Greens, Inc. violated ORS 653.045(3) and OAR 839-020-0012(1) 106 times by failing to provide itemized statements of deductions to 29 workers.

10) ORS 658.420 provides in pertinent part:

"(1) The Commissioner of the Bureau of Labor and Industries shall conduct an investigation of each applicant's character, competence and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor.

"(2) The commissioner shall issue a license * * * if the commissioner is satisfied as to the applicant's character, competence and reliability."

OAR 839-015-0145 provides:

"The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules not limited to, consideration of:

"(1) A person's record of conduct in relations with workers, farmers and others with whom the person conducts business.

" * * * * *

"(3) A person's timeliness in paying all debts owed, including advances and wages.

" * * * * *

"(7) Whether a person has violated any provision of ORS 658.405 to 658.503 or these rules.

" * * * * *

"(10) Whether a person has failed to comply with federal, state or local laws or ordinances relating to the payment of wages, income taxes, social security taxes, unemployment compensation tax, or any tax, fee or assessment of any sort.

" * * * * *

"(12) Whether a person has repeatedly failed to file or furnish all forms and other information required by ORS 658.405 to 658.503 and these rules.

"(13) Whether a person has made a willful misrepresentation, false statement or concealment in the application for a license."

OAR 839-015-0520 provides in pertinent part:

"(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny * * * a license:

"(a) Making a misrepresentation, false statement or certification or willfully concealing information on the license application;

" * * * * *

"(2) When the applicant for a license * * * demonstrates that the applicant's * * * character, reliability or competence makes the applicant * * * unfit to act as a farm or forest labor contractor, the Wage and Hour Division shall propose that the license application be denied * * *.

"(3) The following actions of a farm or forest labor contractor license applicant * * * demonstrate that the applicant's * * * character, reliability or competence make the applicant * * * unfit to act as a farm or forest labor contractor:

"(a) Violations of any section of ORS 658.405 to 658.485;

" * * * * *

"(d) Failure to comply with federal, state or local laws or ordinances relating to the payment of wages, income taxes, social security taxes, unemployment compensation tax or any tax, fee or assessment of any sort;

"(f) Repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.503 or these rules;

"(h) Willful misrepresentation, false statement or concealment in the application for a license;

"(m) A course of misconduct in relations with workers, farmers and others with whom the person conducts business;

"(n) Failure to pay all debts owed, including advances and wages, in a timely manner[.]"

Respondents' violations of ORS 658.417(3) and 658.440(3) demonstrate that Respondents' character, competence, and reliability makes them unfit to act as farm labor contractors.

11) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess against Respondent Ochoas' Greens, Inc. a civil penalty for each violation of ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder. The civil penalties assessed in the Order herein are a proper exercise of that authority. ORS 653.370.

12) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess civil penalties against Respondents Ochoa and Ochoas' Greens, Inc. ORS 658.453(1)(c) and (e). With regard to the magnitude of the penalties, OAR 839-015-0510 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:

"(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

The Agency established by a preponderance of the evidence that Respondents Ochoas' Greens, Inc. and Rodrigo Ayala Ochoa acted jointly as a farm labor contractor between June and December 2000. The Agency seeks both civil penalties for alleged violations that occurred while Respondents acted as a farm labor contractor and to deny Respondents' pending license application based on Respondents' lack of character, competence and reliability to act as a farm labor contractor.

ALLEGED VIOLATIONS

A. Failure to File Certified True Copies of Payroll Records in Accordance with ORS Chapter 658 and Applicable Rules

In order to prevail, the Agency is required to prove that (1) Respondents, while acting jointly as a farm labor contractor, (2) engaged in the forestation of lands, and (3) Respondents or Respondents' agent paid employees directly and (4) failed to file certified payroll records that contained all of the information required in the Agency's form WH-141 in accordance with OAR 839-015-0300.

OAR 839-015-0300 provides in pertinent part:

> "(2) The certified true copy of payroll records may be submitted on Form WH-141. * * * Any person may copy this form or use a similar form *provided such form contains all the elements of Form WH-141*." (emphasis added)

In this case, Respondents do not dispute that while jointly acting as a farm labor contractor, they provided Oregon workers to perform forestation or reforestation on four USFS contracts between June and December 2000 and paid the workers directly. Evidence shows Respondents used the Agency's Form WH-141 to file certified payroll reports for eight payroll periods during the contract periods, but repeatedly failed to provide all of the required information. In some cases, the reports were timely filed but were either not certified or lacked required information. In other cases, the reports were not timely filed, not certified, and lacked required information. At no time did Respondents submit timely reports that contained all of the required information.

Respondents argue that the Agency waived "compliance of the actions complained of in the Agency's Notice of Intent" by allowing Respondents the opportunity to correct deficient payroll records each time they were submitted. That argument has no merit. Waiver is an intentional act that must be plainly and unequivocally manifested either "in terms or by such conduct that clearly indicates an intention to renounce a known privilege or power." *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 252, 293 (2001). There is no evidence that the Agency, explicitly or implicitly, renounced or waived its authority to bring the present action against Respondents for their failure to timely submit accurate and complete payroll records. To support its argument, Respondents rely on a letter dated October 17, 2000, wherein the Agency requests that Respondents submit corrected payroll records "no later than October 30, 2000." First, in that letter the Agency does not extend the statutory deadline for submitting certified true copies of all payroll records, but rather establishes a time limit for providing the Agency with corrected records. Second, the Agency specifically reiterates the rule governing submission deadlines and emphasizes the requirement that the "reports must contain all the elements" listed in the letter, which negates any inference that the Agency intended to waive its authority to pursue violations in a later action. Finally, even if the letter could be construed as implied waiver, and the forum concludes it cannot, there is no evidence in the record that Respondents complied with its provisos. The evidence shows only that Respondents repeatedly submitted deficient payroll records and submitted corrections for most of them either on November 1, 2000, or March 20, 2001, well after the statutory deadline for the

particular payroll periods had passed. Respondents provided no evidence that it was the Agency that established those dates as time limits for submitting corrected payroll records. Respondents failed to prove their affirmative defense by a preponderance of the evidence.

Additionally, the Agency alleged that on some of the payroll reports Respondents incorrectly certified that the applicable minimum wage had been paid, but there is no evidence in the record that shows what the applicable minimum wage was at the time of the contracts. Additionally, the Agency alleged that the number of hours shown on one of the payroll reports reflects an underpayment of wages, but there is no evidence in the record that supports the Agency's allegation. The forum concludes Respondents filed deficient payroll reports eight times on four separate contracts, but did not underpay their workers or fail to pay the workers at the proper wage rate.

B. Failure to Pay Wages When Due in Violation of ORS 658.440(1)(c)

The Agency was required to prove that Respondents (1) were acting jointly as a farm labor contractor in or about April and May 2000, (2) were entrusted with money for the purpose of paying workers, and (3) failed to promptly pay, when due, the money to which workers were entitled. OGI stipulated that $55 was withheld from each of two paychecks issued to one of its employees in May 2000 to pay for raingear purchased by the employee. OGI acknowledged there is no evidence to show the employee signed an authorization for the deduction. The evidence does not establish, however, that Respondents were acting jointly as a farm labor contractor in April or May 2000. In the absence of evidence showing a farm labor contract in effect at that time and that money was entrusted to OGI for the purpose of paying employees, the forum does not find that OGI violated ORS 658.440(1)(c).

C. Failure to Comply with Lawful Contracts in Violation of ORS 658.440(1)(d)

The Agency is required to prove that Respondents, (1) acting jointly as a farm labor contractor, (2) entered into legal and valid contracts with the USFS, (3) entered into the contracts in their capacity as a farm labor contractor, and (4) violated the provisions of the contracts.

The facts establish that in May 2000, OGI obtained two permits to collect cones on federal land that are characterized by a USFS representative as "special use permits" and are issued to holders as a form titled "Forest Product Contract and Cash Receipt." The facts also show that OGI paid workers for cones harvested between April and July 2000 for use in Respondents' nursery business.

ORS 658.405 provides in pertinent part:

" * * * * *

> "(4) 'Farm labor contractor' means any person 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 * * * "

OAR 839-015-0004 provides in pertinent part:

> "(8) 'Farm labor contractor' means:
>
> " * * * * *
>
> "(c) Any person who recruits, solicits, supplies or employs workers to gather wild forest products, as that term is defined in paragraph (23) of this section * * *
>
> " * * * * *
>
> "(23) 'To gather wild forest products' or 'the gathering of wild forest products' means the gathering of evergreen boughs, yew bark, bear grass, salal or ferns, *and nothing else*, from public lands for sale or market prior to processing or manufacture. This term does not include the gathering of these products from private lands in any circumstance or from public lands when the person gathering the products, or the person's employer, does not sell the products in an unmanufactured or unprocessed state.
>
> "Example: A nursery uses its own employees to gather evergreen boughs, which it uses in the manufacture of Christmas wreaths. The nursery is not engaged in farm labor contracting activity and therefore would not be required to obtain a license."

A plain reading of the applicable statute and rule indicates that, in this case, Respondents were not acting in their capacity as a farm labor contractor when OGI agreed to "purchase" cones from the USFS. The USFS representative testified that no license was necessary to obtain a special use permit for cone collecting, and there is no evidence that shows OGI gathered any other wild forest products in May 2000. The forum concludes from these facts that cone collecting is not a regulated activity requiring a farm labor contractor license. There being no evidence that Respondents acted in their capacity as a farm labor contractor in May 2000 when OGI obtained cone collecting permits from the USFS, the forum finds Respondents did not violate ORS 658.440(1)(d).

D. <u>Failure to Provide Pay Stubs to Employees in Violation of ORS 653.045(3)</u>

In order to prevail, the Agency must establish that Respondents (1) employed workers and (2) issued paychecks to workers that did not include itemized statements containing information required under Oregon's wage and hour law.

Evidence establishes that OGI issued 106 checks to 29 workers in payment for bags of cones gathered by the workers between

May and August 2000. OGI stipulated that itemized statements were not included with the checks issued to workers. OGI contended in their closing argument at hearing, however, that the workers were not employees but were working as free lance cone harvesters, *i.e.*, independent contractors, who determined their own work days and hours, used their own initiative to affect the amount of pay they earned each day, and who were free to come and go without constraint.[5] Respondents did not raise this defense in their answer or introduce the issue during the evidentiary portion of the hearing. As already explained elsewhere herein, the forum upholds its denial of Respondents' motion to amend the answer to insert that issue into this case and, accordingly, that issue is not before the forum. Evidence establishes that OGI, through its corporate president and majority shareholder Respondent Ochoa, transported workers to Central Oregon to collect cones for the nursery business. OGI provided the workers with lodging owned by the corporation and furnished the permits that allowed workers to collect cones on federal land. Additionally, OGI paid each worker for the cones they collected. The forum concludes, therefore, that OGI suffered or permitted workers to perform work for OGI, and the corporation is liable for any violations found. ORS 653.010(3) and (4). OGI was an employer subject to Oregon wage laws and despite the fact that none of the workers testified, there is sufficient evidence to conclude that the workers were OGI's employees. OGI and its corporate president admit the workers were not given pay stubs with each paycheck and the forum concludes that OGI is liable for the failure to do so.

E. Failure to Make and Keep Available Required Records in Violation of ORS 653.045(1)

In order to prevail, the Agency must establish that Respondents (1) employed workers and (2) failed to make and keep available required records. The forum has already found herein that Respondent Ochoas' Greens, Inc. employed 29 workers between April and August 2000 and was subject to Oregon wage and hour laws. Respondents admit that other than the corporate "Account Quick Report" the corporation maintained during the applicable time period, the corporation did not make and keep records in accordance with ORS 653.045(1). The forum concludes, therefore, that OGI is liable for 29 violations of ORS 653.045(1).

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[5] None of the workers were called to testify at the hearing and Respondents produced scant evidence to support their bare assertion.

F. Misrepresentations, False Statements/Certifications and Willful Concealment on the License Application in Violation of ORS 658.440(3)(a)

Misrepresentation

A misrepresentation, for the purpose of ORS 658.440(3)(a), is "an assertion made by a license applicant which is not in accord with the facts, where the applicant knew or should have known the truth of the matter asserted, and where the assertion is of a substantive fact which is influential in the [Commissioner's decision] to grant or deny a license." *In the Matter of Alejandro Lumbreras*, 12 BOLI 117, 125 (1993). Although the Agency's substantive allegation refers to "intentional" misrepresentations, this forum has previously held that the Legislature did not intend misrepresentation to include an intention to deceive or mislead because of its "omission of any word next to 'misrepresentation' showing an element of intent." *See In the Matter of Raul Mendoza*, 7 BOLI 77, 82-83 (1988). The forum also observed that the Legislature did not intend that a false assertion, such as an erroneous zip code on a license application, would be grounds for license denial; hence, the requirement that a misrepresentation be of a substantive fact that is influential in the decision whether to grant or deny a license. *Id*. at 82.

False Statement

A false statement, for the purpose of ORS 658.440(3)(a), is "an incorrect statement made with knowledge of the incorrectness or with reckless indifference to the actual facts, and with the intention to mislead or deceive." As with a misrepresentation, the false statement must also be about a substantive matter that is influential in the decision to grant or deny a license. *Id*. at 83.

Willful Concealment

Willful concealment means, for the purpose of ORS 658.440(3)(a), "withholding something which an applicant knows and which the applicant, in duty, is bound to reveal, said withholding must be done knowingly, intentionally, and with free will * * * and must be of a substantive matter which is influential in the [Commissioner's decision] to grant or deny a license." *Id*. at 84.

Standard of Proof

This forum has previously held that in the case of a license disciplinary action based upon misrepresentation, false statement or willful concealment, the forum employs clear and convincing evidence as the standard of proof. *In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990). Such evidence is defined as "evidence that is free from confusion, fully intelligible and distinct and for which the truth of the facts asserted is highly probable." *Id*. at 146, *quoting Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

Accordingly, the forum has applied the clear and convincing evidence standard to the Agency's five allegations that Respondents made misrepresentations, false statements, and willfully concealed information on their joint farm labor license application.

Respondents' statements and certifications

(a) The Agency alleges that Respondents' statement and certification that Respondent Ochoa owns 50 percent of Respondent Ochoas' Greens, Inc. constitutes a misrepresentation or a false statement. The forum finds neither applies in this case. No evidence was offered to show that Respondents' assertion was incorrect or not in accord with the facts at the time the assertion was made on the application. Respondent Ochoa had no inkling at the hearing whether he owned 50 or 51 percent of the corporation. He testified that he had always believed he and his wife owned the business "50/50," but agreed he told his daughter, and reported to BOLI, that he owned 51 percent in response to BOLI's subsequent inquiry about the ownership. Since the statement Respondents made on the application is a statement against interest, *i.e.*, imposes duties and liabilities on the other majority shareholder, the forum finds it is more likely than not that the assertion on the application is true. In the absence of clear and convincing evidence to the contrary, the forum concludes that Respondents did not make a misrepresentation or false statement when stating and certifying that Respondent Ochoa owns 50 percent of the corporation.

