
In the Matter of

PAUL ANDREW FLAGG dba Paul Flagg Construction and The House Doctor

Case No. 67-02

Final Order of Commissioner Dan Gardner

Issued January 3, 2003[1]

SYNOPSIS

Where Respondent contracted with a homeowner to provide labor and materials on a residential construction project and agreed to pay Claimant $15 per hour for performing labor on the contract, the forum found that Claimant was an employee covered by state wage and hour provisions. Additionally, where Respondent admitted Claimant worked 173 hours and Claimant acknowledged receiving $2,560, the forum ordered Respondent to pay Claimant $35 in due and unpaid wages. Respondent's failure to pay was willful and the forum ordered him to pay $3,600 in civil penalty wages. ORS 652.140(2); *former* 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 November 14, 2002, in the Adult and Family Services Conference Room, located at 4670 East Third, Tillamook, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Raymon E. Beasley ("Claimant") was present by telephone throughout the hearing and was not represented by counsel. Paul Andrew Flagg ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called Claimant and Arthur Livermore as witnesses (both telephonic).

Respondent called DeElda Kay Childs, Arthur Livermore (telephonic), and himself as witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-4;

b) Agency exhibits A-1 through A-5 (filed with the Agency's case summary) and A-6 (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

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[1] ED: BOLI Final Orders are usually published in chronological order; however, due to an oversight this Final Order appears in volume 25 of BOLI Orders instead of volume 24.

the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On August 8, 2001, Claimant filed a wage claim form stating Respondent had employed him from March 6 through May 25, 2001, and failed to pay him at the agreed upon rate of $15 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 Respondent.

3) On November 9, 2001, the Agency issued an Order of Determination, numbered 01-3778. The Agency alleged Respondent had employed Claimant during the period March 6 through May 25, 2001, at the rate of $15 per hour for 317 hours of work, no part of which had been paid except $2,560, leaving a balance due and owing of $2,195. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to Claimant for $3,600 as penalty wages, plus interest. The Order of Determination was personally served on Respondent and gave him 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 December 24, 2001, Respondent filed an answer and requested a hearing. In his answer, Respondent denied he was Claimant's employer and alleged that both Respondent and Claimant were Arthur Livermore's employees. Respondent's answer also stated, in pertinent part:

> "Mr. Beasley worked a total of 173 hours on the project and was paid by Mr. Livermore for his work performance. Mr. Beasley was paid $600.00 for roof job in advance that he failed to complete. He was fired because of his lack of attendance and alcohol use on the job.
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> "Mr. Livermore gave [R]ay Beasley another chance for work by putting shingles on the house at $125 pr [*sic*] square but Mr. Beasley would show up for work for two to three hours pr [*sic*] day and would not perform required work so Mr. Livermore paid him for the work performed and asked him to leave the property. Mr. Beasley was never denied any money and was paid in full for the work he performed."

5) On April 22, 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 a.m. on November 14, 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 hearings rules, OAR 839-050-0000 to 839-050-0440.

6) On September 30, 2002, the Agency filed its case summary, with attached exhibits.

7) On October 3, 2002, 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 November 4, 2002, and advised them of the possible sanctions for failure to comply with the case summary order. Respondent did not file a case summary.

8) On November 13, 2002, Respondent contacted the Hearings Unit by telephone to request a postponement of the scheduled hearing. On the same date, the ALJ convened a prehearing conference by telephone that included Agency case presenter McSwain and Respondent. Respondent stated he was concerned his failure to submit his evidence in a case summary prior to hearing would result in his inability to submit evidence that he believed was important to his case. Respondent acknowledged receiving the ALJ's order requiring case summaries and copies of potential exhibits be submitted by November 4, 2002, but stated that he did not read it carefully and missed the deadline for submitting documents.

9) At the start of hearing, Respondent stated he had received the Notice of Contested Case Rights and Procedures and had no questions.

10) 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.

11) On November 15, 2002, the ALJ reopened the evidentiary record and convened the participants by teleconference to take additional testimony from Arthur Livermore. The participants were afforded the opportunity to question Livermore about the matters raised by the ALJ.

12) The ALJ issued a proposed order on December 10, 2002 that notified the participants they were entitled to file exceptions to the Proposed Order within ten days of its issuance. On December 19, 2002, the Hearings Unit received a letter from Respondent that stated, in pertinent part:

> "I am in receipt of BOLI Case # 67-02 regarding a hearing before Administrative Law Judge Linda A. Lohr on November 14, 2002.
>
> "In accordance with ORS chapter 183 and OAR 839-050-0380, I am officially filing for exceptions to the Proposed Order – 16 in regards to FlaggPO.doc.

> "I have hired an attorney to appeal the outcome of this Order. By receipt of this letter, I have met the required 10 days for filing exceptions. My attorney will prepare all legal documents on my behalf and file them in your office.
>
> "As noted below, I have send [*sic*] registered mail copies of this intent to appeal to BOLI Case Presenter Peter McSwain, Administrative Law Judge Linda A. Lohr, and Claimant Raymon Beasley."

On the same date, the Agency filed a response to Respondent's letter that stated, in pertinent part:

> "To the extent that Respondent's 'Filing for Exceptions' may be read as a motion for extension of time in which to file exceptions, the agency resists the motion except on the conditions set forth below.
>
> " * * *
>
> "To the extent that exceptions are soon filed by licensed counsel who recites for the record that, as of December 19, 2002, counsel had been retained by Respondent to represent Respondent in this matter, the agency has no objection to a brief extension of time in which to file exceptions.

"Otherwise the agency resists further delay because the agency received information on which to base a good faith belief that Respondent intends to avoid any financial consequences that may arise from this matter by absenting himself from the State."

13) On December 20, 2002, the forum issued an order granting Respondent and the Agency a brief extension of time until December 27, 2002, with which to file exceptions to the Proposed Order. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Paul Andrew Flagg was a construction contractor operating a business under the assumed business names of Paul Flagg Construction and The House Doctor.

2) In May 2000, Respondent agreed to construct a two-story garage and office at Arthur Livermore's private residence. Respondent and Livermore signed a typewritten document, on "Paul Flagg Construction" letterhead, entitled "Legal Contract" ("Livermore contract") that stated:

> "This is regarding a 1555 sq. ft two level garage with office and bath.
>
> "I agree to provide all laber [*sic*] and materials from the start of framing to the completion of project[.] I agree that all work performed will meet all building codes and pass all inspections before final payment is to be received[.] I will provide all costs of any sub contractors that may be used[.] I will also provide labor and materials for the walkway between the to [*sic*] houses[.]

> This includes all window and doors[,] all finish work[.] sheet rock insalation [*sic*], whirring[,] pluming [*sic*][,] painting and siding and flooring[.] Final payment will be made when owners can occupy and inspections are made[.]
>
> "Total cost 31.00 per ft[.] 48,650.00
>
> "Fifty four thousand four hundred and twenty five."

Livermore and Respondent signed the contract on May 31, 2000, but the construction work did not begin until March 6, 2001.

3) Livermore was present on or near the job site every day to do some of the work and to monitor the progress of the work. When not working or monitoring the work directly, Livermore observed the construction activity from his home office window, which was approximately 30' from the construction site.

4) Livermore did not hire or pay any of the subcontractors or laborers who performed work at the site. During most of the construction, only two or three workers were present each day. Livermore performed some of the work himself, including the wiring, and assisted Respondent with the "trusses." Respondent and a worker named "Fred" performed most of the construction work until about mid April, early May 2001.

5) In early March 2001, Respondent told Claimant he needed help on the Livermore contract and asked if Claimant would "do the roof" on the project. Initially, they discussed a piece rate for the roof job, but when Claimant learned that the "sheeting" and "paper" were not yet finished and that he would be also expected to do the siding and sheetrock, both agreed to an hourly rate of $15.

6) Respondent and Claimant had their discussions about the Livermore contract and Claimant's wages while both were incarcerated in the Tillamook County jail. Respondent was released from jail on or about March 1, 2001, and Claimant was released the next day. Claimant began work on the Livermore contract after the framing was completed and the "trusses" were "put up." Claimant was unable to drive at the time and relied on his friend, John Dunn, to drive him to and from work each day.

7) Claimant kept track of some of his hours on bits of paper but believed Respondent was keeping an independent record of his hours. Neither Claimant nor Respondent produced a written record of Claimant's hours at the hearing.

8) In May 2001, Livermore became distressed about the lack of progress on the construction project. He began noticing that Claimant was not showing up regularly on the job site and when he did show up, that he did not spend a full day working. By the end of May, all of the work had "ground to a halt" because Respondent had not been on the job for a week and Claimant did not show up to work at all during the

week Respondent was absent. In early June 2001, Claimant called Livermore and asked about coming back to work. Livermore was upset that Claimant was a no show for over a week and told Claimant he was no longer welcome on the job site. Claimant asked if he could return to pick up his tools and Livermore reiterated that he was not welcome on the property and that he would have to wait for Respondent to return the tools to him. Despite Livermore's warning to stay away from the property, Claimant returned to pick up his tools. When Livermore confronted him, Claimant asked Livermore to pay him for wages he claimed Respondent owed. Livermore told Claimant to refer that issue to Respondent. Claimant then threatened to have a lien put on Livermore's property. Following the confrontation, Livermore was upset with Claimant and believed Claimant was falsely accusing Respondent of not paying his wages. Claimant did not complain to Livermore about unpaid wages until the day he returned to the job site to pick up his tools.

9) During the course of the Livermore contract, Claimant received wages totaling $2,560, which included a van Claimant valued at $800.

10) Claimant's last day of work was May 25, 2001.

11) Respondent completed the Livermore contract in October 2001. Livermore did not withhold any disbursements due to Respondent for labor and materials during the course of the contract.

12) Livermore was the only witness who had no vested interest in the outcome of this case. He showed no bias toward or against Respondent and readily acknowledged that his only knowledge of Claimant and Respondent's wage agreement derived from Respondent's unsolicited assertion made to him the day before hearing. Although he also acknowledged he harbored some ill will toward Claimant, Livermore's sentiments evolved from his frustration with the slow progress of construction on his personal residence, which he attributed to Claimant's unreliability on the job. Livermore's antipathy increased when Claimant returned to the construction site, contrary to Livermore's instruction, and threatened to file a lien against Livermore's property. Livermore's feelings about Claimant, however, did not impair his testimony. He had the opportunity and capacity to observe Claimant's presence on the work site and testified confidently that he did not see Claimant at the construction site prior to mid April. He observed Claimant thereafter only three or four days per week until Claimant failed to show up at all at the end of May 2001. Livermore also verified his contract with Respondent and confirmed that Respondent was responsible for providing all labor under the contract and that he did not know who Claimant was prior to his appearance on the job site. There is no evidence in the record showing Livermore

had any reason to enhance Respondent's case by being untruthful. The forum, therefore, relied entirely on Livermore's testimony regarding the time period during which Claimant was present at the work site and every other material fact of which he had personal knowledge.

13) Claimant's testimony that he worked on the Livermore contract in March and April 2001 is contradicted by credible evidence to the contrary. Livermore had personal knowledge about Claimant's presence on the construction site and had nothing to gain by exaggerating his observations. Claimant's credibility is diminished further and Livermore's testimony bolstered by the notable absence of testimony from another witness who had first hand knowledge of Claimant's work schedule. Claimant, Respondent, and Livermore testified that because Claimant was unable to drive, John Dunn provided Claimant with rides to and from work. Dunn was listed by the Agency as a witness and was available at hearing to testify. For reasons unknown to the forum, both participants excused Dunn from the hearing and he left without testifying. The forum infers from those facts that Dunn's testimony would not have contradicted Livermore's testimony that Claimant did not appear on the job until around mid April 2001 and worked less than five days per week. Additionally, Claimant acknowledged he was upset with Respondent and friction between them occurred when "Neldy" Childs left her relationship with Claimant for one with Respondent during the course of the Livermore contract. The forum finds that Claimant's feelings toward Respondent may have motivated him to exaggerate the number of hours he worked. For those reasons, the forum believed Claimant's testimony only when other credible testimony corroborated it or it was logically credible.

14) Respondent's brief testimony was insubstantial and primarily self-serving. His bare assertion that he paid Claimant $650 "up front" for roofing work on the Livermore contract was inconsistent with his prior statement to the Agency that Livermore paid Claimant $600 for work he performed. He also contradicted his testimony that Claimant was hired for the roof work only by later acknowledging that Claimant was expected to put shingles on the siding and do the sheetrock in addition to the roof. Respondent's testimony had little credence, but the forum credits his statement at hearing and in his answer that Claimant worked 173 hours on the Livermore contract as an admission and accepts the statement as fact that Claimant worked at least 173 hours during his employment with Respondent.

15) When Claimant's employment terminated, Respondent owed Claimant $35 in gross wages (173 x $15 = $2,595 - $2,560).