(b) The forum finds the Agency established by clear and convincing evidence that Respondents' statement and certification that no other person, other than Respondent Ochoa, has a financial interest in Respondent Ochoas' Greens, Inc. is a misrepresentation. Respondents acknowledge that Respondent Ochoa's wife is a co-owner of the family business. Respondents, therefore, knew or should have known that Respondent Ochoa was not the only one with a financial interest in the business. Respondents' argument that Respondent Ochoa did not understand the question, does not understand the term "shareholder," and believed the inquiry referred to financially interested persons outside the family business, is not believable. The facts establish that the business has been incorporated since 1994, and on a license application Respondents submitted in 1997, Ochoa listed his wife as a financially interested person with a 25 percent interest in the corporation. Given that Respondent Ochoa indicated on the pending application that he owned 50 percent of the business, the forum concludes that Respondent Ochoa knew his statement that "no other persons have a financial interest" in the business was incorrect. Additionally, the disclosure of those financially interested in Respondents' proposed operations is clearly a substantive matter, influential in the decision to grant or

deny a license, because in order to properly enforce the farm labor contractor laws, the Commissioner must know to whom he is licensing. There is no clear and convincing evidence that Respondent Ochoa's statement was made with the intention to mislead or deceive the Agency. The forum finds, however, that Respondents misrepresented the number of persons financially involved in Respondents' business, in violation of ORS 658.440(3)(a).

(c) The Agency further alleges that Respondents willfully concealed "the name, address and telephone numbers of all persons financially interested in Respondent Ochoas' Greens, Inc. other than Respondent Ochoa." OAR 839-015-0505(1) defines "knowingly" or "willfully" as:

> "action undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person 'should have known the thing to be done or omitted' if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts knowingly or willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of this rule, the farm labor contractor * * * is presumed to know the affairs of their business operations relating to farm * * * labor contracting."

Here, Respondents had a duty to reveal to the Agency the identity of all persons financially interested in the business. The facts establish that Respondents had actual knowledge of at least one other person's financial interest in the business, and failed to disclose her identity and other pertinent information about her on the license application. Such data is a substantive matter influential in the commissioner's decision to grant or deny a license. The forum concludes that Respondents withheld that information knowingly, intentionally, and with free will, in violation of ORS 658.440(3)(a).

(d) The Agency alleges Respondents made a misrepresentation or false statement when Respondents certified that there are no judgments or administrative orders of record against Respondents. The facts establish that Respondent Ochoa entered into a consent judgment in U.S. District Court in 1994, and that both Respondents entered into a stipulated consent order with BOLI in 1999. Both documents are consent judgments, "the provisions of which are settled and agreed to by the parties to the action," *i.e.*, settlement agreements. *See* Black's Law Dictionary 842 (6th ed. 1990). The Agency has not alleged Respondents breached either agreement. Nor is there evidence that the agreements remain recorded or docketed in a court or with the Agency. While each document

constitutes a record, the term "of record" as it is used in the contractor license application is defined as follows:

> "Recorded; entered on the records; existing and remaining in or upon the appropriate records * * *."

Id. at 1085. Although the license application does not denote a specific type of judgment or administrative order, the forum infers from the language that the Agency's intent is to establish whether a contractor has judgment liens pending that could affect the contractor's competence to hold a license, *i.e.*, the ability to pay debts incurred or wages earned while performing a farm labor contract.[6] In this case, there is no evidence that Respondents had judgment liens or a final administrative judgment pending against them and the forum therefore concludes that Respondents did not make a misrepresentation or false statement when they denied having such on their joint license application.

(e) The Agency further alleges, and the forum finds by clear and convincing evidence, that Respondents made a misrepresentation when they certified all of the information on the license application was true and correct. Respondents knew or should have known they were not giving correct information when responding to questions about the financial composition of their business. A contractor's truthfulness is a substantive matter that directly influences the Agency's decision to grant or deny a license and is the core of the contractor's character, competence and reliability, particularly with respect to certifying payroll records during the course of forestation or reforestation contracts. In this case, Respondents misrepresented the truthfulness and accuracy of the information they provided the Agency on their license application and the forum finds Respondents violated ORS 658.440(3)(a).

RESPONDENT'S CHARACTER, COMPETENCE AND RELIABILITY

The Agency proposes to deny a farm labor contractor license to Respondents based on their multiple violations of ORS chapter 658 and ORS chapter 653, which violations demonstrate that their character, competence, and reliability make them unfit to act as a farm labor contractor.

ORS 658.420 provides that the Commissioner shall investigate each applicant's character, competence and reliability and any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor. The Commissioner shall issue a license only if satisfied as to the applicant's character, competence, and reliability.

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[6] The question on the application is: "Are there any judgments or administrative orders of record against you?"

In making the determination, the Commissioner must consider whether an applicant has violated any provision of ORS 658.405 to 658.503 or the applicable rules. *See* OAR 839-015-0145(7), 839-015-0520(3)(a). Here, the Agency established that Respondents, while previously licensed, repeatedly failed to timely file certified true and accurate copies of payroll reports in accordance with ORS 658.417(3). Evidence shows that more recently on four contracts Respondents failed to submit a single timely and accurate certified payroll record and instead submitted uncertified payroll records late six times. On all of the contracts the first submission was defective, and on several submissions Respondents failed to report the number of hours each employee worked. Such actions demonstrate Respondents do not have the requisite character, competence and reliability to act as farm labor contractors.[7]

Moreover, where an applicant has made a misrepresentation, false statement, or willful concealment on a license application, or has failed to comply with federal, state, or local laws relating to the payment of wages, such violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny the license application. OAR 839-015-0520(1). In this case, the Agency established that Respondents willfully concealed information and made two misrepresentations on their license application and failed on two occasions to comply with state wage and hour laws. Each of these is of such magnitude or seriousness that Respondents may be denied a farm labor contractor license. Having found multiple violations that demonstrate Respondents lack the character, competence, and reliability to act as a farm labor contractor, the forum denies their joint application for a farm labor contractor license for a period of three years, effective the date the Final Order in this matter issues.

CIVIL PENALTIES

The Agency proposed civil penalties for (1) Respondents' failure to timely file accurate certified payroll reports (8 violations), in violation of ORS 658.417(3); (2) Respondents' failure to provide itemized statements of deductions to employees (106 violations), in violation of ORS 653.045(3); (3) Respondents' failure to make and retain required employment records (30 violations), in violation of ORS 653.045(1); and (4) Respondents' misrepresentations,

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[7] *See, e.g.*, *In the Matter of John Mallon*, 12 BOLI 92, 101-102 (1993) (the forum found that where a contractor repeatedly submitted untimely and inaccurate certified payroll reports, such actions demonstrated that the contractor's character, competence, and reliability make him unfit to act as a farm labor contractor); *In the Matter Alvaro Linan*, 9 BOLI 44, 48 (1990) (the forum found that a contractor who repeatedly fails to observe agency rules by failing to file certified payroll records is unreliable and the agency should deny the contractor a license).

false statements, and willful concealment on Respondents' farm labor contractor license application (1 violation), in violation of ORS 658.440(3)(a).[8]

The Commissioner may assess a civil penalty not to exceed $2,000 for each of the farm labor violations found herein. ORS 658.453(1)(c) and (e); OAR 839-015-0508(1)(e), (f), (j), and (2)(b). The Commissioner may consider aggravating and mitigating circumstances when determining the amount of civil penalty to impose. OAR 839-015-0510(1). It shall be the responsibility of the Respondents to provide the Commissioner with any mitigating evidence. OAR 839-015-0510(2).

The Commissioner may also assess a civil penalty not to exceed $1000 for each willful violation of ORS 653.045. ORS 653.256; OAR 839-020-1000; 839-020-1010. Willfully means knowingly, and is described as follows in OAR 839-020-0004(33):

> "An action is done knowingly when it is undertaken by a person with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person 'should have known the thing to be done or omitted' if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules."

As with farm labor violations, the Commissioner may consider aggravating and mitigating circumstances when determining the amount of civil penalty to impose for wage and hour violations and it is the responsibility of Respondents to provide the Commissioner with any mitigating evidence. OAR 839-020-1020(1) and (2).

FAILURE TO FILE COMPLETE AND ACCURATE CERTIFIED PAYROLL RECORDS

Respondents knew of their obligation to submit accurate and complete certified payroll records and failed to do so multiple times on multiple USFS contracts. The violations are aggravated by Respondents' recent history of failing to file complete, accurate, and certified records that resulted in a written consent order that was signed by Respondents in February 1999, which included a $4,000 penalty. Respondents' assurances at hearing of future compliance by improving and monitoring their bookkeeping system ring hollow in view of the 1999 consent agreement wherein

[8] The Agency also sought civil penalties for alleged violations of ORS 658.440(1)(c) and (d). Elsewhere herein, the forum dismissed those allegations for lack of evidence.

Respondents acknowledged their previous failure to comply with the certified payroll report requirements. The violations are only somewhat mitigated by the absence of any evidence showing Respondents' workers were not paid appropriately by Respondents.

Having considered the aggravating and mitigating circumstances, and in light of recent orders related to violations of ORS 658.317(3), the forum finds the following penalties more appropriate than the $2,000 per violation requested by the Agency:

$1,000 for deficient records filed on USFS contract #0092 ($1,000 for one violation).

$4,000 for untimely, uncertified, and deficient records filed on USFS contract #0078 ($1,000 for each of four violations).

$2,000 for untimely and uncertified records filed on USFS contract #0073 ($1,000 for each of two violations).

$1,000 for defective records filed on the St. Helens USFS contract ($1,000 for one violation).

The forum finds Respondents Ochoa and Ochoas' Greens, Inc. jointly and severally liable for $8,000 assessed as civil penalties for the eight violations found herein.

FAILURE TO PROVIDE EMPLOYEES WITH ITEMIZED STATEMENTS OF EARNINGS

The forum found that Respondent Ochoas' Greens, Inc. employed 29 workers between May and August 2000 to harvest cones in Central Oregon and failed to provide them with written itemized statements of earnings each time they were paid for work performed. Evidence shows that 106 paychecks were issued to OGI's workers, constituting a separate and distinct violation each time a check issued to an employee. OAR 839-020-1000. One of the purposes of the statute is to afford workers an opportunity to verify that they have been correctly paid for all of the hours they worked. *In the Matter of Labor Ready*, 22 BOLI 245, 289 (2001). In this particular case, although evidence shows the workers were paid on a piece rate basis and knew how much they earned for each bag of cones harvested, they had no way of knowing whether they were paid at least minimum wage for the hours they worked because OGI did not provide them with the information. Accordingly, the forum finds the violations serious because they potentially affect the substantive rights of workers. The Agency seeks $150 for each violation. ORS 653.256 allows the commissioner to assess a maximum $1,000 civil penalty for each violation of ORS 653.045. Having considered the aggravating and mitigating circumstances, the forum finds the Agency's proposed $150 per violation an appropriate penalty.

Therefore, the forum finds Respondent Ochoas' Greens, Inc. liable for $15,900 in civil penalties for 106 violations of ORS 653.045(3).

FAILURE TO MAKE AND KEEP AVAILABLE PAYROLL RECORDS

The Agency seeks $200 for each of 29 violations of ORS 653.045(1). The violations are serious because failure to make and keep available payroll records significantly impedes the commissioner's ability to determine whether employees are properly compensated, which potentially affects the substantive rights of the workers. The forum finds that given the seriousness of the violation, and that OGI knew or should have known it was required to keep records for its employees, $200 per violation is reasonable. There is no evidence of mitigation on the part of Respondents. Therefore, the forum finds Respondent Ochoas' Greens, Inc. liable for $5,800 in civil penalties for 29 violations of ORS 653.045(1).

MAKING MISREPRESENTATIONS, FALSE STATEMENTS, AND WILLFUL CONCEALMENTS ON FARM LABOR LICENSE APPLICATION.

Although each violation is separate and distinct,[9] the Agency only seeks the maximum civil penalty of $2,000 for Respondents' two misrepresentations and willful concealment of information on the farm labor license application. Based on Respondents' history of farm labor violations, the fact that Respondents had actual knowledge of information that was either misrepresented or not disclosed, and Respondents' failure to establish any mitigation, the forum finds $2,000 an appropriate penalty. Respondents Ochoa and Ochoas' Greens, Inc. are jointly and severally liable for $2,000 in civil penalties for their multiple violations of ORS 658.440(3).

RESPONDENTS' EXCEPTIONS

Respondents filed exceptions to the ruling on Respondents' motion to amend its answer, the proposed ultimate findings of fact, the proposed conclusions of law, the proposed opinion, the proposed denial of license, and the proposed civil penalties in the proposed order. The forum changed portions of the order in response to some of the exceptions and denied the remainder of the exceptions as discussed below.

EXCEPTION 1 – RULING ON MOTION

Respondents object to the forum's denial of Respondents' motion to amend its answer to conform to the evidence presented at hearing. Respondents contend that, contrary to the forum's ruling, evidence was presented to support its eleventh-hour assertion that Respondents' workers were independent contractors. For reasons explained elsewhere herein, Respondents' motion to amend their answer was not well taken. The "independent

[9] *See* OAR 839-015-0507.

contractor" issue was not tried by the participants' express or implied consent, as required by OAR 839-050-0140(2)(a). Respondents' exception is denied.

EXCEPTION 2 – PROPOSED ULTIMATE FINDINGS OF FACT

(1) Respondents correctly assert that the forum failed to address or consider Respondents' affirmative defense of waiver. The forum revised applicable sections of the order to cure the omission.

(2) Respondents' exception to the ultimate finding that Respondents willfully failed to file timely, accurate and complete payroll records is denied. The preponderance of the credible evidence on the whole record supports the conclusion contained therein.

(3) Respondents' objection to the ultimate finding that characterizes "cone pickers" as "employees" Is denied. In the ultimate findings, the forum found that Respondent OGI employed workers to gather cones, hence the term "employees" to characterize the workers.

(4) Respondents agree with the ultimate finding that failure to disclose the identity of persons with a financial interest in an applicant's business is a substantive matter. Respondents object, however, to its application to Respondent Ochoa's wife, because "virtually every married couple in the State of Oregon has a financial interest in one or the other's business operations" and that in this particular case "the failure to list ones wife as having a financial interest is insubstantial and irrelevant in a license application." Respondents miss the point. Evidence shows Respondent Ochoa's wife is a substantial stakeholder in the business as the corporate secretary and only other shareholder. Respondents' failure to disclose the wife's financial interest impedes the Commissioner's ability to know whom he is licensing and hinders enforcement of ORS chapter 658. Accordingly, the disclosure of who is financially interested in an applicant's proposed operations is a substantive matter, influential in the decision to grant or deny a license. ORS 658.415(1)(d) makes that information a necessary part of the application and does not qualify the question by excluding an applicant's spouse. Respondents' exception is denied.

EXCEPTION 3 – PROPOSED CONCLUSIONS OF LAW

A. Proposed Conclusion of Law 5

As noted elsewhere herein, Respondents take exception to the lack of discussion regarding their waiver defense. In response, the forum has addressed Respondents' defense in the opinion section of this Order.

B. Proposed Conclusion of Law 7

In this exception, Respondents point out that the forum failed to conclude that Respondents' misrepresentations or willful concealment were of a substantive matter that is influential in the

in the decision to grant or deny a farm labor contractor license. The forum has clarified Conclusion of Law 7 to reflect Respondents' exception.

C. Proposed Conclusions of Law 8, 9, and 10

All three conclusions are based on the preponderance of credible evidence in the whole record. Thus, Respondents' exceptions are denied.

EXCEPTION 4 – PROPOSED OPINION

For the reasons set forth above, and except for the changes noted herein, Respondents' exception to the proposed opinion is denied.

EXCEPTION 5 – PROPOSED DENIAL OF LICENSE

Respondents except to the proposed denial of a farm labor contractor license on four grounds. First, Respondents contend that none of the violations for failure to timely file accurate and complete certified payroll records were of a substantive nature. Notwithstanding Respondents' other violations that demonstrate their lack of character, competence and reliability to hold a license, a preponderance of the credible evidence on the whole record supports the conclusion that Respondents filed several payroll records that were not certified, did not include the number of hours worked by each employee, and, in one case, did not provide a contract number. Each of those omissions is substantive and is a repeat violation. Respondents' exception on that ground is denied. Second, Respondents contend that their prior violations were more substantive in nature and in the present case the violations are primarily "clerical errors." The evidence shows otherwise. Respondents' repeated failure to certify their payroll records and to report required information on several contracts is substantive in nature and demonstrates Respondents' lack of competence to handle the paperwork required of a farm labor contractor. Third, Respondents point out that the forum's conclusion that Respondents failed to report the number of hours each employee worked on every submission is incorrect. The forum has modified the opinion section of the order to reflect the factual findings. Finally, Respondents' assertion that the only evidence of misrepresentation on Respondents' license application is Respondents' "uncertainty as to Respondent's wife's financial interest in the corporation" is erroneous. The preponderance of evidence on the whole record establishes that Respondents misrepresented the number of persons financially interested in the corporation and willfully concealed information they were required to disclose. Both are substantive matters that influence the Commissioner's decision to issue a license. Except for the modification to the opinion section noted herein, Respondents' exception is denied.

PROPOSED CIVIL PENALTIES

Respondents challenge the proposed civil penalties as excessive and not warranted by the facts in the record. The penalties for each violation established are supported by the preponderance of evidence on the whole record and warranted by the aggravating factors established in the record. Respondents' exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the penalties assessed for violations of ORS 658.417(3), ORS 658.440(1)(d) and (e), and ORS 658.440(3)(a), the Commissioner of the Bureau of Labor and Industries hereby orders **Ochoas' Greens, Inc.** and **Rodrigo Ayala Ochoa** 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 TEN THOUSAND DOLLARS ($10,000), plus any interest thereon that accrues at the legal rate between the date the Final Order issued, September 6, 2002, until Respondents comply with this Final Order on Reconsideration;

FURTHERMORE, as authorized by ORS 653.256, and as payment of the penalties assessed for violations of ORS 653.045(1) and (3), the Commissioner of the Bureau of Labor and Industries hereby orders **Ochoas' Greens, 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 TWENTY ONE THOUSAND SEVEN HUNDRED DOLLARS ($21,700), plus any interest thereon that accrues at the legal rate between the date the Final Order issued, September 6, 2002, until Respondents comply with this Final Order on Reconsideration;

FURTHERMORE, the Commissioner of the Bureau of Labor and Industries hereby denies **Ochoas' Greens, Inc.** and **Rodrigo Ayala Ochoa** each a license to act as a farm labor contractor, effective on the date of the Final Order. **Ochoas' Greens, Inc.** and **Rodrigo Ayala Ochoa** are each prevented from reapplying for a license for three years from the date of this denial, in accordance with ORS 658.415(1)(c) and OAR 839-015-0520.

In the Matter of

PROCOM SERVICES, INC.

Case No. 56-03

Final Order of Commissioner Dan Gardner

Issued June 23, 2003

SYNOPSIS

Claimant, a telemarketer, worked 67 hours for Respondent at the agreed rate of a $40 commission for every sale, and was only paid $75 for her work. The Agency presented credible evidence that Claimant was an employee, not an independent contractor as alleged by Respondent, but did not present any evidence of the amount of commissions earned by Claimant in her 67 hours of work. The forum therefore computed Claimant's unpaid wages at $6.50 per hour, the minimum wage in effect at the time, and concluded that Claimant was owed $360.50 in unpaid wages. Respondent's failure to pay the wages was willful, and Respondent failed to pay the wages within 12 days after the Agency sent notice of the wage claim to Respondent on Claimant's behalf. The forum ordered Respondent to pay $1,560 in penalty wages in addition to the unpaid wages. ORS 653.010, ORS 653.035, ORS 652.140, ORS 652.150, OAR 839-001-0470.

———————

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 13, 2003, at the Bureau's office at 3865 Wolverine NE, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Wage claimant Alicia L. Duncan ("Claimant") was present throughout the hearing. Respondent did not appear at the hearing and was found in default.

In addition to Claimant, the Agency called Newell Enos, Wage & Hour Division Compliance Specialist, and Arlan Heath, Claimant's former supervisor, as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-6 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-6 (submitted prior to hearing), and A-7 and A-8 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On September 19, 2002, Claimant filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her.

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

3) On December 6, 2002, the Agency issued Order of Determination No. 02-3689 based upon the wage claim filed by Claimant. The Order of Determination alleged that Respondent Procom Services, Inc. owed a total of $394 in unpaid wages and $1,680 in penalty wages, plus interest, and required that, within 20 days, Respondents 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.

4) On January 13, 2003, Respondent filed an answer and request for hearing. Respondent designated Russell Leitch, corporate president, as its authorized representative. In its answer, Respondent alleged that Claimant was an "independent contract agent" and was paid for all work completed.

5) On February 7, 2003, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as 9:30 a.m. on May 13, 2003, at 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon.

6) On February 12, 2003, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit case summaries by May 2, 2003, and notified them of the possible sanctions for failure to comply with the case summary order.

7) Respondent filed a case summary on February 18, and the Agency filed its case summary on April 30, 2003.

8) On May 13, 2003, at 9:30 a.m., Respondent did not appear for the hearing. The ALJ went on the record and announced that he would wait until 10 a.m. to commence the hearing and that Respondent would be in default if it did not make an appearance by that time.

9) At 10 a.m., Respondent had not appeared at the hearing. Pursuant to OAR 839-050-0330, the ALJ declared Respondent to be in default. The ALJ then explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

10) On May 28, 2003, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Procom Services, Inc. was a corporation doing business under the assumed business name of Direct View in Dallas, Oregon, that sold and installed television satellite dishes and employed one or more individuals in Oregon.

2) Arlan Heath, Respondent's manager, hired Claimant on or about July 18, 2002, as a telemarketer. Heath agreed to pay Claimant $7 per hour. Claimant was hired to sell television satellites and service.

3) Claimant worked for Respondent from on or about July 18, 2002, through September 16, 2002, at which time Respondent closed its business in Dallas. She was paid in full for all her work prior to September 3.

4) On July 18, 2002, Heath had Claimant sign an agreement entitled "Independent Contractor Agreement." This agreement purported to make Claimant an independent contractor.

5) From her date of hire until September 3, 2002, Claimant was paid on an hourly basis at the rate of $7 per hour plus $10 per sale, and was only paid for hours that she actually worked. Respondent deducted taxes from Claimant's checks. Claimant worked five days per week at times and days set by Heath. She was hired for an indefinite period of time and had no investment in Respondent's business. Although she was an experienced telemarketer, no prior experience was necessary to perform her job. All the equipment and materials she used to perform her job, including a telephone, writing supplies, and a place to work, was provided by Respondent. She only called prospective customers who were on a list provided to her by Respondent and was not allowed to deviate from the scripted sales pitch provided to her by Respondent. Along with Respondent's other telemarketers, she performed her job at Heath's house, then at an office in Dallas, Oregon.

6) Respondent's regularly scheduled payday was Monday.

7) On or about September 3, 2002, Respondent unilaterally changed the pay rate of Claimant and the other telemarketers in her office to a straight commission of $40 per sale.

8) Claimant worked 67 hours for Respondent between September 3 and 16, 2002. No evidence was provided as to the commissions she earned during that period of time. Computed at $6.50 per hour, Claimant earned $435.50. She was only paid $75 for that work, leaving $360.50 due and owing.

9) As of the date of hearing, Claimant had not been paid any additional wages by Respondent.

10) On October 3, 2002, the Agency sent a "Notice of Wage Claims" to Respondent in which it stated that Alicia L. Duncan had filed a wage claim for $629 for work performed from September 3 to September 23, 2002, and

asked that Respondent "immediately tender to this office the amounts due." That letter was returned to the Agency by the U.S. Postal Service on October 18, 2002, because of "insufficient address."

11) On October 9, 2002, the Agency faxed the same "Notice of Wage Claims" letter to Respondent. Respondent received the letter and faxed a response back to Enos on October 18, 2002. In its response, Respondent claimed that Claimant was paid by "[c]ommissions only" and stated that "[a]ll documented sales have been paid in full."

12) Penalty wages for Claimant, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal $1,560 ($6.50 per hour x 8 hours x 30 days = $1,560).

13) The Agency's witnesses were all credible.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Procom Services, Inc. did business in Dallas, Oregon under the assumed business name of Direct View and employed one or more individuals in Oregon.

2) Respondent hired Claimant in July 2002 as a telemarketer to sell television satellites and satellite service. She was hired at the agreed rate of $7 per hour plus a $10 commission for every sale. Claimant was employed by Respondent until September 16, 2002, when she was involuntarily terminated when Respondent closed its office.

3) On September 3, Claimant's rate of pay changed to a straight commission of $40 per sale. Claimant worked 67 hours between September 3 and 16, 2002, and was only paid $75 for her work.

4) Computed at $6.50 per hour, Respondent owes Claimant $360.50 in unpaid, due and owing wages.

5) On October 9, 2002, written notice of nonpayment of Claimant's wages was made by the Agency and received by Respondent. More than 12 days have passed and Respondent has not paid Claimant the wages due and owing to her.

6) Respondent's failure to pay all unpaid, due and owing wages to Claimant was willful and she is entitled to penalty wages in the amount of $1,560.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer who suffered or permitted Claimant to work. ORS 653.010(3) & (4).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent. ORS 652.310 to ORS 652.332, ORS 653.040, ORS 653.261.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid by September 17, 2002,

the first business day after her termination. Respondent owes Claimant $360.50 in unpaid, due and owing wages.

4) Respondent is liable for $1,560 in penalty wages to Claimant. ORS 652.150; OAR 839-001-0470(1).

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant her earned, unpaid, due and payable wages, and the penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

DEFAULT

When a Respondent files an answer and request for hearing, but then fails to appear at hearing and is held in default, the Agency's burden is to establish a prima facie case to support the allegations in its charging document. *In the Matter of Usra Vargas,* 22 BOLI 212, 220 (2001). The forum may give some weight to unsworn assertions contained in an answer unless other credible evidence controverts them. If a respondent is found not to be credible the forum need not give any weight to the assertions, even if they are uncontroverted. *In the Matter of Keith Testerman*, 20 BOLI 112, 127 (2000).

PRIMA FACIE CASE

The Agency's prima facie case consists of proof the following elements: 1) that Respondent employed Claimant; 2) Claimant's agreed rate of pay, if other than the minimum wage; 3) that Claimant performed work for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *Vargas* at 220.

CLAIMANT WAS EMPLOYED BY RESPONDENT

In its answer, Respondent alleged the affirmative defense that Claimant was an independent contractor and attached a copy of an "Independent Contractor Agreement" signed by Claimant on July 18, 2002. This document is only part of the "totality of the circumstances" the forum must examine in determining whether a wage claimant is an employee or an independent contractor. *In the Matter of Triple A Construction, LLC,* 23 BOLI 79, 93 (2002). This forum applies an "economic reality" test to the circumstances determine whether a wage claimant is an employee or independent contractor under Oregon's wage collection laws. *In the Matter of Heiko Thanheiser,* 23 BOLI 68, 75-76 (2002). The focal point of the test is whether the alleged employee, as a matter of economic reality, is economically dependent upon the alleged employer. The forum considers five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative: (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; and (5) the permanency of the relationship. *Id.* at 75-76.

In this case, the Agency presented credible evidence that Claimant was an employee. Respondent engaged Claimant's personal services and suffered or permitted her to work. Respondent directed Claimant's work and supplied all of the equipment and supplies necessary to perform the work. Claimant had no investment in Respondent's business. Claimant had no opportunity to earn a profit or suffer a loss, as Respondent agreed to pay her a specific wage or commission and she had no investment other than her time. The job required no training, and Claimant was only allowed to call persons on her call list and was provided sales scripts that she was required to use. She was hired for an indefinite period of time; and there was no evidence that anyone else employed Claimant while she worked for Respondent. This credible evidence showing the actual substance of Claimant's working conditions outweighs Respondent's assertion in its answer that Claimant was an independent contractor and the "Independent Contractor Agreement" signed by Claimant.

CLAIMANT'S RATE OF PAY

Claimant credibly testified that her starting rate of pay was $7 per hour, plus a $10 commission for each sale, and that her pay rate was changed on September 3, 2002, to a straight commission of $40 per sale. Consequently, the forum must compute her earned wages at the commission rate instead of the figure of $7 per hour sought by the Agency in its Order of Determination. ORS 653.035(2) provides that an employer "may include commission payments to employees as part of the applicable minimum wage" but "[i]n any pay period where the combined wage and commission payments to the employee do not add up to the applicable minimum wage under ORS 653.010 to 653.261, the employer shall pay the minimum rate as prescribed in ORS 653.010 to 653.261. Claimant's claimed unpaid wages all accrued during the period from September 3 through September 16, 2002. She testified that she was paid $75 for her work during that period and worked 67 hours in total. Because the Agency provided no evidence of specific amount of commissions she earned in that time period, the forum has no way of determining whether her earned commissions exceeded her earnings computed at the minimum wage of $6.50 per hour.[1] Pursuant to ORS 653.03592), the forum determines that her pay rate was $6.50 per hour.

[1] Effective January 1, 2003, the Oregon's minimum wage was increased to $6.90 per hour.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant credibly testified that she was only paid $75 for work she performed from September 3 through September 16 and that this only compensated her for part of the work that she performed. Respondent's unsupported assertion in its answer that Claimant "was paid for all work completed" from "7-15-02 to 9-8-02" and denial that Claimant "is owed any monies" is overcome by Claimant's credible testimony.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

Claimant credibly testified that she worked 67 hours for Respondent between September 3 and September 16, 2002, basing her testimony on a contemporaneous record of her hours worked that she maintained on her personal calendar and transferred to a blank calendar provided by the Agency at the time she filed her wage claim. That Agency calendar was offered and received into evidence. It shows that Claimant worked 67 hours between September 3 and September 16, 2002. Respondent provided no evidence controverting that figure and the forum has accepted those hours as the amount of work performed by Claimant in the wage claim period. In total, Claimant earned $435.50 in the wage claim period and has only been paid $75, leaving $360.50 due and owing.

PENALTY WAGES

An employer is liable for penalty wages when it "willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140[.]" Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she 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).

Calculated at minimum wage, Claimant earned $435.50 between September 3 and September 16, 2002, and was only paid $75. Respondent's claim that Claimant was an independent contractor, when Heath, Respondent's manager, was aware of Claimant's actual conditions of employment and hours worked and the forum has determined that Claimant was an employee, is not a defense.[2] There is no evidence that Respondent acted other than voluntarily and as a free agent in failing to pay Claimant the wages she earned and the forum concludes that Respondent's failure

[2] *See, e.g., In the Matter of Scott Miller,* 23 BOLI 243, 262 (2002) (respondent's failure to apprehend the correct application of the law and actions based on this incorrect application did not exempt respondent from a determination that he willfully failed to pay wages earned and due).

to pay Claimant's wages was willful.