16) Penalty wages, in accordance with *former* ORS 652.150, are computed as follows:

$15 per hour x 8 hours = $120 x 30 days = $3,600.

ULTIMATE FINDINGS OF FACT

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

2) Respondent engaged Claimant's personal services between mid April and May 25, 2001.

3) Respondent and Claimant agreed Claimant would be paid $15 per hour.

4) Claimant's last day of work was May 25, 2001.

5) Between mid April and May 25, 2001, Claimant worked 173 hours and earned gross wages of $2,595. Respondent paid Claimant $2,560 in cash and the value of a van Claimant accepted in lieu of wages.

6) Respondent owes Claimant $35 in gross wages.

7) Respondent's failure to pay Claimant all wages earned and owed when Claimant's employment terminated was willful and Respondent is liable for $3,600 in civil penalty wages.

CONCLUSIONS OF LAW

1) ORS 652.310 provides, in pertinent part:

> "(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees * * *.
>
> "(2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

During all times material herein, Respondent was an employer and Claimant was Respondent's employee, subject to the provisions of ORS 652.310 to 652.414.

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

3) ORS 652.140(2) provides in part:

> "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 af-

> ter the employee has quit, whichever event first occurs."

Claimant's last day of work was May 25, 2001, and the evidence does not clearly establish whether he actually quit before being terminated by the landowner. Even assuming, however, that Claimant quit without notice to Respondent, his wages would have been due on June 1, 2001. Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid by that date.

4) *Former* ORS 652.150[2] 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."

Respondent is liable for $3,600 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).

OPINION

The Agency was required to prove: 1) that Respondent employed Claimant; 2) that Respondent agreed to pay Claimant $15 per hour; 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 Scott Miller*, 23 BOLI 243, 258 (2002). In his answer, Respondent asserted that Arthur Livermore hired and paid both Respondent and Claimant to perform work on Livermore's residential property. The Agency established, however, that Respondent employed Claimant at the rate of $15 per hour at times material and owed Claimant wages that were not paid when Claimant's employment terminated.

RESPONDENT EMPLOYED CLAIMANT

Respondent's bare assertion that Livermore employed Claimant to perform work on Livermore's property is contradicted by credible evidence in the record. Respondent acknowledged and evidence shows that he entered into a construction contract with Livermore and agreed to provide all of the labor and materials for

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[2] 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.

completing a two-level garage with office and bath at Livermore's personal residence. Livermore credibly testified that he did not hire or pay anyone to perform labor on the contract and that Respondent provided, in accordance with their contract, two or three workers, including Claimant, to do all of the construction work. Although Livermore independently terminated Claimant's services, evidence shows Livermore's action was taken as a property owner, not as an employer. Based on Livermore's credible testimony and the documentary evidence, the forum concludes that Respondent employed Claimant.

AGREED UPON WAGE RATE

In weighing their testimony, the forum finds Claimant's statement that Respondent agreed to pay Claimant $15 per hour for roofing, siding and sheetrock work on the Livermore contract more believable than Respondent's contradictory contentions that he or Livermore agreed to pay Claimant a piece rate of $600, or $650, for roof work. The forum notes that at hearing Respondent confirmed the statement in his answer that Claimant worked 173 hours, which is consistent with Claimant's testimony that he believed Respondent was tracking his hours during the course of his employment. Claimant acknowledges Respondent paid him $2,560 in wages, which is $35 short of $15 per hour for 173 hours worked. The forum infers that Respondent tracked Claimant's hours because he was paying an hourly rate and that more likely than not he agreed to pay Claimant $15 per hour.

RESPONDENT FAILED TO PAY CLAIMANT $35 IN DUE AND UNPAID WAGES

Claimant bears the burden of proving he performed work for which he was not properly compensated. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 56 (1999). As stated previously, the Agency established that Claimant did not receive all of the pay he was owed for 173 hours of work at the agreed upon rate.

Claimant, however, claimed additional hours were earned, owed and unpaid at the time of hearing. 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, credible evidence contradicted Claimant's testimony that he performed work in March and early April 2001. Moreover, the Agency declined to call John Dunn as a witness, despite his availability at hearing and his first hand knowledge of the days he drove Claimant to and from work. The forum infers that Dunn's testimony

would not have contradicted Livermore's credible testimony that Claimant was not on the construction site until around mid-April 2001. Notwithstanding Claimant's inability to establish additional hours, Respondent admits Claimant worked 173 hours on the Livermore contract and Claimant credibly testified that Respondent agreed to pay him $15 per hour for all hours worked. Claimant acknowledges receiving $2,560 in wages from Respondent. Based on those facts and the forum's calculation, Respondent fell short of paying Claimant all of his wages by $35 (173 x $15 - $2,560). Accordingly, the forum finds Respondent owes Claimant $35 in unpaid wages.

CIVIL PENALTIES

The forum may award civil penalty wages where a respondent's failure to pay wages is 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). Here, the evidence shows that Respondent voluntarily, intentionally, and as a free agent failed to pay Claimant all of the wages he earned from mid April through May 25, 2001. 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 $3,600. This figure is computed by multiplying $15 per hour by 8 hours per day multiplied by 30 days. *See former* ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **Paul Andrew Flagg** 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 Raymon Beasley, in the amount of THREE THOUSAND SIX HUNDRED AND THIRTY FIVE DOLLARS ($3,635), less appropriate lawful deductions, representing $35 in gross earned, unpaid, due and payable wages and $3,600 in penalty wages, plus interest at the legal rate on the sum of $35 from June 1, 2001, until paid and interest at the legal rate on the sum of $3,600 from July 1, 2001, until paid.

In the Matter of

RODRIGO AYALA OCHOA and Ochoas' Greens, Inc.,

Case No. 142-01

Revised Final Order on Reconsideration of Commissioner Dan Gardner

Issued September 23, 2003

SYNOPSIS

After reconsidering the forum's ruling on Respondents' motion to amend its answer to include an additional issue, the Commissioner granted Respondents' motion and determined that a preponderance of evidence establishes that Respondents' workers were employees as contemplated under ORS chapter 653 and not cone sellers or independent contractors as Respondents contended. The Commissioner further found that 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 Commissioner also found that 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). Additionally, the Commissioner found 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 Commissioner 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 Commissioner 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 Commissioner 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.

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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 his own and Respondent Ochoas' Greens, Inc.'s behalf.

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, the Agency, through counsel, filed a Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals.

On June 5, 2003, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, issued an Order on Reconsideration. After Respondents timely sought judicial review of the Order on Reconsideration, the Agency, through counsel, filed a second Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals on July 28, 2003. Having reconsidered the record and the legal issues presented in this case, I hereby issue this Revised 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, timely filed an 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 timely filed 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 or 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 were addressed in the Opinion section of the Final Order that issued on September 6, 2002.

14) Thereafter, the Agency withdrew the Final Order twice for reconsideration as described elsewhere herein and the record and legal issues are hereby reconsidered and addressed in this Revised 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 issue in its initial pleading and asserted there was no evidence introduced in support of the proposed amended pleading. The forum considered and denied the motion in the proposed order issued July 23, 2002. Based on a review of the hearing transcript, the forum reconsiders that ruling and grants Respondents' motion for reasons set forth below.

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, Respondents raised an "independent contractor" issue in their *opening* statement that was not previously raised in their answer. The Agency did not object and Respondents introduced a modicum of evidence during the hearing that may be construed as relevant to that issue. Since it is evident that the "independent contractor" issue was technically introduced and addressed during the evidentiary portion of the hearing so as to be litigated by the participants' express or implied consent, albeit barely, the forum hereby grants Respondents' motion to amend their answer to include the issue that the workers in question were independent contractors. OAR 839-050-0140(2)(a).

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Rodrigo Ayala Ochoa was corporate president of Respondent Ochoas' Greens, Inc. ("OGI"). 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, which is located in North Plains, Oregon (Washington County).

2) As part of its nursery business, OGI cultivates plants such as rhododendrons, blooming forsythia, and several kinds of willows. OGI employs approximately 25 to 35 workers to work in the nursery, assemble wreaths during the winter, and to perform labor on farm labor contracts. The workers are paid hourly or sometimes on a piece rate basis. Most of OGI's employees come from Mexico and some from Guatemala. Most of OGI's workers do not speak English.

3) Rather than lay off workers during the nursery's slow season, May through July, 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 to sell during the winter months and some are "boxed" for sale. Some workers go home to Mexico or Guatemala during the slow season and others choose to avoid lay-off 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 be-

fore 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 the requisite special use permit to harvest cones, 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) Prior to the cone harvest, OGI's president, Respondent Ochoa, first "scouts" for an area to harvest cones. After he determines the harvest area, he drives OGI's foreman, Andre Gaspar, to Central Oregon to identify each work site because the sites change from year to year. He and Gaspar then go to the ranger station to purchase required permits.

7) 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 approximately 140 miles 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. The reason one of the permits was purchased in Raul Barrera Barrera's name was to avoid designating the workers as "employees."

8) In May 2000, OGI agreed to pay workers $1.55 per "bag" of cones collected during the harvest season. Most of the workers were OGI's "regular" nursery crew and others were temporary workers who 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 crew 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.

9) During the 2000 harvest, OGI used at least three vans, owned by either OGI or its president, Respondent Ochoa, to transport its nursery workers and others who lived outside the Bend area to the cone harvest site. None of the workers spoke English and none owned automobiles. OGI also provided three to five camping trailers for the workers and OGI foreman Andre Gaspar to live in during the harvest season.

10) OGI provided the workers with 33-gallon plastic bags, approximately 16.5" in diameter and 16.5" high, to collect the cones. Each day, after Gaspar sorted through and inspected the cones for imperfections, the workers were instructed to take 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. When the truck was full, Gaspar then contacted Respondent Ochoa who picked up the cones at the site and handed out pay checks to the workers.

11) Respondent Ochoa was not present during most of the cone harvest, but OGI foreman Gaspar was on site monitoring the cone harvest. He kept track of the number of bushels harvested on each site and inspected the cones and rejected any that were broken, sun bleached or otherwise not suitable for OGI's use. 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.

12) 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.

13) 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.

14) 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.

15) 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.

16) 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.

17) 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.

18) 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.

19) 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."

20) 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."

21) 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.

22) 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 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.[2]

23) 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

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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, under the applicable statute both OGI and Respondent Ochoa are jointly responsible for the filing the requisite payroll reports.

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.

24) 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.

25) 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.

26) 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.

27) 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.

28) 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.

29) 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 and highlighting, 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.[3]

30) 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.

31) On May 14, 2001, Respondents applied for a farm labor

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

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.

32) 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."

33) 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. Additionally, Respondent Ochoa's testimony repeatedly shifted whenever he realized he had made a statement against his interest. As an example, he was direct and appeared earnest in stating that Andre Gaspar was an OGI foreman who was present at the work sites and the "guy in charge" of the cone harvest. When prompted by his counsel, however, he attempted to retract his repeated references to his "foreman" by stating that the workers called Gaspar "foreman" as a nickname. Consequently, the forum believed Respondent Ochoa's testimony only when it was logically credible, a statement against interest, or when other credible evidence supported it.

34) 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.

35) Murphy, 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 that disproves Respondents' assertion that Respondents have no judgments against them 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. ("OGI") and Rodrigo Ayala Ochoa ("Respondent 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. The Agency also seeks civil penalties against Respondent OGI for violating provisions of ORS chapter 653.

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) Re-

spondents, 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 either were 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 con-

strued 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. However, there is no evidence in the record that shows what the applicable minimum wage was at the time of the contracts. The Agency also 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." (Emphasis added)

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 Itemized Statements to Employees in Violation of ORS 653.045(3)

ORS 653.045 provides in pertinent part:

> "(3) 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."

ORS chapter 653 does not include an express definition of "employee." However, by contextual implication and for purposes of chapter 653, a person is an "employee" of another if that other "employs," *i.e.*, "suffer[s] or permit[s]" the person to work. ORS 653.010(3)&(4); *In the Matter of Barbara Coleman*, 19 BOLI 230, 264 (2000), *citing State ex rel Roberts v. Bomareto Ent., Inc.*, 153 Or App 183, 188, 956 P2d 254 (1997), *rev den* 327 Or 192 (1998).[4]

Accordingly, the Agency must establish that Respondent OGI (1) employed workers between May and August 2000 and (2) issued paychecks to those workers that did not include itemized statements containing required information. Respondent OGI agrees it did not provide its workers with the requisite statements. The only disputed issue is whether OGI employed workers as contemplated in ORS chapter 653.

1. Employment Relationship

To interpret "suffer or permit to work" and to determine what is required to prove employment under ORS chapter 653, the forum first looks to the statute's text and context. *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1142 (1993).