When the forum has determined that a respondent's failure to pay wages was willful, ORS 652.150 provides that "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 is commenced" for a maximum of "30 days from the due date." ORS 652.150(2) further limits the amount of penalty to not more than "100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after written notice of such nonpayment is sent to the employer by or on behalf of the employee." Here, the Agency sent written notice on behalf of Claimant that was received by Respondent on October 9, 2002. More than 12 days have expired since that date and Respondent has not paid Claimant's unpaid wages. Claimant is therefore entitled to 30 days penalty wages, computed as follows: $6.50 per hour x 8 hours x 30 days = $1,560. ORS 652.150, OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages Respondent owes as a result of its violation of ORS 652.140(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Procom Services, 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:

> A certified check payable to the Bureau of Labor and Industries in trust for Claimant Alicia L. Duncan in the amount of ONE THOUSAND NINE HUNDRED TWENTY DOLLARS AND FIFTY CENTS ($1,920.50), less appropriate lawful deductions, representing $360.50 in gross earned, unpaid, due and payable wages and $1,560 in penalty wages, plus interest at the legal rate on the sum of $360.50 from October 1, 2002, until paid, and interest at the legal rate on the sum of $1,560 from November 1, 2002, until paid.

In the Matter of

TCS GLOBAL CORP.

Case No. 34-03

Final Order of Commissioner Dan Gardner

Issued July 22, 2003

SYNOPSIS

Respondent failed to pay Claimant the minimum wage for hours Claimant worked as a dispatcher and willfully failed to pay Claimant all wages earned and due when Claimant quit his employment, in

violation of ORS 653.025(3) and ORS 652.140(2). Respondent also failed to make and preserve a record of the hours Claimant worked as a dispatcher, in violation of ORS 653.045(1)(b). Respondent is liable for $100.75 in unpaid wages to Claimant. Respondent is also liable for $3,120 in civil penalty wages. The penalty amount, computed as provided in *former* ORS 652.150, and in accordance with ORS 653.055, includes $1,560 as penalties for Respondent's failure to pay Claimant the minimum wage he was entitled to under ORS 653.025 and $1,560 as penalties for Respondent's willful failure to pay Claimant wages due when Claimant quit his employment under ORS 652.140(2). Respondent is also liable for $1,000 in civil penalties for willfully failing to make and preserve a record of Claimant's hours worked. ORS 653.010; ORS 652.310; ORS 652.140(2); *former* ORS 652.150; ORS 653.045(1)(b); ORS 652.025(3); ORS 653.055; ORS 653.256; ORS 652.445.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 11, 2003, in the Bureau of Labor and Industries Conference Room, located at 3865 Wolverine Street NE, Building E-1, Salem, Oregon. Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Joseph Rogers ("Claimant") was present throughout the hearing and was not represented by counsel. TCS Global Corp. ("Respondent") authorized Charles Bresser to appear as its representative and he was present during part of the hearing. Respondent's registered agent, Susan Bresser, was present during part of the hearing.

In addition to Claimant, the Agency called as witnesses: Charles Bresser, Respondent's authorized representative; Dale Thime, former Respondent employee; and Dylan Morgan, BOLI Wage and Hour compliance specialist.

Respondent called no witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-11;

b) Agency exhibits A-1 through A-27 (filed with the Agency's case summary). Having fully considered the entire record in this matter, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On January 24, 2002, Claimant filed a wage claim form stating Respondent had employed him from July 1 through December 15, 2001, and failed to pay him all wages due.

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

3) On September 25, 2002, the Agency issued an Order of Determination and a Notice of Intent to Assess Civil Penalties, both numbered 02-0324. In the Order of Determination, the Agency alleged Respondent had employed Claimant during the period July 1 through December 15, 2001, and that "although the provisions of ORS 653.025 required the employer to compensate the wage claimant at a rate not less than $6.50 per hour for each hour worked in that period, the employer failed to maintain and preserve records of hours worked and wages paid, and failed to provide these records to the bureau as required by [the applicable rules and statutes]. Employer admits that some wages are owed, however, due to lack of reliable records establishing the dates and hours claimant worked, the bureau is unable to compute what claimant earned during the wage claim period." The Agency alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to Claimant for $1,560 as penalty wages, plus interest. The Agency further alleged that Respondent was liable for an additional $1,560 as penalty wages, plus interest, pursuant to ORS 653.055, because it paid Claimant less than the wages to which Claimant was entitled under ORS 653.010 to 653.261. In its Notice of Intent to Assess Civil Penalties, the Agency alleged Respondent failed to maintain and preserve required payroll records or, in the alternative, that Respondent failed to make payroll records available to the Agency for inspection. The Agency cited aggravating factors and sought a $1,000 civil penalty. The Order of Determination and Notice of Intent were personally served on Charles "Bear" Bresser at TCS Global Corp., 225 Wallace Road NW, Suite A, Salem, Oregon, and gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On October 16, 2002, attorney William D. Brandt requested a contested case hearing on Respondent's behalf and did not include an answer to the Agency's charging documents. The Agency notified Respondent that its response was insufficient and extended the filing date of the answer and request for hearing. On November 4, 2002, Brandt filed an answer on behalf of Respondent. In its answer, Respondent denied it owed Claimant any wages or that it had previously admitted any wages were owed. As its defense, Re-

spondent asserted it paid all wages due and "maintained records as required by Oregon law and has not failed to cooperate or provide records to the Bureau of Labor and Industries."

5) On January 30, 2003, the Agency requested a hearing. On February 7, 2003, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on March 11, 2003. With the Notice of Hearing, the forum included copies of the Order of Determination and Notice of Intent to Assess Civil Penalties, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The following statement appears on the Notice of Hearing:

> "Any motions or other documents that participants wish to file with the Hearings Unit must be mailed or hand-delivered to the Hearings Unit. **Fax filings are not allowed except under specific instruction of an Administrative Law Judge.** Following is the Hearings Unit address:
>
> "**HEARINGS UNIT**, Bureau of Labor and Industries, Suite 1025, 800 NE Oregon Street #32, Portland, Oregon 97232-2162, (503) 731-4487
>
> "**Any documents filed with the Hearings Unit must also be served upon all other participants or their representatives**, pursuant to OAR 839-050-0030(3) and those statutes and rules cited in the Order of Determination or Notice of Intent."

The Notice of Hearing and accompanying documents were mailed to William D. Brandt, Attorney at Law, 1820 Commercial Street SE, Salem, Oregon 97301; TCS Global Corp., 225 Wallace Road NW, Suite A, Salem, Oregon 97304; and Susan F. Bresser, Respondent's registered agent, 4550 Boulder Drive SE, Salem, Oregon 97301. The U.S. Post Office did not return the Notice of Hearing documents to the Hearings Unit.

6) On February 13, 2003, the Hearings Unit received a letter by facsimile transmission from Brandt stating, in pertinent part:

> "This office is in receipt of a Notice of Hearing with regard to the above matter. The hearing is set for March 11, 2003. Please be advised that at this time this office does NOT represent TCS Global Corporation and will not be making any appearance on behalf of that corporation at the hearing or with regard to this matter. I have advised TCS Global by letter of that fact."

The Hearings Unit received the original document on February 14, 2003.

7) On February 14, 2003, the forum issued an interim order requiring Respondent to either retain counsel or file a letter authorizing a representative to appear on its behalf in compliance

with OAR 839-050-0110, a copy of which was attached to the interim order.

8) On February 18, 2003, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); and a statement of any agreed or stipulated facts and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by March 3, 2003, and advised them of the possible sanctions for failure to comply with the case summary order. Additionally, the case summary order included an advisory that: "The forum will not consider Respondent's case summary unless it is submitted by counsel or an authorized representative. *See* OAR 839-0500110(2) & (3)." The case summary order was mailed to Susan F. Bresser, Registered Agent, TCS Global Corp., 4550 Boulder Drive SE, Salem, Oregon 97301 and was not returned to the Hearings Unit by the U.S. Post Office.

9) On February 18, 2003, the Agency filed a case summary. Respondent did not file a case summary.

10) On February 21, 2004, the Agency moved to amend its Notice of Intent to correct a typographical error and to add the second page of its case summary to the record because it was inadvertently omitted due to a copying error. The Agency served its motion on "Charles Bresser, Authorized Representative, TCS Global Corp., 4550 Boulder Drive SE, Salem, Oregon 97301." Respondent did not respond to the Agency's motion and on March 5, 2003, the forum issued an interim order granting the motion. On March 7, 2003, the forum issued an addendum to the interim order granting the Agency's motion that stated, in pertinent part:

> "To the extent the interim order issued on March 5, 2003, was served on Charles Bresser as Respondent's "authorized representative," it is not to be construed as sufficient to comply with the requirements of OAR 839-050-0110(3). The forum inadvertently served the order on Bresser based upon the Agency's Certificate of Service that was attached to its Motion to Amend Notice and to Supplement Case Summary which showed the motion was served on 'Charles Bresser, Authorized Representative.' To date, Respondent has not filed a letter with the Hearings Unit authorizing Charles Bresser to appear on behalf of Respondent during this proceeding. Until it complies with the interim order issued on February 14, 2003, requiring it to either retain counsel or file a letter authorizing a representative, Respondent will not be allowed to participate in the

hearing set for Tuesday, March 11, 2003."

11) On March 10, 2003, the participants notified the ALJ by conference call that Agency case presenter Peter McSwain had received a letter on February 20, 2003, authorizing Charles Bresser to represent the corporation in the contested case proceeding. McSwain stated he had assumed at the time that the forum was served with a similar letter. McSwain provided the ALJ with a copy of the letter, which was dated February 18, 2003, and stated, in pertinent part:

"Dear Sir or Madam:

"This letter is to formally inform the Commissioner of the Bureau of Labor and Industries that I, Susan Faye Bresser, President and CEO of T.C.S. Global Corp. do hereby appoint as the Corporation's authorized representative Charles Bresser.

"Information on representative is as follows:

"Charles Bresser, 4550 Boulder Dr. SE, Salem, OR 97301

" * * *

"Thank you for your help in guiding me through this matter as to representatives."

The letter was addressed to: "BOLI, Department of the Commissioner, Wage and Hour Division, Suite 1160, 800 NE Oregon Street, Portland, Oregon."

12) At the start of hearing, Respondent's authorized representative ("Bresser") acknowledged that Respondent had received the Notice of Hearing, but stated it had not received the Notice of Contested Case Rights and Procedures or the administrative rules governing the proceeding. The ALJ took official notice of the Hearings Unit's practice and procedure to include with the Notice of Hearing copies of the summary of contested case rights and procedures and the complete contested case hearing rules. The record reflects both were included in the Notice of Hearing served on Respondent in February 2003. Nevertheless, the ALJ provided Bresser with an extra copy of the Division 50 Contested Case Hearing Rules and an opportunity to review the rules prior to commencing the hearing.

13) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

14) During the hearing, Bresser objected to the case presenter's line of questioning on the ground that the Agency was raising an issue of "implied contract." The ALJ overruled the objection because the Agency's questions were directly related to Claimant's perception of his wage agreement with Respondent for certain job duties. As Claimant continued to testify, Bresser became increasingly belligerent toward Claimant and the Agency case presenter and repeatedly interrupted the

Agency's direct examination with name calling and offensive language. Bresser pounded his fist on the table, yelled at the ALJ, and despite the ALJ's admonition, continued to disrupt the proceeding. After a short recess to afford Bresser the opportunity to calm down, the Agency case presenter completed his direct examination of Claimant and rested the Agency's case. Bresser declined to cross-examine Claimant and requested a postponement to allow Respondent additional time to gather witnesses to rebut the Agency's case. The ALJ determined that Respondent received the Notice of Hearing and all of the forum's orders, including the case summary order, and had adequate time to prepare for the hearing. The ALJ further noted that Respondent had not filed a case summary in compliance with the case summary order. On that basis, the ALJ denied Respondent's request for postponement and this order affirms that ruling. Bresser stated: "I ain't gonna discuss this - this is stupid" and declined to present a case on behalf of Respondent. Bresser and Respondent's registered agent, Susan Bresser, left the hearing without presenting any evidence.

15) The ALJ issued a proposed order on July 3, 2003, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent TCS Global Corp. was an active Oregon corporation engaged in traffic control ("flagging") services and employed one or more individuals in Oregon.

2) At all times material herein, Charles "Bear" Bresser was a co-owner of Respondent.

3) Respondent, through Bresser, hired Claimant on July 1, 2001, as a flagger and pilot car operator. Respondent agreed to pay Claimant $10.00 per hour or the prevailing wage rate if he performed work on contracts involving public works. Claimant received the applicable prevailing wage rate for the hours he worked on public works contracts.

4) About three weeks after Claimant was hired, Bresser offered him additional duties as district manager in charge of Respondent's coastal district. The district incorporated the northern coastal area, extending from Newport to Astoria and 32 miles inland. Claimant understood that his duties would include talking to contractors, determining how many flaggers were needed on each job site, and dispatching the flaggers to the job sites each day. Respondent intended that Claimant have full management of the district, including conducting regular safety meetings and engaging in marketing activities for the coastal area. In exchange for the management duties, Bresser told Claimant that Respondent would

pay Claimant a five per cent commission on all of the flagging contracts for the northern coastal area. Claimant understood from Bresser that his commission was to be paid quarterly and he was to receive the first payment six months from the date Claimant began his employment with Respondent. There was no written contract between Respondent and Claimant. Although Claimant did some safety training and regularly dispatched flaggers to particular job sites, he did not record the hours he performed those duties because he believed his pay for that work was by commission.

5) Claimant's dispatcher duties covered a 60 day period, less the days he was absent from work during hunting season or for other reasons. Bresser dispatched flaggers to their job sites during Claimant's absences. Between July 1 and December 15, 2001, Claimant worked at least 31 days as a dispatcher and spent approximately one half hour dispatching flaggers each of those days.

6) Between July and December 2001, Claimant continued to do flagging and pilot car work to take care of his basic living expenses. He recorded the number of hours he worked as a flagger and pilot car operator on TCS Global Corp. time cards that indicate the name of the contractor, job number, project location, date and day, names of flaggers and pilot car operators, the start and finish time of each, and the number of hours worked. The requisite information on the time cards corresponds with the Oregon Department of Transportation ("ODOT") "Flagger and Pilot Car Receipt," including "Flagger Names" and "Pilot Car Operator Names," that Respondent used for public works contracts. Neither the time cards nor the ODOT receipts provide a timekeeping section for other job descriptions, including hours worked by dispatchers. Claimant makes no claim for unpaid wages pertaining to his flagging and pilot car work.

7) Respondent did not keep a record of the number of hours Claimant worked as a dispatcher between July 1 and December 15, 2001.

8) Sometime during his employment, Claimant ordered business cards and arranged to have his personal cell phone set up as a "company phone" per Bresser's instruction and representation that Respondent would pay for the cards and reimburse Claimant for his cell phone bills. Before Claimant ordered the business cards, the printing company sought and received Respondent's authorization through Bear Bresser. Bresser also attempted unsuccessfully to include Respondent's name on Claimant's personal cell phone account. He assured Claimant that, in any event, Respondent would take care of the cell phone bills. Thereafter, Claimant began receiving bills for the business cards and telephone calls threatening collection activity for his unpaid cell phone bills. Respondent did

not pay Claimant for the business cards or reimburse him for the overdue cell phone bills. Claimant ultimately paid for the business cards himself and in November 2001 the cell phone bills were referred to a collection company. Claimant makes no claim for reimbursement of any of his expenses in this proceeding.

9) During his employment, Claimant used his own car while performing his pilot car duties with the understanding that Respondent would reimburse him for the gasoline he used for the job. Claimant turned in fuel receipts to Respondent for reimbursement five times during a two month period prior to November 2001. Claimant complained to Bresser and Bresser's wife, Susan, on several occasions about Respondent's failure to reimburse him for fuel, the business cards and the cell phone bills. During that time, Claimant began to doubt whether Respondent was going to give him "a big commission check" as he expected at the end of the six month period. Consequently, Claimant quit his employment on December 15, 2001, and gave Respondent a letter that stated:

> "Attn. Bear, Robin & Sue
>
> "As of 12/15/01 I terminate my employment with TCS global [sic][.]
>
> "Submit final payment within 30 days of receiving this letter or further action will be taken and you will be responsible for Lawyer fees as well[.]
>
> "Moneys or dollars owed to Joseph E. Rogers, from TCS Global, as follows
>
> "1. District Manager fees of 5%, off the top of {all contracts in Region 2}, described radius is, starting at Newport, North to Astoria, East to Banks and South West to point of beginning. 5% is owed from 7/01/01 to termination date of 12/15/01.
>
> "2. $130.00 fuel reimbursement owed from Pilot car fuel and oil used on the Elsie Job in early July with Columbia River Contractor, Nehalem Bridge.
>
> "3. One hour owed for under payment on vernonia [sic] job, with morse [sic] brothers in early July. {prevailing}
>
> "4. Two hours owed for under payment on July 12, time card. {prevailing}
>
> "5. Seven hours owed at 11.00 per hour for 7 safety meetings, conducted by myself.
>
> "6. $386.76 owed for cell phone service, unpaid balance.
>
> "7. Debt owed to Coast Printing for TCS Global business cards.
>
> "Joseph E. Rogers 12/15/01"

10) There is no evidence in the record pertaining to the number of contracts or the value of the contracts in "Region 2" between July 1 and December 15, 2001.

11) Respondent concedes that Claimant worked at least one half hour per day for at least 31

days as a dispatcher which equals 15.5 hours.

12) Respondent did not pay Claimant the applicable minimum wage for the hours Claimant worked as a dispatcher.

13) Civil penalties, computed in accordance with ORS 653.055 and as provided in *former* ORS 652.150 and *former* OAR 839-001-0470(1)(c), equal $1,560 ($6.50 per hour x 8 hours per day = $52 per day x 30 days = $1,560).

14) As of the date of hearing, Claimant had not been paid any wages for the 15.5 hours of dispatch work performed between July 1 and December 15, 2001.

15) Civil penalty wages, computed in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1)(c), equal $1,560 ($6.50 per hour x 8 hours per day = $52 per day x 30 days = $1,560).

16) Dale Thime's testimony that he observed Claimant conducting training meetings and dispatching flaggers on behalf of Respondent was generally credible. He was not clear, however, about how much time Claimant spent on those activities. Although he stated Claimant spent one half to one hour per day two or three times per week conducting safety meetings and spent "well over an hour per day" dispatching flaggers, he also stated he only "worked around" Claimant "on some of the jobs." Moreover, he reported to the Agency investigator during the wage claim investigation that he "could not quantify the amount of time [Claimant] spent on these activities, but * * * emphasized that [Claimant] would easily work 40 hours or more in a week." The forum, therefore, credits his testimony insofar as he observed Claimant doing safety training and dispatching, but discounts his estimate of the amount of time Claimant spent on those activities.

17) Claimant's testimony was generally credible. He readily acknowledged that he was paid for his flagging and pilot car work. He also credibly testified that he did not track the hours he worked as a trainer or dispatcher due to his belief that he would receive a commission for performing those duties. Although Claimant and Bresser disagree on whether they implemented a side agreement that included those extra duties, Bresser's testimony regarding his original intention to pay Claimant a commission to perform management duties that included training and dispatching, and his concession that Claimant actually performed dispatcher duties at Bresser's direction, bolsters Claimant's testimony that he performed work for which he was not paid. However, Claimant's testimony did not include any estimate of hours worked and, in the absence of a reliable estimate, the forum has only considered Respondent's concessions that Claimant worked at least 15.5 hours as a dispatcher and that Respondent kept no record of those hours.

18) Bear Bresser's testimony was directly affected by his demeanor during the hearing. Although his testimony during the Agency's case in chief appeared to be direct and straightforward, it was negated entirely when he became argumentative and disruptive during Claimant's testimony. Rather than wait for and use his opportunity to challenge Claimant's credibility on certain points, Bresser chose to repeatedly interrupt Claimant's direct testimony with derogatory language and insults, which continued to escalate, despite the ALJ's admonitions, until Bresser left the hearing voluntarily without cross-examining Claimant or presenting a case on behalf of Respondent. Other than considering his admissions that Claimant performed dispatch work and no records were kept of those hours, the forum gave Bresser's testimony little, if any, weight.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent TCS Global Corp. was an active Oregon corporation that engaged the personal services of one or more persons in Oregon, including Claimant, who was Respondent's employee.

2) At the time Claimant quit his employment without notice, Respondent owed Claimant at least the minimum wage of $6.50 per hour for 15.5 hours of work Claimant performed work as a dispatcher from July 1 through December 15, 2001. Respondent did not pay Claimant for any of the hours he worked as a dispatcher and, therefore, owes Claimant $100.75 in unpaid wages.

3) Respondent's failure to pay was willful and more than 30 days have passed since Claimant's wages became due.

4) Civil penalty wages, computed in accordance with former ORS 652.150 and former OAR 839-001-0470(1)(c), equal $1,560.

5) During his employment, Respondent did not pay Claimant at least the minimum wage for the hours he worked as a dispatcher.

6) Civil penalty wages, in accordance with ORS 653.055 and as provided in former ORS 652.150 and former OAR 839-001-0470(1)(c), equal $1,560.

7) Respondent willfully failed to make and keep payroll records showing the actual hours Claimant worked as a dispatcher between July 1 and December 15, 2001.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an Oregon employer who suffered or permitted Claimant to work. ORS 653.010(3) & (4).

2) The actions, inaction, statements, and motivations of Bear Bresser, Respondent's authorized representative and co-owner, are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 652.445, ORS 653.010 to 653.261.

4) Respondent violated ORS 652.025(3) by failing to pay Claimant the minimum wage for each hour Claimant worked as a dispatcher in Respondent's employ.

5) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant quit his employment without notice. Respondent owes Claimant $100.75 in unpaid, due and owing wages.

6) Respondent is liable for $1,560 in civil penalties under *former* ORS 652.150[1] for willfully failing to pay all wages or compensation to Claimant when due upon termination of employment as provided in ORS 652.140(2).

7) Respondent is liable for $1,560 in civil penalties under ORS 653.055 for failing to pay Claimant the applicable minimum wage to which Claimant was entitled to receive under ORS 653.025.

8) Under the facts and circumstances of this record, and according to the applicable law, 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 all sums until paid. ORS 652.332 and ORS 653.055(3).

9) Respondent violated ORS 653.045(1)(b) by failing to make and keep available a record of the actual hours Claimant worked each week and each pay period of his employment with Respondent.

10) Respondent's failure to make and keep a record of the actual hours Claimant worked each week and each pay period was willful and Respondent is liable for $1,000 in civil penalties under ORS 653.256.

11) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay a $1,000 civil penalty for Respondent's willful violation of ORS 653.045(1)(b). ORS 653.256.

OPINION

The Agency was required to prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000). Respondent does not dispute it employed Claimant between July 1 and December 15, 2001. Additionally, Respondent acknowledges that Claimant performed dispatcher duties over and above his flagging job and that it

[1] In 2001, the legislature amended ORS 652.150. The amendment is not relevant to this matter, which involves wages earned prior to its effective date of January 1, 2002.

may be liable for up to 15.5 hours of work (.5 hours x 31 days).

CLAIMANT'S PAY RATE

Claimant agrees he was paid either the agreed upon rate of $10.00 per hour or the applicable prevailing wage rate for his flagging and pilot car duties during his employment. However, he credibly testified that Respondent failed to pay an agreed upon commission for Claimant to manage Respondent's coastal territory, which included, among other responsibilities, dispatching flaggers to various job sites. Although Respondent is free to pay on a commission basis for those duties, the commission rate must not result in Claimant earning less than the minimum wage rate for each hour worked. *In the Matter of Ann L. Swanger*, 19 BOLI 42 (1999). Here, there is no dispute that Respondent did not pay Claimant any commissions during or after his employment with Respondent. However, there is no evidence from which to determine the amount of commissions Claimant earned during his employment with Respondent. Therefore, in the absence of evidence that Claimant was entitled to the same rate for dispatching that he received for his flagging and pilot car work, the forum concludes that Claimant is entitled to be paid the minimum wage rate of $6.50 per hour for all of the hours he worked as a dispatcher for Respondent.

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

Claimant credibly testified he worked additional hours for Respondent as a district manager, including work as a dispatcher. Respondent agrees only that Claimant performed dispatch work in addition to flagging and pilot car driving. Both agree that Claimant received no commissions as payment for work performed over and above his regular flagging and pilot car driving duties during or after his employment. Claimant's time cards for the claim period support Claimant's contention that he was paid only for flagging and driving. Additionally, Thime credibly testified that he observed Claimant performing work as a dispatcher and he also attended some training sessions that Claimant conducted on behalf of Respondent. Thime also stated Claimant complained to Thime and Thime heard him complain to Bresser about "not getting what he [Claimant] was promised." From those facts, the forum concludes that Claimant performed work for Respondent for which he was not properly paid.

AMOUNT AND EXTENT OF HOURS WORKED

When the forum concludes, as it does here, that an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where an

employer has produced no records, as happened in this case, the commissioner may rely on 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 then may award damages to the employee, even though the result be only approximate." *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001), quoting *Anderson v. Mt. Clemens Pottery Co.*, 3289 US 680 (1946).

Here, Claimant kept no independent records of the hours he worked as a district manager, based on his belief that the five per cent commission Respondent promised him would meet or exceed the wages he was receiving for flagging and driving. While there is credible evidence to support Claimant's contentions that he provided safety training for flaggers and acted as dispatcher for Respondent during his employment, there is a dearth of evidence regarding specific days and the amount of time Claimant spent performing those duties. The Agency alleged in its Order of Determination that "due to the lack of reliable records establishing the dates and hours claimant worked, the [Agency] is unable to compute what claimant earned during the wage claim period." Bresser and Claimant agree, however, that Claimant was scheduled to work at least 60 days as a dispatcher. There is insufficient evidence to determine exactly how many days Claimant actually worked as a dispatcher because both agree Claimant took time off for hunting season and other indeterminate days off. However, Bresser concedes that Claimant worked at least .5 hours for each of 31 days during Claimant's employment. Claimant credibly testified and Bresser acknowledges that Claimant was paid only for the work recorded on his time cards. The forum therefore concludes that Claimant performed at least 15.5 hours of work for which he was not properly compensated (.5 x 31). For those hours, Claimant earned a total of $100.75 (minimum wage rate of $6.50 x 15.5). Respondent owes Claimant $100.75 in unpaid wages.

CIVIL PENALTY WAGES UNDER *FORMER* ORS 652.150

The forum may award civil penalty wages where a respondent willfully fails to pay any wages due to any employee whose employment ceases. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she 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).

In this case, Respondent knew Claimant was performing work as a dispatcher and made no apparent effort to confirm whether Claimant was recording the time on his time cards. The time records clearly denote the nature of the work being recorded and Respondent knew or should have known that Claimant was not re-

cording his hours as a dispatcher. From these facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages he earned between July 1 and December 15, 2001, at the time Claimant terminated his employment without notice. Respondent acted willfully and is liable for penalty wages under *former* ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with *former* ORS 652.150 in the amount of $1,560. This figure is computed by multiplying $6.50 per hour by 8 hours per day multiplied by 30 days. *See former* ORS 652.150 and *former* OAR 839-001-0470.

CIVIL PENALTY WAGES UNDER ORS 653.055

The forum may also award civil penalty wages where a respondent fails to meet minimum employment conditions, including the failure to pay minimum wage, in violation of ORS 653.025. ORS 653.055 provides, in pertinent part:

> "(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:
>
> "(a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and
>
> "(b) For civil penalties provided in ORS 652.150."

In this case, the Agency established by a preponderance of the evidence that Respondent failed to pay Claimant at least the minimum wage of $6.50 per hour for every hour Claimant worked in Respondent's employ as a dispatcher. As such, Respondent paid Claimant less than the wage to which Claimant was entitled and Respondent is liable for $1,560 in civil penalties as provided in *former* ORS 652.150. This figure is computed by multiplying $6.50 per hour by 8 hours per day multiplied by 30 days.

RECORDKEEPING VIOLATIONS

The Agency asks this forum to impose a $1,000 civil penalty against Respondent for failing to maintain and preserve payroll records or, in the alternative, for failing to make records required to be maintained and preserved available to the Agency, in violation of ORS 653.045. Respondent admits it did not make a record of the hours Claimant worked as a dispatcher between July 1 and December 15, 2001. ORS 653.045(1) provides:

> "Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:
>
> " * * * *

> "(b) The actual hours worked each week and each pay period by each employee."

The forum has found that Respondent was required to pay Claimant at least the minimum wage rate for the hours he worked as a dispatcher. ORS 653.256 authorizes the commissioner to assess civil penalties not to exceed $1,000 for each willful violation of ORS 653.045.

OAR 839-020-0004(33) states:

> "'Willfully' means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person "should have known the thing to be done or omitted" if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules."

Respondent knew or should have known it was required to make and keep records of Claimant's work hours. Respondent, in fact, knew of the requirement because it kept records of the hours Claimant worked as a flagger and pilot car operator. Respondent also knew or should have known the content of the time cards Claimant turned in for the work he performed which showed only the hours Claimant worked as a flagger and pilot car operator. Since Respondent knew Claimant was performing additional dispatcher duties at Respondent's direction, it was obliged to make and preserve records of those additional hours. Bresser's assertion, on behalf of Respondent, that Claimant was responsible for recording all of his hours on his time cards is not a defense and does not negate Respondent's duty to comply with the requirements of ORS 653.045.

The actual amount of the civil penalty the Commissioner assesses depends on the mitigating and aggravating circumstances set forth in OAR 839-020-1020. *See* OAR 839-020-1010. In this case, Respondent presented no mitigating evidence for the forum to consider when determining the amount of the civil penalty. On the other hand, the Agency alleged, and the forum finds, that Respondent knew or should have known of the violation and had opportunity to correct the violation but failed to do so. Additionally, the forum finds Respondent's failure to make and keep a record of Claimant's hours worked over and above those he worked as a flagger and pilot car operator make it impossible in this case to determine the total amount of wages Claimant earned or the total number of hours Claimant worked for which he was not compensated. As such, the violation is serious and the forum finds $1,000 to be

an appropriate civil penalty in this case.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **TCS Global Corp.** is hereby ordered 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 Claimant Joseph E. Rogers, in the amount of THREE THOUSAND TWO HUNDRED TWENTY DOLLARS AND SEVENTY FIVE CENTS ($3,220.75), representing $100.75 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, and $3,120 in penalty wages, plus interest at the legal rate on the sum of $100.75 from January 1, 2002, until paid and interest at the legal rate on the sum of $3,120 from February 1, 2002, until paid.

FURTHER, as authorized by ORS 653.256, and as payment of the civil penalty assessed herein, TCS Global Corp. is hereby ordered 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 the amount of ONE THOUSAND DOLLARS ($1,000), as a civil penalty for one violation of ORS 653.045(1)(b), plus interest at the legal rate from the date the Final Order issues.