While the plain meaning of "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law test for determining an employment relationship. To "permit" something to happen does not require an affirmative act, but only a decision to allow it to happen.[5] To "suffer" something to happen is even broader and means to tolerate or fail to prevent it from happening.[6] Thus, a business may be liable under the provisions of ORS chapter 653 if it knows or

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[4] There are some statutory exceptions to this definition of employee, including those set forth in ORS 653.020, but Respondents did not assert any of those exceptions.

[5] *See* Webster's Third New International Dictionary 1683 (unabridged ed 1999) ("permit" defined as "[t]o consent to expressly or formally * * * grant leave for or the privilege of * * * ALLOW, PERMIT * * * to give (a person) leave * * * AUTHORIZE."

[6] *See* Webster's Third New International Dictionary 2284 (unabridged ed 1999) ("suffer" defined as "not to forbid or hinder * * * ALLOW, PERMIT * * * to put up with * * * TOLERATE."

has reason to know a worker was performing work in that business and could have prevented it from occurring or continuing.[7]

The traditional common law test for employment, based on concepts of the right to control means and manner of work and on agency principles, is very narrow and different from the meaning of the definitions under ORS chapter 653. The broader definition of "employ" at chapter 653 is identical to and patterned after the federal Fair Labor Standards Act ("FLSA"), enacted in 1938. The Court of Appeals noted this in *State v. Acropolis McLoughlin, Inc.*, 149 Or App 220, 942 P2d 829 (1997) (citing 29 U.S.C. § 203(e)(1), "under which the term 'employee' is defined as 'any individual employed by an employer,' and employer is defined as 'any person acting directly or indirectly in the interest of an employer in relation to an employee.' 29 U.S.C. § 203(d). 'Employ' is defined as including 'to suffer or permit to work.' 29 U.S.C. § 203(g)").

Moreover, the U.S. Supreme Court has repeatedly recognized the "striking breadth" of the FLSA definition of "to employ" and the remedial nature of FLSA provisions. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 381, 326 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947)("[the FLSA] contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category * * * [w]e have said that the [FLSA] included those who are compensated on a piece rate basis"). (Citations omitted)

Oregon courts and this forum have consistently relied upon the FLSA and federal courts to interpret the identical provisions contained within ORS chapter 653. *See In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148, 163 (1996), *citing Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993) ("relevant definitions of 'employer' and 'employ' in ORS chapter 653 were taken from the FLSA * * * [f]ederal courts have adopted an expansive interpretation of the definition of 'employer' under the FLSA in order to effectuate 'its broad remedial purposes'"); *see also In the Matter of Barbara Coleman*, 19 BOLI at 264.

Federal and state case law does not provide specific guidance for applying the broad definition of "to employ."[8] The fo-

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[7] Of course, if the facts in a case show an employment relationship under common law, a worker is automatically covered under the broader definition of ORS 653.010(4).

[8] However, in the leading *Rutherford Food Corp.* case, the U.S. Supreme Court disregarded isolated factors in determining the employment relationship by viewing the "circumstances of the whole activity" performed, and concluded that "where the work done, in its essence, follows the usual path of an employee, putting on [a] label

rum, however, has adopted an approach suggested by the authors of an article examining the history of the FLSA's suffer or permit to work standard which is to apply the definitions directly and determine first if the work is encompassed within the overall business of the supposed employer. If so, the work is suffered or permitted by the employer unless it is so highly skilled and capital intensive that it forms a completely separate business. Where the business owner supplies the capital and the work is unskilled, a business would be determined to have suffered or permitted the work within the meaning of the definition. *See Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983 (1999). In this case, the Agency proved by a preponderance of the evidence that Respondent OGI's workers performed work encompassed within OGI's overall business that was unskilled and required no capital on the part of the workers. Indeed, most of the workers were already on OGI's payroll as hourly or piece rate workers, agreed to harvest cones for use in OGI's business to avoid a summer layoff, and were expected to return to the nursery following the cone harvest.

Where an employment relationship has been previously established, as it was in this case, the burden is on the employer to prove a change in status. *In the Matter of Superior Forest Products*, 4 BOLI 223 (1984). Undisputed evidence shows that Respondent OGI's workers were regular employees prior to the cone harvest. Respondent OGI offered no evidence that explains by what agreement its "regular crew" changed their working relationship with OGI. Respondent Ochoa's only explanation for the change in status during the cone harvest season is that "[I]t wouldn't make any sense [to hire employees]. It's far too – you'd waste a lot of time keeping track of your crew. You know, if you're paying them by the hour, who's working, who's not working. A lot of – it would have a lot of headaches. That's why we buy products instead of hire crew and pay them by the hour."[9] Essentially, OGI argues that it is too cumbersome to track workers' hours during the cone harvest season and, in order to bypass that requirement, OGI purchases "product" by the piece from its own crew.

Other than Respondent Ochoa's self-serving testimony,

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does not take the worker from the protection of the [FLSA]." *Rutherford*, 331 U.S. at 729.

[9] Respondent OGI also contends it considered the workers to be "independent contractors," which is a slightly different issue than whether OGI simply purchased cones from particular sellers. The independent contractor issue is discussed elsewhere in this Opinion.

there is no evidence in the record that the workers were in the "cone selling" business, as a group or as individual entrepreneurs. There is no worker testimony in the record to support Respondent OGI's contention and no other evidence whatsoever that any of Respondent OGI's regular crew or other temporary workers ever "sold" cones to any purchasers during the harvest season of May-August 2000. Instead, the forum infers from Respondent Ochoa's testimony that OGI wanted to avoid the record keeping requirements of ORS chapter 653 and believed it could do so by labeling its regular employees and temporary workers as "cone sellers" during the harvest months.

Absent evidence of a specific agreement with the workers to change the nature of their working relationship with Respondent OGI, the forum finds Respondent OGI failed its burden of showing a change of status in the employment relationship established in the record. The forum concludes that the Agency established by a preponderance of evidence that the workers were employees for the purpose of ORS chapter 653.

2. Independent Contractor Issue

Respondents moved to amend their answer to include an additional issue at the close of hearing. The motion was initially denied, but upon review of the record, the forum reversed its ruling and the issue Respondents raised is addressed below.[10]

Respondent Ochoa testified that OGI "treated the cone pickers as independent contractors" because "in our slow time of year in the nursery, which is May, June, July, instead of laying off the regular employees that we had, we would need them again in November, December, so instead of laying them off, there would be opportunity for them to – instead of going south, they stay in the state and work. So we were – I would scout for an area for pinecones and then show the – show the – my employees at the nursery, and they were interested, and then we'd bring them to the – I show them the area and then they'd go pick cones." As noted elsewhere herein, he later explained that the recordkeeping required for using "employees" as cone harvesters was too cumbersome – "you'd waste a lot of time keeping track of your crew" – hence, the "independent contractor" designation during the cone harvest. The forum finds that Respondents' reasoning is indicative of its intention to avoid the law rather than of the true nature of OGI's relationship with its workers.

In 1996, the forum adopted the FLSA's test for distinguishing employees from independent contractors, which requires a full inquiry into the true "economic reality" of the employment

[10] *See* Ruling on Respondent's Motion to Amend Answer elsewhere herein.

relationship based on a particularized inquiry into the facts of each case. *In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148, 164 (1996) (relying on *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993)); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (employee status under FLSA depends not on isolated factors but on the circumstances of the whole activity). Since then, this forum has consistently applied the "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection laws. *See In the Matter of Ann L. Swanger*, 19 BOLI 42, 53 (1999); *In the Matter of Frances Bristow*, 16 BOLI 28, 37 (1997).

The test is a series of factors that depend on the facts in each case and no one factor is dispositive. In this case, a preponderance of credible evidence in the record establishes the following:

a. The degree of control exercised by the alleged employer

Several unique circumstances in this case suggest that Respondent OGI retained or exercised considerable control over the workers who harvested cones for its business. OGI did not need nor did it seek out persons with specialized skills to harvest cones. Instead, it needed unskilled labor to harvest a product necessary to its annual production of wreaths. Because work in the nursery was slow from May through July, OGI offered its regular employees an alternative to lay-off by paying them to harvest cones for OGI's use in the nursery, *i.e.*, a choice between continuing to receive a pay check or not. Additionally, Respondent OGI determined the compensation method, negotiated with private land owners for sites to harvest cones, and purchased the permits necessary to harvest cones on federal land. All the workers had to do was show up at the predetermined sites and even that was orchestrated by Respondent OGI. Because OGI's workers did not own automobiles, OGI provided round trip transportation from Washington County to the Deschutes National Forest and provided free lodging for the workers at the work sites. None of the workers spoke English and because they were out in the forest, approximately 140 miles from Bend, the nearest city, the forum infers they were even more dependent upon OGI's control than workers who speak English. Respondent Ochoa's testimony, albeit contradictory, described Andre Gaspar as an OGI foreman and "the guy in charge." Although Ochoa's testimony fell short of characterizing Gaspar as the workers' supervisor, the record is replete with references to the "foreman" Gaspar who tracked and reported, if Ochoa asked, the number of bushels harvested, and who monitored the quality of cones collected by the workers. According to Ochoa, the foreman determined which cones made a "good crop" and rejected those that did not meet OGI's specifications. The forum infers from the

record that the manner and means of cone harvesting is not particularly complex and may not require close supervision. However, based on the totality of the foregoing circumstances, the forum concludes that OGI controlled the workers' presence on the work site, the workers' payroll, and the daily working conditions, *i.e.*, lodging and transportation, to an extent indicative of an employer-employee relationship.

b. The extent of the relative investments of the worker and the alleged employer

The workers had no investment in OGI's nursery business other than their physical presence in Central Oregon, courtesy of Respondents, and the time they expended gathering cones. Respondents, on the other hand, invested in vehicles to transport the workers to Central Oregon, invested in camping trailers to house the workers for the duration of their stay, and furnished the $2,500 permits (without which none of the workers could have collected the cones) and equipment the workers used to gather cones. The workers' investment was nil compared to OGI's and is indicative of an employment relationship. The forum finds that the workers could not have performed the work they did for Respondent OGI without OGI's vastly greater investment in the business.

c. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer

Since the workers had no investment in Respondent OGI's business, they could earn no profit and suffer no loss. Respondent determined and exclusively controlled the amount of the workers' piece rate and the forum can conclude from the facts that the workers were "wage earners toiling for a living, [rather] than independent entrepreneurs seeking a return on their risky capital investments." *See Reich v. Circle C. Investments, Inc.*, 998 F2d 324, at 328 (5th Cir 1993), *citing Brock v. Mr. W. Fireworks, Inc.*, 814 F2d 1042 at 1051 (5th Cir), *cert. denied*, 484 US 924 (1987). While it is true that the workers in this case had some degree of influence over the amount of money they earned harvesting cones, it was no more than they would have had performing any other piecework. Respondent OGI determined the piece rate and, therefore, ultimately determined the workers' opportunity for income.

OGI argues, however, that the workers were permitted to sell cones to other buyers if they chose to do so and therefore were not dependent upon OGI's business. The forum finds Respondent Ochoa's testimony on that point dubious, at best. First, he qualified his statement about selling cones to others by stating that the workers were actually obliged to harvest cones only for

OGI because OGI provided free lodging on site for the duration of the season. Second, evidence shows that a permit is required before cones may be harvested on federal land and there is no credible evidence that each cone picker, or purported "independent contractor," had the means or capability of obtaining one, let alone possessed one during the cone harvest. In fact, Respondent OGI purchased the permits that the workers worked under and it defies common sense to suggest that the workers, none of whom spoke English, had the ability or opportunity for entrepreneurship in the middle of the vast Deschutes National Forest. Finally, not one witness testified that any of the workers actually sold cones to other cone purchasers during the season. There is simply no evidence that the workers were anything but economically dependent upon Respondent OGI's business. Contrary to Respondents' contention, compensation by piece rate[11] is not independently indicative of independent contractor status. Except for the exclusion set forth in ORS 653.020(1), employees who receive a piece rate must still earn at least the minimum wage for every hour worked. Respondent asserted no such exclusion. The aforementioned facts portend an employer-employee relationship.

[11] ORS 653.010(9) defines "piece-rate" as "a rate of pay calculated on the basis of quantity of the crop harvested."

d. The degree of skill and initiative required to perform the work

While the amount of money the workers earned somewhat depended upon the efficiency of their work, the skill required was limited to their ability to bend over and pick up cones. Moreover, the initiative required for picking cones is no more than that required of any other piecework, and, in any event, does not reach the level of an enterprise for which success depends on the initiative, judgment or foresight of the typical independent contractor.

e. The permanency of the relationship

With few exceptions, the workers were Respondent OGI's "regular" nursery crew who had worked for OGI prior to the cone harvest and who returned to the nursery after the cones were harvested. Except for the summer months, the crew was on OGI's regular payroll and OGI treated them as employees. As noted earlier herein, OGI proffered no evidence that explains the temporary change in its relationship with its workers, other than OGI's acknowledgement, through its president, that maintaining records for workers out in the field would "cause a lot of headaches." By merely designating its workers "cone sellers" or "independent contractors," Respondent OGI cannot change the true nature of its relationship with the workers. The preponderance of evidence in the record shows that most of the

workers were not hired for a temporary, limited period for their unique skill and expertise, but were regular employees for an indefinite period whose designation only changed temporarily for the convenience of Respondent OGI.