In the Matter of

THE ALPHABET HOUSE and Children's Center, LLC

Case Nos. 08-03 and 58-03

Final Order of Commissioner Dan Gardner

Issued July 24, 2003

SYNOPSIS

Respondent Alphabet House employed Claimant from June 1999 until September 9, 2001, at the agreed salary of $3,000 per month and paid her nothing for her work in October, November, and December 2000. Alphabet House also failed to make and keep available records of her actual hours worked in October 2000 and September 2001, in violation of ORS 653.045(1) & (2). Alphabet House was ordered to pay $9,000 in unpaid wages to Claimant. Children's Center, LLC, was not Claimant's joint employer and was not liable for the unpaid wages. The forum found that Alphabet House's failure to pay the wages was willful and awarded $4,061 in penalty wages. Alphabet House was also ordered to pay $1,200 in civil penalties for its four violations of ORS 653.045. ORS 652.140(2), ORS 652.150,

ORS 653.045, ORS 653.256; OAR 839-020-0080; OAR 839-020-1020.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 6 and 7, 2003, at the Bureau's Salem office located at 3865 Wolverine NE, E1, Salem, Oregon. The hearing was reconvened briefly on May 27, 2003, by teleconference.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Wage claimant Mildred Anne Parker ("Claimant") was present throughout the hearing and was not represented by counsel. Respondents were represented by William C. Williams ("Williams"), their designated authorized representative.

The Agency called as witnesses: Claimant; Harley Roth, former member of Alphabet House's board of directors; and Stan Wojtyla, BOLI Wage and Hour Division Compliance Specialist. Respondents' only witness was William C. Williams, Respondents' authorized representative.

The forum received into evidence:

a) Administrative exhibits X-1 through X-31 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-4, A-6 through A-14, A-19 through A-29, A-31, A-40, and A-52 (submitted prior to hearing). A-53 was offered, but not received;

c) Respondent exhibits R-1 and R-3 (submitted at hearing). R-2 was offered at hearing, but not received.

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

FINDINGS OF FACT -- PROCEDURAL

1) On January 9, 2002, Claimant filed a wage claim with the Agency alleging Respondents had employed her and failed to pay wages earned and due to her.

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

3) Claimant brought her wage claim within the statute of limitations.

4) On April 11, 2002, the Agency issued Order of Determination No. 02-0046 based upon the wage claim filed by Claimant

and the Agency's investigation. The Order of Determination alleged that Respondent "The Alphabet House" ("Alphabet House") owed a total of $12,000 in unpaid wages and $4,152 in civil penalty wages, plus interest, and required that, within 20 days, Alphabet House 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 April 30, 2002, Alphabet House filed an answer and request for hearing through Williams, its authorized representative. Alphabet House denied all the allegations in the Order of Determination.

6) On October 29, 2002, the Agency filed a motion to amend its Order of Determination to include "Children's Center, LLC" as an additional respondent based on the Agency's belief that the evidence would show that Claimant was an employee of both Alphabet House and Children's Center, LLC, and that Alphabet House was the sole member of Children's Center, LLC.

7) Respondent objected to the Agency's motion and denied that the Agency's assertions supporting its motion to amend were true. On November 21, 2002, the ALJ granted the Agency's motion on the ground that OAR 839-050-0170 "merely requires that the Agency assert a right to relief arising out of the same transaction(s) or occurrence(s) and that questions of law or fact common to both respondents will arise."

8) On December 12, 2002, Respondents, through their authorized representative Williams, filed an answer to the Agency's amended Order of Determination.

9) On January 3, 2003, Respondents filed a motion for an order requiring the Agency to make more definite and certain allegations contained "in the Agency's Notice of Intent to Assess Civil Penalties dated December 16, 2002." Respondents alleged that the Agency's Notice of Intent "neglects to allege what specific acts or omissions constitute the violations." Among other things, Respondents alleged that the Notice of Intent failed to provide adequate notice under "the Due Process Clause of the US Constitution, Amend XIV, and Oregon Constitution Art I, §10."

10) On January 10, 2003, the Agency objected to Respondents' motion and provided the forum with a copy of its Notice of Intent, which alleged that Respondents had committed 12 payroll record violations under ORS 653.045 and sought to impose $12,000 in civil penalties. The Notice of Intent alleged the following specific violations:

> "(4) During the period of July 4, 1999 through October 17, 2001, Respondents employed Millie Anne Parker ('Claimant') as a non-exempt employee. Respondents are obligated by law to pay their employees wages they earn. Respon-

dents have failed and refused to pay Claimant wages she has earned and to which she is entitled."

"(5) With regard to these lawful obligations Respondents willfully

"(a) failed to make required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080 (four violations);

"(b) failed to keep available required payroll and other records in violation of ORS 653.045 and OAR 839-0200080 (four violations); and

"(c) failed to supply Claimant with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610 in violation of ORS 653.045 and OAR 839-020-0012 and 839020-0080 (four violations)."

11) On January 13, 2003, the Agency moved to consolidate the cases involving its amended Order of Determination and its Notice of Intent.

12) On January 13, 2003, the ALJ granted Respondents' motion to make more definite and certain, noting that the Agency's Notice of Intent referred to 13 monthly payroll periods but the allegations encompassed only four of those periods. The ALJ required that the Agency specify which months or payroll periods in which the alleged violations occurred and ruled that Respondents need not file an answer and request for hearing until 20 days after Respondents received an Amended Notice of Intent containing this information.

13) On January 15, 2003, the ALJ denied the Agency's motion to consolidate on the basis that no answer and request for hearing had yet been filed in response to the Agency's Notice of Intent.

14) On January 21, 2003, Respondents filed an answer and request for hearing to the Agency's Notice of Intent. In pertinent part, Respondents' answer stated the following:

"I.

"With regard to the factual allegations * * * Respondents * * * DENY, each and every allegations therein delineated, severally and jointly, with the following exception: Respondent, the Alphabet House, ADMITS that * * * 'Claimant] was its employee during certain times relevant to the above proceeding, however, it DENIES that it employed Claimant prior to January 1, 2001 and subsequent to October 1, 2001.

"II.

"In the alternative, with regard to the factual allegations contained in Notice, Respondents, The Alphabet House and the Children's Center, LLC, ADMITS [sic], each and every allegation therein delineated, severally and jointly. Respondent [sic] further contend, as

has been previously admitted, * * * that Claimant was responsible for the acts and omissions in this paragraph herein acknowledged. Specifically, Respondents contend that it is admitted that Claimant was responsible for the 'disbursement of funds and the payment of accounts,' * * * such responsibility being at the core of the allegations contained in Notice. It follows that, if Responsibility [sic] have any liability for that [sic] acts and omissions described in Notice, such liability is predicated upon the acts and omissions of Claimant, being their agent and officer, who performed or omitted to perform the aforesaid while in the employ of Respondents. Accordingly, Respondents maintain that the aforementioned admission permits assertion of the following[.]

"* * * * *

"IV.

"As the allegations as recited above are due primarily to the acts or omissions of Claimant, her liability therefore is at least equal to, if not greater than, that if [sic] Respondents, to the extent that BOLI's claims contained in Notice are based upon an assignment of rights from Claimant, such claims are barred by the legal doctrine of *in pari delicto,* i.e., of equal guilt.

"* * * * *

"VI.

"Because Claimant was employed contractually by Respondents to perform the duties that form the basis of BOLI's claims and, to the extent that BOLI's claim as contained in Notice are based upon assignment of rights from Claimant, such claims constitute a breach of Claimant's and through Claimant, BOLI's contractual obligation of good faith performance.

"* * * * *

"VIII.

"As Claimant was an agent of Respondents, an officer of Respondent, The Alphabet House, and a manager of Respondent, the Children's Center, her conduct violates the standard of conduct delineated in ORS 65.577 and ORS 60.377, with respect to the Alphabet House, and the standard of conduct delineated in ORS 63.155(9), with respect to the Children's Center.

"* * * * *

"X.

"Because Claimant is liable, at least to the extent that Respondents are, if not to a greater extent, Respondents are entitled to seek an equal contribution from Claimant to any judgment rendered herein against them, pursuant to ORS 18.440.

"* * * * *

"XII.

"Because Claimant is liable, at least to the extent that Respondents are, if not to a greater extent, Respondents are entitled to seek indemnification with respect 'to] any judgment rendered herein against them."

15) On January 23, 2003, the Agency renewed its motion to consolidate and filed a motion to dismiss Respondents' five counterclaims. In the same motion, the Agency clarified that it was alleging Claimant was not paid for her work during the months of October, November, and December of 2000 and September of 2001.

16) On January 29, 2003, the Agency filed a "BOLI Request for Hearing" with the forum.

17) On February 7, 2003, the ALJ granted the Agency's motion to consolidate, finding that the Agency's amended Order of Determination and Notice of Intent involved the same Respondents and common questions of fact.

18) On February 7, 2003, the ALJ issued an Interim Order granting the Agency's motion to dismiss Respondents' counterclaims on the basis that the Commissioner "lacks the authority to grant relief on the basis of any of the counterclaims stated by Respondents in their answer." The ALJ also required the Agency to file a statement listing the specific times in which the recordkeeping and itemized statement violations alleged in its Notice of Intent occurred.

19) On February 7, 2003, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimant stating the time and place of the hearing as May 6, 2003, at 3865 Wolverine Street NE, Bldg. #E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, 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 839-050-000 to 839-050-0440.

20) On February 12, 2003, the Agency filed a statement indicating that the four alleged ORS 653.045 violations related to making records and the four alleged itemized statement of deductions violations contained in the Notice of Intent occurred "on or about Respondents' regular paydays following October, 2000, November, 2000, December, 2000 and September, 2001." The Agency further stated that the four ORS 653.045 payroll and record availability violations alleged in the Notice of Intent "occurred and/or continue to occur for two years following October, 2000, November, 2000, December, 2000 and September, 2001, respectively."

21) On February 12, 2003, the forum ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into

evidence; a brief statement of the elements of the claim (for the Agency only); and a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only.) The forum ordered the participants to file case summaries no later than April 25, 2003, and notified the Agency and Respondents of the possible sanctions for failure to comply with the case summary order. The forum also enclosed a form designed to assist *pro se* respondents in filing a case summary. Williams, Respondents' authorized representative, received this Interim Order.

22) On March 26, 2003, the Agency filed a motion for a discovery order seeking payroll documents pertaining to Claimant for the months of October through December 2000 and September 2001. The motion included a statement that an informal request had previously been made for these documents and that Respondents had not provided them and also included a statement of relevancy.

23) On April 3, 2003, Respondents filed a motion to dismiss the allegations contained in the Notice of Intent relating to failure to provide itemized statements of deductions on the basis that the Agency had failed to comply with the ALJ's order requiring the Agency to state the specific time periods in which those violations occurred.

24) On April 9, 2003, the ALJ granted the Agency's motion for discovery order over Respondents' objection that the Agency's request was overly broad, finding that the Agency had requested documents that were directly related to its allegations and had clearly defined the scope of its request.

25) On April 9, 2003, the ALJ denied Respondents' motion to dismiss, finding that "the Agency's statement that the violations alleged in the Notice of Intent occurred on Respondents' paydays corresponding to the months of October, November, and December 2000, and September 2001" conformed to the ALJ's interim order requiring the Agency to clarify its pleadings.

26) On April 25, 2003, the Agency filed a case summary, accompanied by 52 exhibits.

27) Respondents did not file a case summary.

28) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the Agency and Williams, Respondent's authorized representative, of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

29) During the hearing, Respondents sought to call four witnesses besides William C. Williams -- Bill Hoard, Kathe Williams, John Hawkins, and an unnamed individual from Larry Tokarski's office. The Agency objected on the grounds that Respondents had not filed a case summary listing these witnesses, that this was the first notice the Agency had of Re-

spondents' intent to call these witnesses, and that the Agency would be prejudiced based on its lack of ability to prepare to meet the witnesses' testimony. Williams stated that he had not filed a case summary because Jonathan Nelson, the individual he was relying on to prepare the case summary, had been taken ill on the Friday (May 2) before the hearing and was unable to prepare the case summary. The AUJ found that this did not constitute a satisfactory reason for not filing a case summary, in that the case summary was due on April 25, 2003, and Williams, as Respondents' authorized representative, was the person responsible for filing it. The ALJ further found that the Agency would not receive a fair hearing if Respondents were allowed to call the four witnesses, and that a continuance would not cure the problem. For these reasons, the ALJ ruled that Respondents would only be allowed to call William C. Williams, its authorized representative, as a witness. The ALJ allowed Williams to make an offer of proof stating the substance of the testimony each of the four witnesses would give, if allowed to testify.

30) When the hearing resumed on May 7, Williams requested to have three unnamed [3]rebuttal' witnesses testify. The AUJ denied the request, ruling that Respondent was entitled to present "rebuttal" evidence during the presentation of its case after the Agency presented its case in chief, but was not entitled to call rebuttal witnesses to counter testimony by the Agency's rebuttal witnesses.

31) On June 20, 2003, the AUJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT -- THE MERITS

1) The Alphabet House was founded in 1994 by William and Kathe Williams as a facility for fragile and developmentally delayed children aged birth to six where children could come with their families and receive care.

2) The Oregon Corporation Division's records show that The Alphabet House ("Alphabet House") was registered on September 20, 1994, as a nonprofit organization for "public benefit." At all material times herein, Alphabet House was a "501(c)(3)" company.

3) William and Kathe Williams envisioned a birth-infant-toddler-kindergarten school that would include "regular" children and fragile and developmentally delayed children.

4) At all material times herein, Alphabet House's office was located in the back of a large warehouse in Salem, Oregon.

5) In June 1999, Claimant signed an employment contract with Alphabet House to work as an independent contractor/consultant for Alphabet House at a salary of $3,000 per month.

Kathe Williams told Claimant she would receive a signing bonus and become an employee at the salary of $3,000 per month when Alphabet House received expected funding from a grant through HHECFA, a state bonding agency. About the same time, Alphabet House also entered into similar independent contractor employment contracts with Leslie Harrison, Trudy Campbell, and Karla Ridling.

6) Shortly after signing the employment contract, Claimant began working from 8 a.m. to 5 p.m., Monday through Friday, for Alphabet House. She sometimes worked evening hours if there was a meeting related to Alphabet House business.

7) Between June 1999 and the summer of 2000, Claimant's primary job duties included, among other things, setting up and maintaining all of Alphabet House's records, bookkeeping, scheduling meetings, attending meetings related to Alphabet House, and paying bills. Claimant learned how to do bookkeeping while working at Alphabet House. Williams asked Claimant to keep copies of Alphabet House's records in her fireproof safe at home because Alphabet House did not have a fireproof safe.

8) Alphabet House's plans for growth hinged on getting the grant from HHECFA. Sometime in the summer of 2000, Alphabet House learned that HHECFA had denied its grant application. In response, Alphabet House opened a retail store called the "Attic" in the same warehouse as Alphabet House's office. The retail store was opened to show that Alphabet House could successfully operate a small business, giving Alphabet House greater credibility for gaining funding.

9) Claimant helped set up the Attic and worked part-time in it after it opened, along with other persons on Alphabet House's staff.

10) In or around August 2000, Alphabet House rented a separate building space that was already licensed as a daycare center for the purpose of starting the school originally envisioned by the Williams.

11) Alphabet House hired a contractor and architect to remodel the new building space so it would be accessible to disabled children, and construction began.