Conclusion

For the above reasons, the forum finds the workers were economically dependent upon Respondent OGI's business. The "economic reality" in this case is that the cone harvest is an integrated unit of Respondent OGI's production and that the work involved is neither highly skilled nor capital intensive so as to constitute a completely separate business.

Respondents believe that the independent contractor issue is a defense and that, consequently, the Agency bears the burden to disprove Respondents' allegation that the workers were independent contractors. The forum need not decide here whether Respondents' allegations of independent contractor status raise a defense or instead an affirmative defense on which Respondents would bear the burden of proof. The forum finds that, even if the burden of proof rested on the Agency, the Agency satisfied that burden.

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) & (4). OGI was an employer subject to ORS chapter 653 and despite the lack of testimony from OGI workers, there is sufficient evidence to conclude 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).

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.[12] 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.

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

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

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.[13]

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).[14]

[13] *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).

[14] The Agency also sought civil penalties for alleged violations of ORS 658.440(1)(c) and (d). Elsewhere

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 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.

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herein, the forum dismissed those allegations for lack of evidence.

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,[15] 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).

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

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.

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. The forum has reconsidered the motion and for reasons stated elsewhere herein, Respondents' motion to amend their answer is granted and the "independent contractor" issue raised in the amendment is addressed in the Opinion section of this Order.

B. 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.

C. Exception 3 – Proposed Conclusions of Law

1. 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.

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 Respondents' exception.

3. 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.

D. 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.

E. 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.

F. 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

WILLIAM PRESLEY dba
Westside Classic Buicks

Case No. 66-03

Final Order of Commissioner Dan Gardner

Issued October 14, 2003

SYNOPSIS

Respondent suffered or permitted Claimant to work 1,079.5 hours between October 29, 2001, and April 18, 2002. At $6.50 per hour, Claimant earned $7,016.75 and was only paid $2,700. Respondent was ordered to pay Claimant $4,316.75 in unpaid, due and owing wages. Respondent's failure to pay the wages was willful and Respondent was ordered to pay $1,560 in penalty wages and

$1,560.00 in civil penalties. ORS 652.140(1), ORS 652.150, ORS 653.025(3), ORS 653.055; OAR 839-010-0470.

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 June 24-26 and June 29-30, 2003, at the Bureau's Eugene office, 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 Domas, an employee of the Agency. Ethan Davis ("Claimant"), the wage claimant, was present throughout the hearing. William Presley ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called the following persons as witnesses: Claimant; Margaret Pargeter, Wage and Hour Division compliance specialist; Curt Davis, Claimant's father; Susan Davis, Claimant's mother; Elan Davis, Claimant's brother (telephone); Ray Brock, former co-worker (telephone); Vivian Meyers (telephone), Randy Thom (telephone), Dick Schuh (telephone), James Misner (telephone), Scott Pickett (telephone), and John Wise IV (telephone).

In addition to himself, Respondent called the following witnesses: Ruth Presley, Respondent's mother; James Presley, Respondent's brother; Jason Presley, Respondent's son; Lee Bryant, John Morehouse, Charles Cardinal, and Ron Lago (telephone).

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);

b) Agency exhibits A-1, A-2, A-4 through A-26, and A-28 (submitted prior to hearing); and A-29 through A-32 (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 11, 2002, Claimant filed a wage claim with the Agency alleging that Respondent 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) On January 16, 2003, the Agency issued Order of Determination No. 02-3563 based upon the wage claim filed by Claimant. The Order of Determination alleged that Respondent William Presley, dba Westside Classic Buicks, owed a total of $5,670.38 in unpaid wages and $1,560 in 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.

4) On February 12, 2003, Respondent filed an answer and request for hearing. In his answer, Respondent admitted he paid Claimant $2700, but denied paying it as a "wage," and alleged that Claimant was not employed by him, that he was financially unable to pay Claimant, and that Claimant's wage claim was satisfied by Claimant's acceptance of a 1972 Chevrolet Impala.

5) On May 13, 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 June 24, 2003, at 1400 Executive Parkway, Suite 200, Eugene Oregon.

6) On May 19, 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 June 13, 2003, and notified them of the possible sanctions for failure to comply with the case summary order.

7) The Agency filed its case summary on June 12, 2003. Respondent did not file a case summary.

8) On June 17, 2003, the Agency filed a motion for a discovery order and to compel answers to interrogatories. The Agency supported its motion with a statement of relevancy and documentation of unsuccessful informal attempts to obtain the requested documents and information.

9) On June 18, 2003, the ALJ granted the Agency's motion.

10) On June 20, 2003, Respondent faxed documents to the Agency case presenter in partial response to the ALJ's discovery order. One page was entitled "Names of my witnesses to call" and listed the following: Mona Hulsey, Ruth Presley, Jim Presley, Lee Bryant, Ron Lago, Charles Cardinal, Dick Schuh, George Livisly, Jason Presley, and Road Runner Delivery.

10) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

11) On the first day of hearing, Respondent asked when his witnesses would be able to testify and the Agency case presenter stated that she would object to all Respondent's witnesses except for Respondent, based on Respondent's failure to submit a case summary and the Agency's resultant lack of opportunity to interview any of Respondent's witnesses. After discussion, the Agency case presenter agreed that the basis for her objection would be cured if she had the opportunity to interview Respondent's witnesses before they testified. The ALJ ruled that the witnesses listed in Respondent's June 20 witness list would be allowed to testify on the condition that Respondent produce those witnesses for interviews with Ms. Domas by noon on June 25.

12) During the hearing, Respondent offered exhibits R-1, R-2, and R-3 into evidence. R-1 was a purchase order showing the trade-in value for a 1972 Chevrolet Caprice. R-2 was Respondent's time clock, and R-3 was a blank timecard used in Respondent's time clock. The Agency objected on the basis that they should have been and were not provided as part of Respondent's case summary. The ALJ sustained the Agency's objection and did not receive these three exhibits.

13) During the hearing, Respondent claimed that Claimant had telephoned Mona Hulsey and intimidated her from testifying. Respondent asked the ALJ to do something about this situation. The ALJ gave Respondent three options: (1) The ALJ would issue a subpoena for Hulsey; (2) If Respondent did not want a subpoena, the ALJ would leave the record open for Hulsey's testimony until the end of the hearing; (3) Respondent could testify as to what Hulsey told him concerning Claimant's alleged intimidation and the ALJ would give Respondent's testimony its appropriate weight. Respondent did not exercise any of these three options.

14) At the conclusion of Respondent's testimony, the Agency moved to amend the Order of Determination to allege a violation of ORS 653.045 and OAR 839-020-0080, based on Respondent's failure to keep records of the hours and dates worked by Claimant. The Agency did not seek additional penalties. The ALJ granted the motion over Respondent's objection, based on Respondent's testimony that he kept no records of the dates and hours worked by Claimant.

15) The ALJ issued a proposed order on August 14, 2003, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Both Respondent and the Agency filed exceptions. Those exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent William Presley owned and operated a used car sales business in Eugene, Oregon under the assumed business name of Westside Classic Buicks ("Westside"), employing at least one person.

2) Respondent's primary business was selling "classic" cars. The "classic" cars were American cars, mainly Buicks, built between 1954 and the early 1970s.

3) At all times material herein, Westside was located at 1701 W. 11th in Eugene. On the same lot, Respondent owned and operated an auto stereo installation business under the assumed business name of Sound Installation Services.

4) On or about October 28, 2001, Respondent and Claimant agreed that Claimant would start work the next day selling cars for Respondent at the agreed rate of $200 commission per car sold. They also agreed that Claimant would perform mechanical work for Respondent and that Claimant would be paid for that work. Claimant and Respondent never agreed on the rate of pay Claimant would receive for mechanical work. There was no discussion about the length of time that Claimant would work on Respondent's lot.

5) Claimant started work for Respondent on October 29, 2001. On April 1, 2002, he gave notice of his intent to quit on April 18, 2002. His last day of work for Respondent was April 18, 2002.

6) Claimant's primary duty at Respondent's lot was selling cars. Other duties he performed included: picking up a car at an adjacent podiatrist's office at least once a week for Respondent to clean and vacuum; delivering and picking up Respondent's cars to and from auto glass and brake and muffler shops located adjacent to Respondent's business; answering phones; detailing cars; washing cars; painting engines; selling cell phones; performing mechanical work; and showing stereos to customers of Sound Installations.

7) While working for Respondent, Claimant also performed work for Peterson Auction Group ("PAG"), a business owned by his father, Curt Davis. When Claimant started work, Respondent agreed that Claimant could promote PAG's business on Respondent's premises. Claimant brought a stack of PAG fliers and left them on Respondent's front counter for customers, who sometimes picked up the fliers. Claimant also talked to customers about PAG.

8) While Claimant worked for Respondent, PAG had several cars consigned on Respondent's lot. Claimant also brought his motorcycle to Respondent's lot and left it on display in an attempt to sell it. Claimant's motorcycle was not consigned to Respondent.

9) While Claimant worked for Respondent, Respondent's busi-

ness hours were 10 a.m. to 6 p.m. on Monday through Saturday and noon to 5 p.m. on Sunday.

10) Respondent made no record of the dates or hours worked by Claimant.

11) Claimant wrote down the hours he purportedly worked in a spiral notebook each day that he worked for Respondent, along with a brief description of mechanical work he had performed or car sales he had made.

12) Claimant worked a total of 1,079.5 hours during his employment with Respondent. Computed at $6.50 per hour, Claimant earned a total of $7,016.75. He was paid only $2700 and is owed $4,316.75 in unpaid wages.

13) Penalty wages are computed as follows: 8 hours x $6.50 per hour x 30 days = $1,560.

14) Respondent gave Claimant a 1972 Chevrolet Caprice Classic that Claimant wanted in March 2001, before Claimant left Respondent's employment. Respondent gave the car to Claimant after a discussion with Claimant concerning Claimant's potential wage claim. The value of this car was not established at hearing.

15) Claimant used none of his own equipment while working at Respondent's lot and made no financial investment in Respondent's business.

16) Claimant did not sign an authorization for Respondent to deduct any money from his wages.

17) On September 24, 2002, BOLI's Wage and Hour Division sent a letter to Respondent notifying him that Claimant had filed a wage claim and demanding that Respondent immediately send a check for $6,773.75 in "unpaid minimum and overtime wages of $6,773.75 at the rate of $6.50 per hour from October 29, 2001 to April 18, 2002" if Claimant's claim was correct.

18) On November 20, 2002, Margaret Pargeter, a compliance specialist employed by BOLI's Wage and Hour Division, sent a letter to Respondent stating that Claimant's wage claim had been assigned to her for resolution and that she had calculated Claimant's unpaid wages and they amounted to $5,670.38. Pargeter enclosed a copy of her calculations and asked that Respondent send a check for that amount or submit evidence that Claimant did not work the hours claimed or that her computations were incorrect. Respondent did not respond to this letter.

19) On December 4, 2002, Pargeter sent a second letter to Respondent stating that an Order of Determination would be issued soon based on Respondent's failure to respond to her letter. Pargeter's letter again requested payment of $5,670.38 "in wages owed" or "appropriate records and/or information pertinent to this matter" if Respondent disputed the claim.

20) Respondent sent no payment in response to Pargeter's letters and had not paid Claimant any additional wages at the time of hearing.

21) On June 23, 2003, Claimant telephoned Lee Bryant and asked him if he was going to testify for Respondent and if Respondent was asking him to lie about anything. Bryant said "no" and Claimant replied "Good, because I wouldn't want to come over and thump on your head." The forum finds that Bryant did not perceive this as a serious threat for three reasons. First, Bryant chuckled as he gave this testimony. Second, he sat within a few feet of Claimant while giving his testimony and did not display any discomfort at Claimant's presence. Third, he testified that he was not afraid of Claimant and he did not feel that he or his family were in danger.

22) Vivian Meyers, Chawn Flesher, Dick Schuh, Scott Pickett, James Misner, Ron Lago, and Elan Davis were credible witnesses and the forum has credited their testimony in its entirety.

23) John Morehouse and Lee Bryant were credible witnesses, but the forum has not relied on their testimony because it shed no light on any material issues in the case.

24) Margaret Pargeter was a credible witness. Her testimony, which was based in part on a review of her investigative notes, was straightforward and unimpeached. The forum has credited her testimony in its entirety.

25) The testimony of John Wise was given no weight because he testified that he observed Claimant at work at Respondent's lot in the "summer months," a physical impossibility.

26) Curt Davis, Claimant's father, was not a credible witness. The acerbic tone of his voice during cross examination showed that he disliked Respondent. He testified that he dropped Claimant off at Respondent's lot prior to 8 a.m. on weekdays and at 9 or 10 a.m. on Sundays, both times that were earlier than those testified to by Claimant and that were considerably earlier than Respondent was open for business. He also testified that PAG, the business he owned, had no vehicles on Respondent's lot during Claimant's employment that were not consigned, which was contrary to Claimant's testimony. The forum has not relied on his testimony because of his bias and testimony that was contradicted by more credible evidence.

27) Randy Thom was a longtime friend of Claimant. He answered questions directly, did not exaggerate the number of times he saw Claimant at work, and had a clear recollection of his observations of Claimant at Respondent's shop. With one exception, the forum has credited his testimony in its entirety. That exception is his testimony that he saw Claimant at Respondent's shop at 9 a.m.

28) Ray Brock's testimony concerning the specific jobs performed by Claimant, Charles Cardinal, Ruth Presley, and Jim Presley was credible. His testimony concerning the hours worked by different persons at Respondent's lot, including Claimant, was not credible because it contradicted more credible evidence or contained assertions of facts that he could not have observed. For example, he testified that Respondent was not open on Sundays, an otherwise undisputed fact. He also testified that Ruth Presley was there "pretty much all day long," an assertion contradicted by every other witness who testified as to her hours at Respondent's lot. Finally, he testified that Claimant left work at 7 p.m., but could not have known this from observation because Brock left work at 5 p.m.

29) Charles Cardinal demonstrated a marked bias towards Respondent in his demeanor and testimony. His testimony that he was on Respondent's lot 40-50 hours per week during the wage claim period doing work for Respondent's benefit, despite being paid as little as $500 total and a maximum of $2,000, and that he still hangs out at Respondent's lot, was evidence of this bias. Many of his answers were evasive. He pointedly avoided giving a direct answer to the ALJ's question as to whether or not he was Respondent's employee, yet volunteered information that was potentially detrimental to Claimant. For example, when asked if Claimant came in late he answered in the affirmative, then began an unsolicited explanation of the reason why Claimant was late. On cross examination, the Agency case presenter had to ask him three times if he had discussed the case with other Respondent witnesses the previous day while waiting to testify before he gave an answer responsive to the question, and even then it was an indirect answer. He made unsolicited putdowns about his co-workers instead of responding directly to questions, an indicator that he did not take the proceeding seriously.[1] His three felony convictions, including one conviction for theft, further detracted from his credibility. The forum has only credited his testimony that was corroborated by other credible evidence.

30) Jason Presley, Respondent's son, was not entirely credible. Given the undisputed fact that Claimant's primary job duty was to sell cars, Presley's testimony that it was not Claimant's responsibility to talk to customers or answer phones was not believable. He testified that Ruth Presley worked at Respondent's lot seven days per week, which contradicted her testimony and earlier statement to Pargeter that she did not work on Sundays. Finally, his testimony contained at

[1] In response to three questions about the type of work that Jason Presley, Ray Brock, and Robert Hinkle did, Cardinal gave the following answers: "As little as possible"; "Running the buffer and his mouth"; and "Robert is unteachable."

least one internal inconsistency – his statements that Ray Brock did not work for Respondent while he worked there and that Ray Brock was hired and came in to detail cars in that same time period. The forum has credited Presley's testimony where it was corroborated by other credible evidence or undisputed.

31) James Presley, Respondent's brother, was a study in contrasts. On direct examination, he answered questions in a straightforward manner. During cross examination, he became hostile, argumentative, and uncooperative. An example of this was when the agency case presenter asked him "During the break that we just had, you had an opportunity to review your notes, didn't you?" and he answered "I had the opportunity to go to the restroom, too." This dramatic change in demeanor detracted markedly from his credibility and the forum has only relied on his testimony where it was corroborated by other credible evidence or was undisputed.

32) Ruth Presley, Respondent's mother, gave testimony that was only partly credible because of a significant prior inconsistent statement and her bias against Claimant. During the agency's investigation, she told Pargeter that she worked at Respondent's lot from 1 p.m. to 6 p.m., Monday through Friday. At hearing, she testified that she arrived at work at 9:45 a.m. and worked Monday through Saturday. Her bias against Claimant was demonstrated in testimony that deprecated Claimant's work performance. For example, when asked what Claimant did, she answered "Just walk around the lot and look at the cars. Once in a while talk to what I presumed was a customer." Despite her claim to have been on Respondent's lot virtually all the time that Claimant was there, she also asserted that she never saw Claimant sell a car or "fill out anything." This was contrary to Respondent's admission that Claimant sold at least four cars, and that they all required filling out paperwork. The forum has only relied on her testimony where it was corroborated by other credible evidence or was undisputed.

33) Claimant's testimony was not entirely credible because of evasiveness in some of his testimony, at least one internal inconsistency, a significant omission in his wage claim, and his exaggeration concerning the hours that he worked and his job responsibilities. Consequently, the forum has only relied on his testimony where it was corroborated by other credible evidence or was undisputed. Where no other credible evidence was presented, the forum has credited Claimant's testimony wherever it conflicted with Respondent's testimony.

Claimant testified unequivocally on direct examination that he only worked one other place during his employment with Respondent, and then only one weekend when he worked for his

father. On cross examination, he was asked if he had worked for Dick Schuh during that period of time. His successive responses were: "I may have"; "I very well could have"; "I may have possibly worked for him"; and "I cannot recall at this time if I did or didn't." These responses are not consistent with those that a candid, straightforward witness would have given.

Claimant claimed he was entitled to a $200 commission based on the sale of a 1971 Monte Carlo that was sold immediately after the PAG auction. On direct, Claimant testified that he put together a deal "that went half to PAG and half to [Respondent]." On cross examination, he admitted that all the money went to PAG.

The circumstances by which the 1972 Caprice came into Claimant's possession remain murky, but the weight of the evidence showed that Claimant desired to have the vehicle, that it had substantial value, and that it came into Claimant's possession after a discussion concerning his potential wage claim. Despite this, Claimant failed to mention the car in his wage claim. Although the forum has not allowed the value of the car as a setoff, it views Claimant's omission as a negative reflection on his credibility.

Claimant testified that on the average day Respondent's four business phones would "ring off the hook" from 8 a.m. until Respondent locked the doors as late as 8 or 9 p.m. However, Claimant's calendar showed that he was only at work before 9 a.m. three times and that he only worked as late as 8 p.m. on three days during his entire employment. These occasions all came in the last month of his employment. This testimony as to events that Claimant could not have observed demonstrate a tendency to exaggerate. Claimant testified that he was Respondent's general manager and that Respondent agreed to pay him a salary of $1,000 per month in addition to a $200 commission for each vehicle sold. Other than Claimant's testimony, the Agency presented no evidence to support Claimant's claim that he was Respondent's general manager, despite having the opportunity to examine numerous witnesses who would have been a witness to that fact if it was true. Claimant's record of hours worked shows that he went to work on December 30 but "couldn't get in" because "Jason [Presley] didn't show." This was a day when Respondent was on vacation. Claimant's claim of being Respondent's general manager is inconsistent with him not having a means of entering Respondent's car lot to open the business. The forum has discredited Claimant's testimony that he was Respondent's general manager and concludes that his duties were limited to those described in Finding of Fact 6 -- The Merits, and that his primary duty was selling cars.

The number of hours Claimant claimed to have worked was inconsistent with the preponderance

of credible evidence in the record. In all, Claimant claimed to have worked a total of 1,287.75 hours. During his employment, Respondent was open for business from 10 a.m. to 6 p.m., Monday through Saturday, and from noon to five p.m. on Sundays. Claimant's contemporaneous calendar shows him starting work at least an hour before Respondent opened and leaving work at least an hour after Respondent closed on numerous occasions. Based on Claimant's and Respondent's testimony that Claimant agreed to work for a $200 commission per vehicle sale, Claimant provided no credible explanation[2] for presence on Respondent's lot during hours when there was no potential for earning money, *i.e.* no customers to buy vehicles.

34) William Presley, the Respondent, was not a credible witness and the forum has only credited his testimony where it was corroborated by other credible evidence. The forum has made this determination based on his demeanor, prior inconsistent statements, internal inconsistencies in his testimony, and contradictions with more credible evidence.

Because Respondent represented himself, his testimony on direct was in narrative form. That testimony was smooth and cohesive. During cross examination, he was combative, uncooperative, and argumentative, and became quite testy while responding to questions concerning the frequency of his absences from his business. This marked change in demeanor detracted from the credibility of his testimony.

In correspondence with the Agency prior to the hearing, Respondent stated in one letter that he gave Claimant a 1970 Caprice Classic, and in a second letter stated it was a 1972 Impala. At hearing, the evidence was undisputed that the car in question was a 1972 Caprice Classic. Respondent further stated in his pre-hearing correspondence that "[Claimant] did receive the payments he listed [in his wage claim] as remuneration for sales he made of cars and for various repairs he made on Westside Classics inventory." At hearing, Respondent claimed he had paid Claimant a total of $3,060 in checks and cash as "loans." In response to the Agency's interrogatory, Respondent stated he had no employees between October 2001 and May 2002. In contrast, at hearing Respondent acknowledged that he had two persons working on his lot – Ray Brock and Robert Hinkle – who punched a time clock and whom he considered to be "employees."

Respondent's hearing at testimony contained several internal

[2] As indicated in the previous paragraph, the forum does not believe that Claimant was Respondent's general manager and has not considered that testimony as a plausible explanation for his presence on Respondent's lot when Respondent was not open to the public for business.

inconsistencies. First, Respondent testified that Claimant showed up at Respondent's lot on Sundays for varying lengths of time. On cross, he testified that he was the only person who worked on the lot on Sundays. Second, he testified that his business only sold one car in November 2001 and none in December 2001. Subsequently, he testified that he personally sold four of the five cars Claimant claimed to have sold in November 2001 and agreed that Claimant sold one car in December 2001, not disputing the dates on which Claimant claimed that the cars were sold.

Finally, Respondent's testimony concerning the cars he claimed to have sold was contradicted by Claimant's calendar showing the dates Respondent was absent from the lot. Those dates were not disputed by Respondent. That calendar showed that Respondent was not at work on the dates on which he claimed to have sold six specific vehicles.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent William Presley did business in Eugene, Oregon under the assumed business name of Westside Classic Buicks and employed one or more individuals in Oregon.

2) Respondent hired Claimant on October 29, 2001, to sell vehicles on Respondent's lot. Respondent and Claimant agreed that Claimant would receive a $200 commission for every vehicle that he sold. Respondent and Claimant also agreed that Claimant would be paid for any mechanical duties that he performed.

3) Claimant worked 1,079.5 hours while employed by Respondent, earning a total of $7,016.75 when computed at Oregon's minimum wage of $6.50 per hour. His last day of work was April 18, 2002. At the time of hearing, Respondent had only paid him $2,700.

4) Respondent owes Claimant $4,316.75 in unpaid, due and owing wages.

5) On September 24, 2002, November 20, 2002, and December 4, 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 him.

6) Respondent's failure to pay all unpaid, due and owing wages to Claimant was willful and he is entitled to penalty wages in the amount of $1,560.

7) Respondent failed to pay Claimant the minimum wage to which Claimant was entitled under ORS 653.055 and Claimant is entitled to civil penalties of $1,560.

8) Respondent did not make a record of the actual hours worked each week and each pay period by Claimant.

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 653.025.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid on April 18, 2002, Claimant's last day of work. Respondent owes Claimant $4,316.75 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) Respondent is liable for $1,560 in civil penalties to Claimant. ORS 653.055.

6) Respondent violated ORS 653.045 and OAR 839-020-0080(1)(g) by failing to make a record of the actual hours worked each week and each pay period by Claimant.

7) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages, and the penalty wages and civil penalties, plus interest on these sums until paid. ORS 652.332.

OPINION

INTRODUCTION

This case involves wage claims by Claimant Ethan Davis, whom the Agency alleges worked at Respondent's car lot. Respondent acknowledges that Claimant performed work at his car lot, but denies that Claimant was his employee or is owed any wages. 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 Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which they were not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman,* 19 BOLI 230, 262-63 (2000).

A. Respondent employed Claimant.

Respondent asserted in his answer that Claimant was never his employee. At hearing, he explained that he could not afford another employee in October 2001 and agreed to let Claimant sell cars on his lot on a commission basis as a favor to Claimant, with Claimant able to come and go as he liked. Respondent's defense fails for several reasons.