12) By November 2000, Alphabet House had exhausted its funds and construction on the school was only half finished. Williams sought money from an individual named Larry Tokarski, who agreed to provide additional funding under certain conditions. First, the school would become an LLC, with Tokarski and Alphabet House as its two members, each having a 50% ownership interest. Second, that Alphabet House would manage the LLC, with the LLC reimbursing Alphabet House for half the salary of Alphabet House staff who managed the LLC. On November 9, 2000, the "Children's Center, LLC," registered with the Oregon

Corporations Division as an LLC with "The Alphabet House" listed as its member of record.

13) Sometime between the HHECFA grant denial and November 9, 2000, Williams asked Claimant, Harrison, Campbell, and Ridling to tear up their independent contractor employment contracts. Harrison, Campbell, and Ridling tore up their contracts. Claimant did not. All four continued working for Alphabet House.

14) In October, November, and December 2000, Claimant believed she was an employee of Alphabet House. Claimant worked 532 hours in total in these three months.

15) During the months of October, November, and December 2000, Claimant completed a single ³Time Billing´ form on which she itemized dates and times worked in those months that involved work on weekends or after 5 p.m. The words "The Alphabet House, 3896 Beverly Ave. NE J-20, Salem, OR 97305" are printed on top of this form and the two forms described in Finding of Fact 16 -- The Merits.

16) In November and December 2000, Claimant completed two additional Alphabet House "Time Billing" forms on which she wrote down each date she worked, the work she did that day, and the total number of hours she worked each day. Beginning on November 13, 2000, Claimant also wrote down the number of hours she worked each day for the Children's Center.

17) Neither Alphabet House nor the Children's Center maintained copies of these time sheets. Neither Alphabet House nor the Children's Center created or maintained any other record of the hours worked each day by Claimant in October, November, and December 2000, or in September 2001.

18) In November 2000, Claimant worked 88 hours for Alphabet House and 72 hours for the Children's Center. In December 2000, Claimant worked 106 hours for Alphabet House and 88 hours for the Children's Center.

19) By January 1, 2001, the Children's Center had exhausted its funds and the school was not yet ready to operate. Tokarski agreed to provide more funds on the conditions that Bill Frey, chairman of Alphabet House's board of directors, would contribute an equal amount. Tokarski and Frey contributed an equal amount of funds. In exchange, Frey acquired Alphabet House's 50% ownership interest and membership in the Children's Center. The agreement that Alphabet House would manage the Children's Center for a fee continued in effect.

20) Neither Alphabet House nor the Children's Center paid Claimant anything for the work she performed from June 1999 through December 31, 2000.

21) From June 1999 until September 7, 2001, Claimant worked under the direct supervision of either William or Kathe

Williams. She worked from 8 a.m. until 5 p.m., Monday through Friday, and used equipment provided by Alphabet House or the Children's Center to perform her job duties. There was no expectation that her employment would end at any particular time. There was no evidence that she was employed elsewhere or had any investment in Alphabet House or the Children's Center.

22) The Children's Center opened its school in late February or early March 2001. Campbell, Harrison, Ridling, and Kathe Williams all began working exclusively for the Children's Center. Claimant continued working for Alphabet House and began performing additional administrative services for the Children's Center. Additional services she performed included setting up ADP payroll for Children's Center's employees, notifying ADP each month of the Children's Center's payroll, producing employee handbooks for Alphabet House and the Children's Center, setting up CPR and First Aid classes for Children's Center employees, and setting up and monitoring Children's Center employee personnel files.

23) In late August 2001, Alphabet House and the Children's Center again ran out of funds and the Children's Center was unable to pay its employees on August 31, 2001, its regularly scheduled payday.

24) Frey and Tokarski agreed to contribute equal amounts of money so the Children's Center could meet its payroll. At the same time, they terminated Alphabet House's management of the Children's Center. At that time, Claimant and Williams were Alphabet House's only employees.

25) Early in the week beginning September 3, 2001, Williams met with Claimant, told her that there was no money to pay her salary, and said she should talk with Kathe Williams about working at the Children's Center. Williams told Claimant that her computer would be moved over to the Children's Center. Claimant met with Kathe Williams, who told her that she could do aide work with children at the Children's Center.

26) On September 9, 2001, Claimant delivered a letter to Williams that read as follows:

> "Dear Bill:
>
> "In the three years I have worked for The Alphabet House I have never taken a leave of absence. I need to take this next week due to illness.
>
> "Since you and Kathe have always told me to take my vacation whenever I liked this is to inform you that I will take a month's paid vacation starting September 17, 2001.
>
> "I am also removing my personal belongings from The Alphabet House since you are moving to a smaller location and liquidating the Attic. I do

not want to cause you any concern on what is my personal property or can be sold."

"Millie Parker, Director of Administrative Services, The Alphabet House"

27) On October 10, 2001, Williams telephoned Claimant and left a message in which he stated, among other things, that Claimant [3]was never fired from The Alphabet House,' that [3]she was laid off from The Alphabet House because I was ordered to cut down to one person to save money,' and that she "was going to be picked up at the other building as an employee and then we were going to work out something so she could be doing the things she liked to do."

28) Claimant never returned to work at Alphabet House or the Children's Center. Her last date of work was September 7, 2001.

29) In 2001, Claimant received nine paychecks drawn on Alphabet House's general account. Except for one check, Claimant made out and signed each check, with Williams's authorization. The eight checks Claimant made out and signed were each for one months' pay and were in the gross amount of $3,000, less statutory deductions that Claimant made and deposited in appropriate accounts. The ninth was issued by Alphabet House on 9/28/01 in the amount of $207.72. The notation "for 12 hours pay" was written on it.

30) There was no evidence presented that any deductions were taken from the $207.72 check issued to Claimant on 9/28/01.

31) Respondents did not provide Claimant with a statement of itemized deductions for the $207.72 check issued to her on 9/28/01.

32) Claimant was paid in full for all the hours she actually worked in 2001.

33) Pursuant to the agreement between Alphabet House and the Children's Center whereby Alphabet House would manage the Children's Center in exchange for a fee, the Children's Center reimbursed Alphabet House in the amount of $1,782.60 for each of Claimant's eight $3,000 paychecks.

34) Neither Alphabet House nor the Children's Center had a written vacation policy for employees. However, the board of directors for Alphabet House decided that certain persons, including Claimant, would get paid vacations. No reliable evidence was presented as to the specific amount of time authorized for vacations.

35) In the summer of 2001, William and Kathe Williams, Karla Ridling, and Camille Self all took paid vacations ranging from about one week to about one month.

36) On August 16, 2001, Kathe Williams, as vice president of Alphabet House, signed an agreement with the Internal Revenue Service in which Alphabet House agreed that "[b]eginning

October 1, 2000, and for all periods thereafter, officer workers and persons performing equivalent duties regardless of taxpayer's job titles will be treated as employees for all federal tax purposes.'

37) On January 16, 2002, BOLI's Wage & Hour Division sent a "Notice of Wage Claim"' to Alphabet House stating that Claimant had filed a wage claim in which she claimed "[3]unpaid wages of $10,000 at the rate of $3,000.00 per month from October 1, 2000 to October 17, 2001 and claims unpaid vacation compensation of $3,000.00 for period October 1, 2000 to October 17, 2001 for a total claim of $13,000.00."

38) As of the date of hearing, neither Alphabet House nor the Children's Center had paid any wages to Claimant since Claimant received the 9/28/01 check for $207.72.

39) Penalty wages are computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(d) as follows. $9,000 in unpaid wages ÷ 532 hours = $16.92 per hour x 8 hours = $135.36 x 30 days = $4,061 penalty wages.

40) Harley Roth was a disgruntled former member of Alphabet House's board of directors who testified as to the relationship between Alphabet House and the Children's Center and the vacation policy of both entities. His memory was admittedly hazy and he did not recall how much vacation was approved for Alphabet House and the Children's Center's staff. Consequently, the forum has only relied on his undisputed testimony that the board approved paid vacation for staff persons, including Claimant.

41) Stan Wojtyla testified as to his investigation of Claimant's wage claim. His memory was also unclear, as shown by hazy recollection of whom he spoke to and when those conversations took place. His testimony was largely irrelevant to the ultimate issues of the case and the forum has not relied on it.

42) Claimant was a credible witness. With one exception, her testimony was consistent with her other testimony at hearing and statements made prior to hearing. That exception was her initial testimony that she only received $24,000 pay from Alphabet House in 2001, by way of eight checks for $3,000 in gross wages. She later acknowledged receiving a ninth check for $207.72. This inconsistency was more than balanced out by her voluntary acknowledgment that she received eight checks for $3,000 in gross wages, whereas Alphabet House's record showed she was only paid seven checks in this amount.[1] Her testimony on the most important issue -- Respondents' failure to pay for her work in October, November, and December 2000, was undisputed. As a

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1 Alphabet House's record, which is Exhibit A-22, shows eight $3,000 checks, but check #120 is listed twice.

result, the forum has credited her testimony as to facts in its entirety. The forum has disregarded the legal conclusions she testified to based on those facts. For example, her testimony that she was an independent contractor and that the Children's Center was her joint employer.

43) William Williams, Respondents' authorized representative and only witness, was an emotional witness who expressed considerable anger and disgust at BOLI's investigation and hearings process. He repeatedly sought to evoke the ALJ's sympathy by complaining about how little money he and his wife took home from their work at Alphabet House and how much money Alphabet House owed them. He repeatedly claimed ignorance of legal procedure and complained of his inability to adequately represent Respondents at the hearing, yet in his pre-hearing motions cited case law, constitutional law, the Oregon Rules of Civil Procedure, and legal doctrines by using their Latin name. Finally, his sincerity was diluted by his extravagant expressions of affection for Claimant.[2] His requirement that his four so-called independent contractors tear up their contracts and irritation at Claimant for not tearing up hers cast considerable doubt on the content of the contracts, as well as his willingness to pay employees as required by law. His claim that Claimant worked as a volunteer in October, November, and December 2000 because she was afraid of tax consequences, in the context of his assertion that Claimant had been an independent contractor up to that point earning $3,000 per month, was unbelievable, as was his testimony that Claimant stole documents from Alphabet House. As a result, the forum has only credited his testimony where it was undisputed or corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Alphabet House was a nonprofit organization that engaged the personal services of one or more employees in Oregon.

2) Between November 9, 2000, and October 2001, Children's Center, LLC, was a limited liability company doing business in Oregon.

3) The Alphabet House was a member of the Children's Center, LLC, from November 9 through December 31, 2000, with a 50% ownership interest.

4) Claimant was employed by Alphabet House between June 1999 and September 9, 2001, as director of administrative services. When she was hired, Alphabet House agreed to pay her a $3,000 per month salary. During her employment with Alphabet House, Claimant's regular work schedule was 8 a.m. to 5 p.m., Monday through Friday.

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[2] The most pronounced example of this was his testimony "I love her and her husband.'

5) Between November 13 and December 31, 2001, Claimant spent 45% of her time performing administrative work for the Children's Center, pursuant to an agreement between Alphabet House and the Children's Center whereby Alphabet House agreed to manage the Children's Center, and the Children's Center agreed to reimburse Alphabet House for staff time.

6) Alphabet House and the Children's Center paid Claimant nothing for her work in October, November, and December 2000 and Claimant is owed $9,000 in unpaid, due and owing wages.

7) Alphabet House and the Children's Center did not maintain records showing Claimant's actual hours worked each week and each pay period in October, November, and December 2000.

8) Alphabet House and the Children's Center did not create or maintain records showing the actual hours worked by Claimant in October 2000 and September 2001.

9) Alphabet House willfully failed to pay the wages due and owing to Claimant and more than 30 days has elapsed since they were due.

10) Penalty wages are computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(d) as follows. $9,000 in unpaid wages ÷ 532 hours = $16.92 per hour x 8 hours = $135.36 x 30 days = $4,061 penalty wages.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Alphabet House was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. During all times material, Alphabet House employed Claimant.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414, ORS 653.040, ORS 653.256, ORS 653.261.

3) Respondent Alphabet House violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid by September 14, 2001, five days after she voluntarily left her employment, excluding Saturdays, Sundays and holidays. Alphabet House owes Claimant $9,000 in unpaid, due and owing wages.

4) Respondent Alphabet House is liable for $4,061 in penalty wages to Claimant. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

5) Respondent Alphabet House committed two violations of ORS 653.045(1)(b) by failing to make records of the actual hours worked each week by Claimant during the months of October 2000 and September 2001.

6) Respondent Alphabet House committed two violations of ORS 653.045(1)(b) by failing to keep available records of the ac-

tual hours worked each week by Claimant during the months of October 2000, and September 2001.

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 Alphabet House to pay Claimant her earned, unpaid, due and payable wages, and the penalty wages, plus interest on both sums until paid. ORS 652.332.

8) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner's imposition of penalties for Respondent Alphabet House's violations of ORS 653.045(1)(b) is an appropriate exercise of his discretion. ORS 653.256.

OPINION

CLAIMANT'S WAGE CLAIM

To prevail, the Agency must prove: 1) that Respondent or Respondents employed Claimant; 2) any pay rate upon which Respondent(s) and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent(s). *In the Matter of Toni Kuchar,* 23 BOLI 265, 273 (2002).

A. Alphabet House was Claimant's employer.

Respondents contended that Claimant was an independent contractor between June 1999 and September 2000, and worked as a volunteer from October 1 to December 31, 2000. Respondent also argued that the Children's Center was never Claimant's employer. Claimant acknowledged signing a purported independent contractor agreement when she started work for Alphabet House, but denied working as a volunteer for the last three months of 2000. The Agency alleged that she was an employee of Alphabet House and the Children's Center in October, November, and December 2000 and in September 2001. For reasons stated below, the forum concludes that she was an employee of Alphabet House between June 1999 and September 7, 2001, the last day she worked for Alphabet House, and that the Children's Center was never Claimant's employer.

This forum uses an "economic reality" test to determine whether a wage claimant is an employee or independent contractor under Oregon's wage collection laws. *In the Matter of Heiko Thanheiser,* 23 BOLI 68, 75-76 (2002). 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." *Id.* The forum considers five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative: (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; and (5) the permanency of the relationship. *Id.*

Respondent rests its claim that Claimant was an independent contractor on the agreement that she signed.[3] Although Claimant may have signed an "independent contractor" agreement, this fact does not control the outcome of this case, as the forum looks at the totality of the circumstances in determining whether a wage claimant was an employee or an independent contractor. *In the Matter of Triple A Construction, LLC,* 23 BOLI 79, 93 (2002). In this case, the relevant facts show that William or Kathe Williams directed Claimant's work; Alphabet House or Children's Center supplied all the equipment necessary to perform her work; Claimant had no investment in Alphabet House or Children's Center; Claimant had no opportunity to earn a profit or suffer a loss, as she was paid a set salary of $3,000 per month; Claimant learned how to do bookkeeping while working for Respondents; Claimant was hired for an indefinite period of time; and no one else employed Claimant between June 1999 and September 7, 2001. Williams testified that Claimant said she would work as a volunteer during the months of October, November, and December 2000, but the forum did not find this testimony credible. There was no evidence that any significant changes occurred in Claimant's conditions of employment at Alphabet House between June 1999 and December 31, 2000, further indicating that her employment status was the same throughout her tenure at Alphabet House. Additionally, Alphabet House began paying Claimant as an employee retroactive to January 1, 2001, and did not provide a credible explanation for Claimant's alleged employment status change on that date. All these factors point the forum to the conclusion that Claimant was an employee, not an independent contractor, throughout her tenure at Alphabet House. However, the forum may only award back wages for the period of time in which back wages were sought.[4]

Prior to hearing, the Agency amended its Order of Determination to allege that the Children's Center was also Claimant's employer during the wage claim

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[3] This agreement is not in evidence, as Respondent objected to its admission when the Agency offered it into evidence and the ALJ sustained the objection.