First, there was undisputed evidence that Claimant performed other work on Respondent's lot

besides selling cars, for Respondent's benefit, including mechanical work for which Respondent had agreed to pay him.[3]

Second, the relevant definition of "employ" includes "to suffer or permit to work." ORS 653.010(3). Respondent was aware of the work that Claimant was performing and there was no evidence that Respondent ever told Claimant to leave Respondent's lot or not to perform a particular job.

Third, the Agency established that Claimant was not an independent contractor. This is an affirmative defense that Respondent has the burden of proving. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 206-07 (1999). 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 Ann L. Swanger*, 19 BOLI 42, 53 (1999). 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 [he] renders [his] 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.*

In this case, Respondent controlled the hours that Claimant could perform his work (the hours Respondent's lot was open); Claimant had no investment in the business and had no opportunity for profit or loss because of his lack of ownership interest; the skill and initiative required of him was that required of any car salesperson; and there was no fixed date for Claimant's employment to cease. All these factors indicate an employer-employee relationship.

Finally, Respondent's testimony concerning the employment status of Charles Cardinal, who was not a car salesman and worked 40-50 hours per week on Respondent's lot during Claimant's employment, doing work for Respondent's benefit, indicated that Respondent's definition of an "employee" varies considerably from the applicable definition in ORS 653.010(3).

In conclusion, Respondent's defenses fail and the forum concludes that Claimant was Respondent's employee during the wage claim period.

B. <u>Claimant was entitled to Oregon's minimum wage.</u>

Claimant and Respondent both testified that Respondent agreed to pay Claimant a $200 commis-

[3] *See* Finding of Fact 6 – The Merits, *supra*.

sion for each vehicle sold. Respondent contends that Claimant sold only five vehicles and therefore was entitled to be paid only $1,000. Respondent is wrong. Employers are free to pay employees solely by commission so long as the commission rate does not result in an employee earning less than minimum wage for all hours worked. *In the Matter of Anne L. Swanger,* 19 BOLI 42, 56 (1999); ORS 653.035(2). Here, Claimant was entitled to be paid the minimum wage rate of $6.50 per hour for all hours worked, less any commission payments received.

C. Claimant performed work for which he was not properly compensated.

Claimant was paid a total of $2,700. At $6.50 per hour, this means Claimant was paid for 415 hours of work, or 10+ workweeks of 40 hours. Respondent and Claimant agree that Claimant worked on Respondent's lot from October 29, 2001, through April 18, 2002, a period covering approximately 25 weeks. This means that Respondent paid Claimant in full only if Claimant averaged 16.6 hours per week (415 hours ÷ 25 weeks) of work or less throughout his employment with Respondent. There is no reliable evidence in the record to support a conclusion that Claimant was on Respondent's lot for this minimal amount of time. Consequently, the forum concludes that Claimant performed work for which he has not yet he has not been properly compensated. The question is how much work.

D. The amount and extent of Claimant's work.

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 and therefore had no reason to keep records. In contrast, Claimant produced a contemporaneous

written record of the dates and hours he purportedly worked. The forum has found those records only partially credible because Claimant, who thought he was working for commission only, did not provide a credible explanation to explain his presence on Respondent's lot during hours when Respondent was not open for business and Claimant had no opportunity to earn money. Claimant's claim that he was Respondent's general manager, which could have justified the hours claimed, was not credible for reasons described in Finding of Fact 33 – The Merits. However, based on Respondent's failure to rebut the dates Claimant claimed to have worked or establish Claimant's absence during Respondent's business hours on any specific date, the forum has credited Claimant with having worked during Respondent's business hours on all days he claims to have worked. Where Claimant's notes show that he started work later than Respondent's opening time, the forum has credited Claimant as having worked the hours between his arrival time and Respondent's closing time. For example, Claimant's notes show he worked from 11 a.m. – 7 p.m. on November 14, 2001, and the forum has only credited him with seven hours work (11 a.m. – 6 p.m.) In all, Claimant's work time amounted to 1,079.5 hours. Computed at $6.50 per hour, Claimant earned $7,016.75. He was paid only $2,700 and is owed $4,316.75 in unpaid wages.

THE 1972 CHEVROLET CAPRICE CLASSIC

Respondent alleged in his answer that Claimant's wage claim had already been satisfied by Claimant's acceptance of a 1972 Chevrolet from Respondent. At hearing, Respondent established that he had acquired a 1972 Chevrolet Caprice Classic as a trade-in, that Claimant wanted the car, and that he conveyed it to Claimant after Claimant left Respondent's employment. There was no evidence that Claimant and Respondent ever executed a written agreement connected with this transaction that settled Claimant's potential[4] wage claim or that Respondent and Claimant expressly agreed that conveyance of the vehicle would constitute full settlement of Claimant's claim.

Oregon's wage and hour laws provide only two possible exceptions that would justify a reduction in Claimant's award of unpaid wages based on Respondent's claim. Both are found in ORS 652.610. First, ORS 652.610(3) allows an employer to withhold or deduct an employee's wages if "[t]he deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books[.]" The forum concludes that Respondent's conveyance of the Caprice Classic is not properly

[4] The forum uses the term "potential" because it appeared that Claimant had not yet filed his wage claim with BOLI at the time Respondent conveyed the Caprice Classic to him.

categorized as a withholding or deduction because it occurred well after the payroll period in which Claimant's wages were due.[5] Even if it could be considered as a withholding or deduction, Respondent's claim would still fail because Claimant did not authorize the transaction in writing and there was no evidence that it was recorded in Respondent's books. Second, ORS 652.610(4) provides that "[n]othing in this section * * * shall * * * diminish or enlarge the right of any person to assert and enforce a lawful setoff * * * on due legal process." Assuming, *arguendo*, that ORS 652.610(4) applies to these facts, Respondent's defense must fail because the conveyance of the Caprice Classic was not a "setoff." The Oregon Supreme Court has defined "setoff" as a "money demand by the defendant against the plaintiff arising upon contract and constituting a debt *independent of and unconnected with the cause of action* set forth in the complaint." *Rogue River Management Company v. Shaw,* 243 Or 54, 59 (1966) (internal quotation marks omitted; emphasis in original). In this case, there was no debt, as Claimant owed no money to Respondent, and the wages in question were dependent on and connected with Claimant's wage claim.

Finally, the forum notes that Respondent's failure to establish the value of the Caprice Classic would prevent it from applying ORS 652.610(3) or (4) in any event.[6] In conclusion, Respondent must pursue any claim that he has against Claimant based on the conveyance of the 1972 Chevrolet Caprice Classic in another forum.

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 Claimant and was usually present at his car lot during business hours, the forum concludes that he knew Claimant's hours of work.

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[5] Although no evidence was presented to establish Respondent's regular payday, ORS 652.120(2) mandates that "[p]ayday shall not extend beyond a period 35 days from the time that such employees entered upon their work[.]"

[6] Exhibit R-1 showed that Respondent assigned a trade-in allowance of $2495 to the Caprice Classic, but R-1 was not received as evidence. *See* Finding of Fact 12 – Procedural, *supra*.

There was no evidence that Respondent acted other than voluntarily or as a free agent in not paying Claimant for the work he performed during the wage claim period. The evidence shows that he simply chose not to pay Claimant. Therefore, Claimant is entitled to penalty wages.

Claimant voluntarily quit, giving 18 days' advance notice of his intention to quit, and his wages became due at the end of his last workday, April 18, 2002. More than 12 days have elapsed since written notice of Claimant's wage claim was sent to and received by Respondent, and more than 30 days have elapsed since Claimant's last workday. Penalty wages are therefore assessed and calculated pursuant to ORS 652.150 (8 hours x $6.50 per hour x 30 days = $1,560).

CIVIL PENALTIES UNDER ORS 653.055

Where a Respondent pays an employee "less than the wages to which the employee is entitled under ORS 653.010 to 653.261," the forum may award civil penalties to the employee. ORS 653.055; *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001); *In the Matter of TCS Global Corp.,* 25 BOLI 1, 15 (2003). Oregon's minimum wage requirements are contained in ORS 653.025 and fall within the range of wage entitlement encompassed by ORS 653.055. 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 for Respondent. Therefore, Respondent is liable for $1,560 in civil penalties as provided in ORS 652.150. This figure is computed by multiplying $6.50 per hour x 8 hours x 30 days.

EXCEPTIONS

A. The Agency's exception.

The Agency excepted to the ALJ's omission of any reference to the $1,560 civil penalties sought by the Agency in the Order of Determination based on ORS 653.055(1)(b). The Agency's exception is well taken and the forum has awarded Claimant an additional $1,560 in civil penalties.

B. Respondent's exceptions.

Respondent filed a number of exceptions, most of them relating to the ALJ's assessment of the credibility of witnesses. Specifically, Respondent filed exceptions to Proposed Findings of Fact – The Merits 4, 11, 14, 15, 23, 32, and 33, Proposed Ultimate Finding of Fact 2, and four statements in the Proposed Opinion.

1. Exceptions to Proposed Findings of Fact – The Merits.

Respondent's exceptions to Proposed Findings 4 and 11 are denied because those findings are supported by substantial evidence.

Proposed Finding 14 has been modified to comport with Respondent's testimony concerning when Respondent gave Claimant the '72 Chevrolet Caprice.

Respondent's exception to Proposed Finding 15 is denied because there was no evidence that Claimant used his own tools. The fact that Claimant may have cleaned and repaired his own vehicles is not material because there is no evidence that Respondent forbade him from doing those repairs while he worked for Respondent.

Respondent's exception to Proposed Finding 23 is denied for the reason that the testimony of Morehouse and Bryant has already been given appropriate weight.

Respondent's request that the testimony of Ruth Presley, as summarized in Proposed Finding 32, be reconsidered is denied because it has already been appropriately characterized and Respondent's statement does not accurately describe her testimony.

Respondent's exception to Proposed Finding 33 is denied because it does not add anything to the forum's assessment of Claimant's credibility.

2. Exceptions to Proposed Ultimate Findings of Fact.

Respondent's exception to Proposed Ultimate Finding of Fact 2 is denied because it is supported by substantial evidence.

3. Exceptions to Proposed Opinion.

Respondent excepts that Claimant's performance of work on other cars than Respondent's cars shows Respondent did not employ Claimant. This exception is denied for the same reason that Respondent's exception to Proposed Finding of Fact 15 – The Merits was denied.

Respondent excepted that he told Claimant he was not needed and didn't need to be at work. Respondent may have told Claimant that, but here was no evidence that he did not allow Claimant to stay and work.

Respondent excepted that Claimant worked at other places while employed by Respondent. The evidence shows Claimant spent the vast majority of his working time at Respondent's business, and there was no evidence that Claimant received any income from PAG.

Respondent excepted to the forum's failure to take time off Claimant's award of wages based on Claimant's testimony that he took "long extended leaves from respondent's lot, 2 to 4 hours per day." This was not Claimant's testimony. Furthermore, the burden was on Respondent to produce records or credible testimony to show specific hours that Claimant did not work. Respondent produced neither, and Respondent's exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages Respondent owes as a result of his violations of ORS 652.140(1), the Commissioner of the Bureau of Labor and Industries hereby orders **William Presley** 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 Ethan Douglas Davis in the amount of SEVEN THOUSAND FOUR HUNDRED THIRTY SIX DOLLARS and SEVENTY FIVE CENTS ($7,436.75), less appropriate lawful deductions, representing $4,316.75 in gross earned, unpaid, due and payable wages, $1,560 in penalty wages, and $1,560 in civil penalties, plus interest at the legal rate on the sum of $4,316.75 from May 1, 2002, until paid, and interest at the legal rate on the sum of $3,120 from June 1, 2002, until paid.

In the Matter of

KATHY MORSE dba Central Oregon Intermediate Care

Case No. 70-02

Final Order of Commissioner Dan Gardner

Issued October 23, 2003

SYNOPSIS

Claimant filed a wage claim against Respondent seeking $371.57 in unpaid wages. Respondent, who had ceased doing business, alleged it had insufficient assets to pay those wages. A determination was made that Claimant's claim was valid and Claimant was paid $371.57 from the Wage Security Fund. The Commissioner ordered Respondent to repay this amount, along with a 25 percent penalty. ORS 652.140, ORS 652.414, ORS 839-001-0500 through 839-001-0520.

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 ("BOLI") for the State of Oregon. The hearing was held on September 16, 2003, at BOLI's office located at 3865 Wolverine NE, E-1, 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. Respondent Kathy Morse did not appear and was held in default.

The Agency called two witnesses: Margaret Pargeter, Wage and Hour Division compliance specialist, and Stephanie Bennett (telephonic), the wage claimant**.**

The forum received into evidence:

a) Administrative exhibits X-1 through X-21 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-21(submitted prior to 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 December 31, 2001 Claimant Stephanie Bennett ("Claimant") filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages that she earned between November 1 and December 10, 2001.

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) Claimant brought her wage claim within the statute of limitations.

4) On March 11, 2002, the Agency issued Order of Determination No. 02-0696 based upon Claimant's wage claims and the Agency's investigation. The Order of Determination alleged that BOLI had made a determination that Claimant was entitled to and had received payment from the Wage Security Fund ("WSF") in the amount of $371.57, and that the Commissioner was entitled to recover this amount from Respondent, together with a penalty of 25 percent of $371.57, with interest at the legal rate per annum from February 1, 2002, until paid. The Order of Determination further 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 March 19, 2002, Respondent filed an answer and request for hearing. The answer acknowledged that Respondent owed $371.57 to Claimant, and further alleged that Claimant was an independent contractor.

6) On July 8, 2003, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On May 15, 2003, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as July 8, 2003, at the Oregon Employment Department, 1007 SW Emkay Drive, Bend, 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.

8) Respondent did not receive the Notice of Hearing because she changed her address after filing the answer. On July 30, 2003, the Hearings Unit issued another Notice of Hearing stating the time and place of the hearing at 9:30

a.m. on September 16, 2003, at BOLI's Salem office located at 3865 Wolverine NE, E-1, Salem, Oregon. This Notice was personally served on Respondent and was accompanied by all the documents listed in the previous paragraph.

9) At 9:30 a.m. on September 16, 2003, Respondent had not appeared at the hearing. Subsequently, no one appeared on behalf of Respondent and no one contacted the Hearings Unit to state that Respondent would be late or would not appear. The ALJ waited until 10 a.m. to convene the hearing, and then declared Respondent in default.

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

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Kathy Morse owned and operated an adult foster care home under the assumed business name of Central Oregon Intermediate Care and engaged the personal services of one or more employees in Oregon.

2) Claimant began work at Respondent's business on October 1, 2001. Her last day of work was December 10, 2001.

3) Respondent agreed to pay Claimant $7.00 per hour to start. Beginning November 1, 2001, Respondent raised Claimant's pay to $7.25 per hour.

4) Claimant's duties included caring for Respondent's clients, babysitting Respondent's children, housecleaning, and cooking.

5) Claimant had no financial interest in Respondent's business. She was hired for an indefinite period of time. Respondent determined her hours of work and she did not use any of her own tools or equipment while working for Respondent. She received no special training to perform her work.

6) At the time Claimant left Respondent's employment, Respondent owed her $371.57 in unpaid wages that were earned between November 29 and December 10, 2001. At the time of hearing, Respondent still had not paid any of those wages.

7) Claimant's wage claim was assigned to Margaret Pargeter, Agency compliance specialist, for investigation.

8) Pargeter investigated Claimant's wage claim by interviewing Claimant and other witnesses and obtaining a written response from Respondent. At the conclusion of her investigation, she determined that Claimant was Respondent's employee and had a valid wage claim. She also determined that Respondent had gone out of business and that Respondent was not going to pay the unpaid wages based on her defense that Claimant was an independent contractor.

9) Based on her determination, Pargeter recommended that Claimant's wages be paid to her from the Wage Security Fund ("WSF"). Subsequently, BOLI paid Claimant $371.57 from the WSF.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent conducted business under the assumed business name of Central Oregon Intermediate Care and engaged the personal services of one or more employees in Oregon.

2) Respondent employed Claimant between October 1 and December 10, 2001.

3) At the time Claimant left Respondent's employment, Respondent owed her $371.57 in unpaid wages that were earned between November 29 and December 10, 2001. At the time of hearing, Respondent still had not paid any of those wages.

4) Claimant filed a wage claim. The Agency investigated her wage claim and made a determination that her claim was valid, that Respondent had ceased doing business and was without sufficient assets to pay the wage claim, and that Claimant's wage claim could not otherwise be fully and promptly paid.

5) BOLI paid Claimant $371.57 from the WSF based on the Agency's investigation and determination.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer who engaged the personal services of one or more employees, including Claimant. ORS 652.310.

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 652.409 to ORS 652.414.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant $371.57 in earned and unpaid wages after she left Respondent's employment.

4) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner may recover from Respondent the $371.57 paid to Claimant from the WSF, along with a 25 percent penalty on that sum ($92.89), plus interest on both sums until paid. ORS 652.414.

OPINION

The Agency alleged in its Order of Determination that Respondent employed Claimant and owed her $371.57 in earned and unpaid wages and that Respondent is liable for the $371.57 paid out by BOLI from the WSF and a 25 percent penalty on that sum. Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. In a default situation, the task of the forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on

the record. *In the Matter of Usra Vargas,* 22 BOLI 212, 220 (2001).

In cases involving payouts from the WSF, where (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) BOLI has paid out money from the WSF and seeks to recover that money, a rebuttable presumption exists that the Agency's determination is valid for the sums actually paid out. *In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 260 (1999). Pargeter's credible testimony concerning her investigation and eventual determination, coupled with Agency exhibits showing the documents she gathered in her investigation, satisfies the first and second elements of this test. Her testimony that BOLI paid Claimant $371.57 from the WSF, coupled with the Order of Determination itself, satisfies the third element. Consequently, Respondent is liable to repay the WSF the sum of $371.57, the amount actually paid out, plus a 25 percent penalty on that sum, or $92.89, for a total of $464.46, plus interest.

ORDER

NOW, THEREFORE, as authorized by ORS 652.414, and as payment of the amounts paid from the Wage Security Fund as a result of her violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Kathy Morse** 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 FOUR HUNDRED SIXTY FOUR DOLLARS AND FORTY SIX CENTS ($464.46), representing $371.57 paid to Stephanie Bennett from the Wage Security Fund and a 25 percent penalty of $92.89 on that sum, plus interest at the legal rate on the sum of $464.46 from February 1, 2002, until paid.

In the Matter of

NORTHWEST PIZZA, INC. dba Northwest Pizza and Pasta Company

Case No. 61-03

Final Order of Commissioner Dan Gardner

Issued November 13, 2003

SYNOPSIS

The Agency alleged that Respondent terminated Complainant because she applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656. The Commissioner found that Complainant's compensable injury suffered while in Respondent's employ was a substantial factor in Respondent's decision to terminate her. The Commissioner awarded $6,488.50 in lost wages

and $30,000 in emotional distress damages. *Former* ORS 659.410, ORS 659A.040.

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 September 30, 2003, at the Oregon Employment Department office located at 119 N. Oakdale Avenue, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Summer S. Lucero ("Complainant") was present and was not represented by counsel. Respondent did not make an appearance and was found in default.

The Agency called the following witnesses: Complainant; Mindette Herndon, Respondent's assistant manager during Complainant's employment with Respondent; and Leslie Peterson (telephonic), Civil Rights Division Senior Investigator.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or gener ated prior to hearing); and

b) Agency exhibits A-1 through A-14 (submitted prior to 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 1, 2002, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she 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 January 23, 2003.

2) On July 18, 2003, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by discharging her because she applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656, in violation of *former* ORS 659.410 and *current* ORS 659A.040. The Agency sought damages in the amount of $10,000 in wage loss, and $30,000 for emotional stress.

3) On July 23, 2003, the forum served the Formal Charges on Respondent,[1] accompanied by the

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[1] The Formal Charges were mailed on July 23, 2003, to Respondent at 1585 Siskiyou Blvd., Ashland, OR 97520, the address of Gerald Allen, Respon-

following: a) a Notice of Hearing setting forth September 30, 2003, in Medford, 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 September 15, 2003, the Agency filed a motion for an Order of Default based on Respondent's failure to file an answer to the Formal Charges after being served with the documents and after being sent a notice by the Agency on September 3, 2003, that the Agency would seek a default order if Respondent did not file an answer within ten days.

5) Based on Respondent's failure to file an answer, the ALJ granted the Agency's motion and found Respondent to be in default. The ALJ issued an interim order on September 17, 2003, stating that Respondent had ten days to seek relief from default by means of a written request.

6) At the time set for hearing, Respondent did not appear and had not notified the forum that it would be late or would not attend the hearing. The ALJ waited 30 minutes, then declared Respondent to be in default and commenced the hearing.

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

8) Respondent did not seek timely relief from default prior to or after the hearing.

9) The ALJ issued a proposed order on October 16, 2003, 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 was an Oregon corporation that employed six or more persons in Oregon.

2) Complainant was employed by Respondent beginning October 3, 2001, to work as a cook and cashier at the wage of $7 per hour, plus shared tips. At the time of her termination, she averaged four shifts and 30 hours per week, earning $210 per week in wages and $26 per week in tips, for a total of $236 per week.

3) Complainant's supervisor throughout her employment with Respondent was CJ Udell.

4) Soon after Complainant was hired, CJ told her that an assistant manager position would be coming open, and that he wanted Complainant to fill that job.

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dent's registered agent, on file with the Corporations Division.

5) On October 6, 2001, Complainant slipped on Respondent's kitchen floor on water leaking from a walk-in cooler and cut her face and a finger on glass that broke when she fell.

6) Complainant was taken to the hospital and a plastic surgeon treated her cuts with 46 stitches. The next day she visited Respondent's business and asked CJ for an accident report form so she could file a workers' compensation claim. CJ told Complainant that there were no accident forms at the store. Three weeks later, CJ finally gave her an accident form to sign.

7) Complainant's injury was accepted as a compensable injury and Respondent's workers' compensation carrier has paid all medical expenses attributable to her injury, including several plastic surgeries.

8) Complainant was off work until October 14, 2001, when she was released to perform light duty work, with the restriction that she could not get her stitched finger wet. CJ put Complainant back to work as a cashier the next day.

9) Complainant received an unrestricted release to return to work at the end of October 2001 and began working as a cook and cashier again. (Testimony of Complainant)

10) On November 4, 2001, Complainant's four month old daughter had an allergic reaction to a shot she received the day before and became ill, necessitating that Complainant stay home and care for her. On that day, Complainant was scheduled to work from 5 p.m. to 9 p.m. Complainant called Respondent between 1 and 2 p.m. and told Barbara Udell, CJ's wife and co-manager, that she would not be at work because of her daughter's illness. Barbara told Complainant it was busy and that CJ would call Complainant back if there was a problem. At 4:50 p.m., Complainant received a call from CJ, who told her that she was terminated if she did not show up for work at 5 p.m. Complainant said she couldn't be at work in 10 minutes because of her daughter's illness. CJ repeated that Complainant was terminated if she didn't show up for work in 10 minutes.

11) Complainant did not go to work and was terminated.

12) Complainant worked an average of 30 hours per week for Respondent.

13) Prior to November 4, 2001, Complainant did not miss any time from work that was not attributable to her compensable injury and had not been disciplined for any reason.

14) Three of Complainant's co-workers – Dan ____, Danny O., and Mindette Herndon missed entire work shifts during Complainant's employment and were not terminated. None of these three were injured at Respondent's workplace or filed workers' compensation claims.

15) On October 7, 2001, CJ and Herndon had a conversation in which CJ expressed extreme

annoyance and showed obvious irritation that Complainant would be missing work right after she was hired. CJ "ranted" that he could not tolerate Complainant's absences and exclaimed that he couldn't believe she had gotten hurt two days after she got hired, that he needed people to work, and that he needed someone to fill her shift. At the time, Complainant had been scheduled for a full week of work.

16) Respondent's written personnel policy in effect at the time of Complainant's employment stated: "All schedule requests must be made 2 weeks prior to the requested time off, except in the case of family emergencies. * * * If you have a family emergency, you must contact your manager a.s.a.p."

17) Leslie Peterson, Civil Rights Division senior investigator, investigated Complainant's complaint. In the course of her investigation, Respondent's president, Gerald Allen, sent a fax to Peterson in which he stated "She [Complainant] was released because we could not rely on her to be present for her assigned shifts."

18) Complainant actively sought work after her discharge. She began working five hours per week for her mother-in-law, earning $8.50 per hour. In mid-May 2002, she was hired at the Ashland Tanning Salon. One month later, she was enrolled in the Jobs Plus Program by the Salon, which set a limited duration on her job. She worked at the Salon until November 17, 2002, when the Jobs Plus Program ended. She worked 30 hours per week and was paid $7 per hour at the Salon.

In December 2002, Complainant had plastic surgery related to her compensable injury. In January 2003, when she had recovered from the surgery, she went to work at the National Marketing Group. From January through the end of July 2003 she worked 25-30 hours per week and averaged $9-10 per hour in wages and commission.

Starting a year prior to the hearing, and continuing as of the date of hearing, Complainant worked as a caregiver one day a month, earning $60 per month.