[4] *Compare In the Matter of Francisco Cisneros,* 21 BOLI 190, 213 (2001) and *In the Matter of Contractor's Plumbing*, 20 BOLI 257, 273 (2000) (in both cases, the Commissioner awarded wage claimants unpaid wages earned in excess of those sought in the Agency's Order of Determination; however, the excess wages were earned during the specific wage claim period alleged in the Order of Determination).

period. At hearing, the Agency rested its allegation on credible evidence that Claimant performed at least half of her work for the Children's Center beginning in November 2000, that the Children's Center paid for 60% of her salary, that the Children's Center did not write Claimant a separate check as a money saving convenience for Claimant, and that Alphabet House also paid the salary of Kathe Williams, a fulltime employee of the Children's Center. Claimant also testified to her belief that she was employed by both entities. On the other hand, Respondents presented credible evidence that the Children's Center had an agreement with Alphabet House to the effect that Alphabet House would manage the Children's Center and the Children's Center would reimburse Alphabet House for the proportion of salaries paid out to its staff that was attributable to management of the Children's Center.[5] Credible evidence also established that Claimant's work-site was in Alphabet House's office and that her paychecks, which she wrote herself, were drawn on Alphabet House's general account. Williams testified that Claimant was always an employee of Alphabet House. Williams, who was an employee of Alphabet House, was Claimant's immediate supervisor after the Children's Center began operations. Claimant and Williams both agreed that Williams asked Claimant to interview with Kathe Williams about employment with the Children's Center in early September 2001, an unlikely scenario if Claimant was already employed by the Children's Center. In addition, the evidence was undisputed that Claimant never completed any paperwork for the Children's Center, such as an I-9 or W-4, that a new employee would be asked to complete, even though Claimant was in charge of the records for Alphabet House and the Children's Center. Claimant kept track of her time in November and December 2000 on Alphabet House "Time Billing" sheets. Finally, Claimant signed her September 9, 2001, letter as [3]Director of Administrative Services, The Alphabet House.' Based on the above, the forum concludes that the Agency failed to meet its burden of proof in establishing that the Children's Center was her employer.

The forum also notes that the Children's Center, LLC, did not exist as a business entity prior to November 9, 2000,[6] and therefore could not have been Claimant's employer before that date.

B. <u>Claimant's Rate Of Pay</u>

Claimant's credible testimony as to her salary agreement, together with the fact that she was actually paid $3,000 in gross salary for eight separate months in 2001, establishes that Claimant's

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5 During 2001, Claimant and Williams were Alphabet House's only employees.

6 *See* Finding of Fact 12 -- The Merits, *supra*.

rate of pay was a $3,000 per month salary based on working eight hours per day, five days a week.

C. Claimant Performed Work For Which She Was Not Properly Compensated

Claimant's credible testimony and records established that her regular work hours during October, November, and December 2000, were 8 a.m. to 5 p.m., Monday through Friday. Respondents did not dispute her claim that she was paid nothing for her work. These facts establish the third element of the Agency's case.

D. The Amount And Extent Of Work Claimant Performed For Respondent

As stated above, Claimant credibly testified that her regular work schedule during the wage claim period was 8 a.m. to 5 p.m., Monday through Friday. She also credibly testified that she occasionally worked in the evening and on weekends. At the time she filed her wage claim, she provided the Agency with a calendar showing she worked a total of 532 hours in October, November, and December 2000. She further testified that that total was accurate, to the best of her recollection, and Respondents did not challenge this figure. The forum concludes that Claimant worked 532 hours during the wage claim period, earning $9,000 based on her salary agreement with Alphabet House. Those wages are still unpaid, leaving $9,000 due and owing.

VACATION PAY

The Agency additionally alleged, in its amended Order of Determination, that Claimant was due $3,000 in unpaid wages for the month of September 2001. At hearing, the Agency clarified that the wages sought for the month of September 2001 represented one month's vacation pay. Respondents denied that any vacation pay was due Claimant. It is the Agency's burden to establish that Claimant was entitled to vacation pay. The evidence relevant to this issue is discussed below.

The Agency based its claim on four pieces of evidence. First, undisputed testimony of Harley Roth, former member of Alphabet House's board of directors, that the board decided sometime in 2001 that certain employees, including Claimant, were entitled to paid vacations. Roth testified he did not recall the length of vacation that was approved, only that "was in a chunk of weeks" and that the length was stated in the board's minutes. Second, the undisputed fact that Williams and at least three employees of the Children's Center -- Kathe Williams, Karla Ridling, and Camille Self, took paid vacations of approximately a week or more in the summer of 2001. Third, Claimant's undisputed testimony that Williams told her to take a paid vacation whenever she wanted. Fourth, Claimant's testimony that she believed she was entitled to two weeks' vacation pay each from Alphabet House and the Children's Center.

It was undisputed that Respondents' personnel manuals, which Claimant wrote, contained no reference to vacation leave and that Claimant did not take any vacation prior to the effective end of her employment on September 9, 2001. In addition, there was no evidence concerning Respondents' policy, if any, concerning payment for accrued vacation time upon termination of employment, and no evidence that the Children's Center had any policy whatsoever for vacation pay, other than the fact that some of its employees took paid vacations.

Assuming, *arguendo*, that Claimant was entitled to accrued vacation pay after September 9, 2001,[7] the forum must be able to calculate the amount due in order to award vacation pay. It is also the Agency's burden to establish the amount of vacation pay owed to her. The evidence in the record proves only that other employees took paid vacations ranging from approximately one week to approximately four weeks. There is no evidence that any other employees took paid vacation after their last day on the job. Based on the evidence in the record, the forum has no way of determining the specific extent, if any, of Claimant's entitlement to vacation pay, and declines to base an award of unpaid wages for accrued vacation leave on speculation.[8]

LIABILITY FOR UNPAID WAGES

Alphabet House was Claimant's employer and is liable for $9,000 in unpaid, due and owing wages to Claimant. Since the Children's Center was not Claimant's joint employer, it is not liable for any of the unpaid wages in this proceeding.[9]

PENALTY WAGES

ORS 652.150 allows an award of penalty wages "i]f an employer willfully fails to pay any wages or compensation of any employee whose employment ceases." Since Children's Center was never Claimant's employer, penalty wages, if appropriate, can only be assessed against Alphabet House.

An employer is liable for penalty wages when it "willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140[.]" Willfulness does not

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[7] The forum does not decide the question of whether or not Claimant was actually entitled to vacation pay because the Agency's claim fails on other grounds.

[8] *Cf. In the Matter of Rubin Honeycutt,* 23 BOLI 224, 233 (2002) (this forum has repeatedly declined to speculate or draw inferences about wages owed based on insufficient, unreliable evidence).

[9] The Commissioner only has the authority to collect unpaid wages from a claimant's employer, which does not include another member of an LLC to which the employer belongs where the claimant is not an employee of the other member. ORS 652.310 through ORS 652.332.

imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she 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).

Claimant's last date of employment was September 9, 2001. Under ORS 653.140(2), her $9,000 in unpaid wages became due on September 14, 2001. None of those wages have been paid. Alphabet House's claim that Claimant was an independent contractor, then a volunteer, when Williams, her supervisor, was aware of Claimant's actual conditions of employment and hours worked and the forum has determined that Claimant was an employee, is not a defense.[10] There is no evidence that Alphabet House acted other than voluntarily and as a free agent in failing to pay Claimant the wages she earned and the forum concludes that Alphabet House's failure to pay Claimant's wages was willful.

Penalty wages amount to $4,061 and are computed as shown in Ultimate Finding of Fact 10.

ALPHABET HOUSE VIOLATED ORS 653.045 BY FAILING TO MAKE RECORDS OF CLAIMANT'S HOURS IN OCTOBER 2000 AND SEPTEMBER 2001

The Agency alleged that Respondents violated ORS 653.045 and OAR 839-020-0080 by failing to make "required payroll and other records." Because the Agency does not specifically allege which of the many subsections of OAR 839-020-0800 was violated, the forum looks to language of the statute to determine if one or more violations occurred. The statutory language that fits the Agency's allegation requires employers to make a record of "[t]he actual hours worked each week and each pay period by each employee." ORS 653.045(1)(b).

Claimant's pay periods were on a monthly basis. The Agency itself provided evidence that Respondents met this requirement for November and December 2000 by Claimants' written record of the dates and hours she worked each day in November and December 2000.[11] However, no testimony was elicited from Claimant, Respondents' record keeper, as to whether or not she kept a similarly detailed record for October 2000 and September 2001, and no evidence was presented that records were made for

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10 *See, e.g., In the Matter of Scott Miller,* 23 BOLI 243, 262 (2002) (respondent's failure to apprehend the correct application of the law and actions based on this incorrect application did not exempt respondent from a determination that he willfully failed to pay wages earned and due).

11 *See* Finding of Fact 16 -- The Merits, *supra*.

those months. The forum finds that Alphabet House, Claimant's employer, committed two violations of ORS 653.045(1)(b) by failing to make a record of the actual hours worked each week by Claimant in October 2000 and September 2001. The Children's Center is not liable for the violation because it was not Claimant's employer.

CIVIL PENALTY

OAR 839-020-1020 sets out six mitigating and aggravating circumstances that may be considered by the commissioner in determining the amount of civil penalty to be assessed.

> "(a) The history of the employer 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 employer 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."

It is the employers' responsibility to provide mitigating evidence, and the commissioner must consider all mitigating circumstances presented by the employer. OAR 839-020-1020(2) & (3). There was no evidence presented concerning (a) and (b). The magnitude and seriousness of the violations was low, as they only involved one salaried worker. As to (d), Alphabet House claimed it was not responsible for creating records in 2000 because it was not Claimant's employer. The forum has concluded otherwise and has previously determined that an employers' failure to apprehend the correct application of the law and actions based on that incorrect application are not a defense. *In the Matter of Toni Kuchar*, 23 BOLI 265, 275 (2002). Likewise, Williams, as Claimant's supervisor, should have known of the violation, in that employers are presumed to know the laws they are required to follow and Williams was acting as an agent for Alphabet House. *In the Matter of John Mathioudakis,* 12 BOLI 11, 20-21 (1993). Alphabet House, as Claimant's employer, was ultimately responsible to insure that Claimant, its record keeper, created the records required by law and the forum concludes that Alphabet House should have known of the violation. Complying with the law would have been a simple matter of requiring Claimant to keep a written record of the hours that she worked. Finally, Claimant's wage loss was not a result of Alphabet House's failure to make these records.

Alphabet House's two violations are mitigated by the fact that Claimant was the employee who was responsible for making the very records on which the Agency bases its allegations.

Considering all the aggravating and mitigating circumstances, the forum assesses a civil penalty of $250 for each violation, for a total of $500.

ALPHABET HOUSE VIOLATED ORS 653.045 BY FAILING TO KEEP AVAILABLE RECORDS OF CLAIMANT'S HOURS IN OCTOBER 2000 AND SEPTEMBER 2001

As applied to this case, ORS 653.045(1)(b) required Alphabet House to "keep available" to BOLI "for not less than two years" its record of Claimant's hours worked each week and month. Williams, Alphabet House's authorized representative, acknowledged at the hearing that Alphabet House did not have any records of Claimant's hours, and that Claimant's time records for November and December 2000 were provided to the Agency by Claimant, not Alphabet House. However, there was no evidence presented as to whether or not these records were in the possession of Alphabet House at the end of November and December 2002, respectively, two years after those records were created. Accordingly, the Agency's claim must fail as to the November and December 2000 records. Since the October 2000 and September 2001 records were never created, it would have been impossible for Alphabet House to keep them "available" for any period of time. The forum concludes that that Alphabet House committed two violations of ORS 653.045(1)(b) by failing to keep available Claimant's October 2000 and September 2001 time records "for not less than two years."

CIVIL PENALTY

The criteria set out in OAR 839-020-1020 also apply here. Again, there is no evidence concerning the employer's history in record keeping or prior violations, and magnitude and seriousness of the violations was low, as they only involved one salaried worker. Williams, as Claimant's supervisor, should have known of the violation, in that employers are presumed to know the laws they are required to follow and Williams was acting as an agent for Alphabet House and should have known whether the required records were being kept and where they were kept. *Id.* Complying with the law would have been a simple matter of requiring Claimant to keep a written record of the hours that she worked and filing those records in a place accessible to Williams or another agent of Alphabet House. Claimant's wage loss was not a result of Alphabet House's failure to make these records.

These two violations are not mitigated by the fact that Claimant was the employee who was responsible for Alphabet House's records, particularly with regard to the September 2001 record violation, as Claimant was no longer working for Alphabet House.

Considering all the aggravating and mitigating circumstances, the forum assesses a civil penalty of

$350 for each violation, for a total of $700.

ALPHABET HOUSE DID NOT VIOLATE ORS 653.045(3), OAR 839-020-0012, OR OAR 839-020-0080 BY FAILING TO SUPPLY CLAIMANT WITH ITEMIZED STATEMENTS OF AMOUNTS AND PURPOSES OF DEDUCTIONS

The Agency alleged that Respondents violated ORS 653.045(3), OAR 839-020-0012, and OAR 839-020-0080 on four occasions by failing to provide Claimant with itemized statements of deductions in October, November, and December 2000, and September 2001. ORS 653.045(3) requires employers to "supply each of the employer's employees with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610." ORS 652.610 requires that "the itemized statement shall be furnished to the employee at the time payment of wages, salary or commission is made[.]" OAR 839-020-0012, which interprets these statutes, states that "employers must furnish each employee, each time the employee receives a compensation payment from the employer, a written itemized statement of earnings." OAR 839-020-0080(1)(j) requires employers to preserve records showing the deductions taken "from wages paid each pay period[.]"

In order to prevail, the Agency must prove that (1) Respondents made wage payments to Claimant; (2) Respondents made deductions from Claimant's wage payments; and (3) Respondents did not provide the itemized statement required by ORS 652.610 at the time Respondents made the wage payments.

The Agency did not meet its burden of proof for any of its four allegations. The allegations regarding October, November, and December 2000 fail because Claimant did not receive a wage payment in any of those months. Respondents' alleged September 2001 violation also must fail because the Agency produced no evidence to show that Alphabet House made deductions from the $207.72 check that was issued to Claimant.

OPINION

NOW, THEREFORE, as authorized by ORS 652.140(2) and ORS 652.332 and as payment of the unpaid wages and the penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **The Alphabet House** 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 Claimant Mildred Anne Parker in the amount of THIRTEEN THOUSAND SIXTY ONE DOLLARS ($13,061), less appropriate lawful deductions, representing $9,000 in gross earned, unpaid, due and payable wages, plus interest at the legal rate

on that sum from December 1, 2001, until paid, and $4,061 in penalty wages, plus interest at the legal rate on that sum from January 1, 2002, until paid..

NOW, THEREFORE, as authorized by ORS 653.256, and as payment of the civil penalties assessed as a result of its violations of ORS 653.045(1) and (2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **The Alphabet House** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(2) A certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND TWO HUNDRED DOLLARS ($1,200), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent **The Alphabet House** complies with the Final Order.

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