19) Between November 5, 2001, and December 1, 2002, Complainant earned approximately $6,727.50. This figure was derived from the following calculations:

a) 5 hours a week at $8.50 per hour for 27 weeks (11/5/01 to 5/14/02) for her mother-in-law = $1,147.50;

b) 30 hours a week x $7 per hour for 26 weeks (5/15/02 – 11/17/02) for Ashland Tanning Salon = $5,460;

c) one day per month x $60 a day for two months (10/02 – 11/02) as a caregiver = $120;

d) $1,147.50 + $5,460 + $120 = $6,727.50.

20) Complainant would have worked 30 hours per week, earning $7 per hour and averaging $26

per week in tips, for a total of $236 per week, had she not been terminated by Respondent. Her total gross earnings between November 5, 2001, and December 1, 2002, would have amounted to $13,216 ($236 per week x 56 weeks).

21) Complainant would have earned an additional $6,488.50 in wages between November 5, 2001, and December 1, 2002, had she not been terminated by Respondent.

22) Complainant's termination caused serious emotional and financial stress in her life until May 2002, when she was hired at the Ashland Tanning Salon. Complainant originally went to work for Respondent because her boyfriend had been laid off from his job and she needed the money to support her four-month-old daughter. After her termination, she became depressed. She lost sleep and became unable to breast feed her daughter, which caused additional stress. She worried about how she would support her family. She had to ask her parents, who were also financially stressed, for financial assistance. This impacted her dignity negatively and lessened her self-esteem.

23) Complainant, Herndon, and Peterson were all credible witnesses.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an Oregon corporation that employed six or more persons in Oregon.

2) Complainant was employed by Respondent beginning October 3, 2001, to work as a cook and cashier at the wage of $7 per hour, plus shared tips.

3) Complainant's supervisor throughout her employment with Respondent was CJ Udell. Prior to her compensable injury, CJ told Complainant he would like to promote her to assistant manager.

4) On October 6, 2001, Complainant suffered a compensable injury when she slipped on Respondent's kitchen floor on water leaking from a walk-in cooler and seriously cut her face and one finger. Complainant was off work until October 15, when she was given light duty work after she received a light duty release to return to work.

5) The day after Complainant's injury, CJ expressed extreme annoyance that Complainant would be missing work so soon after being hired.

6) Complainant was scheduled to work from 5 p.m. to 9 p.m. on November 4, 2001. That morning, her four month old daughter had became ill, necessitating that Complainant stay home and care for her. Complainant followed Respondent's written policy for calling in the event of a family emergency by calling Respondent between 1 and 2 p.m. and telling a manager that she would not be at work because of her daughter's illness.

7) At 4:50 p.m., CJ called Complainant and told her that she was terminated if she did not

show up for work at 5 p.m. Complainant told CJ that she couldn't be at work in 10 minutes because of her daughter's illness. Complainant did not go to work and was terminated.

8) At the time of her termination, Complainant worked an average of 30 hours per week for Respondent and received an average of $26 per week in tips, earning an average of $236 per week.

9) Prior to her termination, Complainant did not miss any time from work that was not attributable to her compensable injury.

10) Three of Complainant's co-workers missed entire work shifts during Complainant's employment and were not terminated. None of these three were injured at Respondent's workplace or filed workers' compensation claims.

11) Complainant actively sought work after her discharge and earned $6,727.50 between November 5, 2001, and December 1, 2002, when she became unavailable for work.

12) Complainant would have earned $13,216 between November 5, 2001, and December 1, 2002, if she had not been terminated by Respondent. In all, Complainant lost $6,488.50 in back wages between November 5, 2001, and December 1, 2002.

13) Complainant suffered substantial emotional distress over a period of six months as a direct result of her unlawful termination.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of *former* ORS 659.010 to *former* ORS 659.11, and *former* ORS 659.400 to *former* ORS 659.410.

2) The actions, inactions, statements, and motivations of CJ Udell are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659A.800 to ORS 659A.850.

4) Respondent's termination of Complainant was based on Complainant's application for benefits and invoking or utilizing the procedures provided for in ORS chapter 656. Respondent's termination of Complainant violated *former* ORS 659.410 and *current* ORS 659A.040.[2]

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[2] At the time Respondent terminated Complainant, *former* ORS 659.410 was the statute in effect that made it unlawful for an employer to discriminate against a worker because the worker had "applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656[.]" In its 2001 session, the Oregon Legislature completely reorganized ORS Chapter 659 and the substantive provisions of *former* ORS 659.410 were incorporated in ORS 659A.040(1),

5) Pursuant to ORS 659A.850, 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 an appropriate exercise of that authority.

OPINION

INTRODUCTION

Respondent was served with the Notice of Hearing and Formal Charges and did not file an answer or appear at the hearing and was found in default. When a respondent defaults, the Agency needs only to establish a prima facie case on the record to support the allegations of its charging document in order to prevail. *In the Matter of Executive Transport, Inc.,* 17 BOLI 81, 92 (1998).

PRIMA FACIE CASE

In this case, the Agency's prima facie case consists of the following elements: (1) Respondent employed six or more persons in Oregon; (2) Complainant was a worker who applied for benefits or invoked or utilized the workers' compensation procedures; (3) Respondent terminated Complainant; and (4) Complainant's use of the workers' compensation procedures was a substantial factor[3] in Respondent's decision to terminate Complainant.

The first two elements of the Agency's prima facie case were established by the Complainant's credible testimony. The third was established by the credible testimony of Complainant and Respondent's admission to Peterson, the Agency's investigator.[4] The fourth element requires a more substantial analysis and is discussed in the following paragraphs.

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which became effective January 1, 2002. This change was contained in Sections 31 to 34 of chapter 621 of Oregon Laws 2001. Section 91(1), chapter 621, Oregon Laws 2001, provides that Sections 31 to 34 of chapter 621 of Oregon Laws 2001 apply to complaints filed after January 1, 2002. The complaint in this case was filed on March 1, 2002. Therefore, even though *former* ORS 659.4190 was in effect at the time of Complainant's termination, the forum applies *current* ORS 659A.040(1).

[3] *See In the Matter of Hermiston Assisted Living,* 23 BOLI 96, 127 (citing *McPhail v. Milwaukie Lumber Co.,* 165 Or App 596, 603 (2000) ("It is sufficient in Oregon for the [complainant] to show that the unlawful motive was a substantial and impermissible factor in the discharge decision.")

[4] *See* Finding of Fact 17 –The Merits, *supra.*

RESPONDENT'S ACTION WAS TAKEN BECAUSE OF COMPLAINANT'S USE OF THE WORKERS' COMPENSATION SYSTEM

The forum applies the different treatment theory contained in OAR 839-005-0010(B) to determine if Complainant's use of the workers' compensation system was a substantial factor in her termination. Under OAR 839-005-0010(B), different treatment occurs when:

> "The respondent treats members of a protected class differently than others who are not members of that protected class. When the respondent makes this differentiation because of the individual's protected class and not because of legitimate, nondiscriminatory reasons, unlawful discrimination exists. In establishing a case of different or unequal treatment:
>
> "(i) There must be substantial evidence that the complainant was harmed by an action of the respondent under circumstances that make it appear that the respondent treated the complainant differently than comparably situated individuals who were not members of the complainant's protected class."

During the Agency's investigation, Respondent's ostensible reason for terminating Complainant was that she missed her 5 p.m. to 9 p.m. work shift on November 4, 2001. Respondent did not dispute the facts that Complainant called in at least three hours prior to her shift to let Respondent know she could not work that night, that her absence was caused by her daughter's illness and that Respondent was aware of that fact, and that she followed Respondent's written policy in reporting her pending absence. Complainant testified credibly at hearing that she had never been tardy or missed any work except for her time off due to her compensable injury. Through the testimony of Complainant and Herndon, the Agency established that Respondent employed at least three other persons at the time of Complainant's termination who missed entire shifts of work, who had not been compensably injured while employed by Respondent, and who were not terminated. The only difference between Complainant and these three comparators is that Complainant suffered a compensable injury and they did not. This comparative evidence is sufficient to establish that Complainant was terminated because of her use of the workers' compensation system.[5] The forum concludes that

[5] *See, e.g., In the Matter of ARG Enterprises, Inc.,* 19 BOLI 116, 139 (2000) (The forum found complainant had been subjected to different treatment based on his use of the workers' compensation system where he violated respondent's cut glove policy and cut himself, suffering a compensable injury, and was discharged, whereas other similarly situated kitchen staff who violated the same policy but did not suffer compensable

Respondent unlawfully discriminated against Complainant in violation of *former* ORS 659.410 and *current* ORS 659A.040.

This conclusion is bolstered by Herndon's credible testimony that CJ, the manager who terminated Complainant, expressed extreme annoyance and irritation that Complainant had gotten hurt shortly after her hire.

DAMAGES

In its Formal Charges, the Agency sought $10,000 in lost wages and $30,000 for emotional distress.

A. Lost Wages.

The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. *See, e.g., In the Matter of ARG Enterprises, Inc*., 19 BOLI 116, 136 (2000). Where a respondent commits an unlawful employment practice by discharging a complainant, the forum is authorized to award the complainant back pay for the hours the employee would have worked absent the discrimination. *In the Matter of Bob G. Mitchell*, 19 BOLI 162, 188 (2000). A complainant's right to back wages is cut off when he or she obtains replacement employment for a similar duration and with similar hours and hourly wages as respondent's job. *In the Matter of H.R. Satterfield*, 22 BOLI 198, 210-11 (2001). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *See, e.g., In the Matter of Servend International, Inc*., 21 BOLI 1, 30 (2000), *aff'd without opinion, Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

Through the credible testimony of Complainant, the Agency established that, at the time of Complainant's termination, she was working 30 hours per week at the wage rate of $7 per hour and averaged $26 per week in tips, for total average earnings of $236 per week. Her employment was for an indefinite tenure, and CJ, the manager, thought so highly of her work before her injury that he wanted to promote her to assistant manager. Complainant's credible testimony established that she began actively seeking work after her termination, but was unable to find alternative employment, other than five hours of work per week for her mother-in-law, until mid-May 2002, when she was hired to a limited duration job at the Ashland Tanning Salon. The Salon job, which ended in mid-November 2002, did not cut off Complainant's back pay accrual because of its limited duration. Complainant was unable to work in December 2002 because of plastic surgery related to her compensable injury and is not entitled to back pay for that

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injuries received only verbal warnings.)

period of time due to her unavailability for work.[6] When she recovered from the surgery and was able to return to work, she began working at National Marketing Group, where she worked an average of "25-30" hours per week, earning combined wages and commission amounting to "$9-10" per hour.[7] This job was of indefinite tenure; in fact, Complainant was still working there at the time of hearing. Her average earnings per week, calculated at 27.5 hours per week x $9.50 per hour, amounted to $261.25, about $26 per week more than she was earning at the time of her termination from Respondent's employ. Since Complainant's replacement employment at National was for a similar duration and greater pay than her employment with Respondent, her right to back wages was cut off when she started work at National. In total, her back pay loss amounts to $6,488.50.[8]

B. Emotional Distress.

In determining damages for emotional distress, the commissioner considers a number of things, including the type of the discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. The amount awarded depends on the facts presented by each complainant. *In the Matter of Barrett Business Services, Inc.,* 22 BOLI 77, 96 (2001). A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for emotional distress damages. *Id*. at 96.

The Agency relied on Complainant's testimony to establish emotional distress damages. Complainant credibly testified that her termination caused serious emotional and financial stress in her life until May 2002, when she obtained work at the Ashland Tanning Salon. Complainant originally went to work for Respondent because her boyfriend

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[6] *See In the Matter of Lucille's Hair Care,* 3 BOLI 286, 297-98, 301 (1983), *modified, Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984), *order reinstated, remanded with instructions,* 299 Or 98, 699 P2d 189, *order on remand,* 5 BOLI 13, 29 (1985) (where complainant was not able to work for a limited time period due to injury, the forum did not award back pay for that time period).

[7] During direct examination, Complainant testified to these working conditions. Later, in response to the ALJ's request for total earnings since January 1, 2003, Complainant testified that she earned an average of $850 per month from January through July 2003 at National. At $9.50 per hour, this would amount to only 89.5 hours of work per month, or about 20 hours a week. Because there was no evidence that Complainant based this estimate on any actual records and $850 per month is substantially less than the monthly earnings her earlier estimate of hours and wages amounts to (rounded off, 27.5 hours per week x $9.50 per hour = $261.25 per week), the forum relies on Complainant's initial testimony to determine her earnings at National.

[8] *See* Findings of Fact 19-21 – The Merits, *supra*.

had been laid off from his job and she needed the money to support her four-month-old daughter. After her termination, she became depressed. She began to lose sleep and became unable to breast feed her daughter, which caused additional stress. She worried about how she would support her family. She had to ask her parents, who were also financially stressed, for financial assistance. This impacted her dignity negatively and lessened her self-esteem. All of these circumstances constitute emotional distress that may be considered by the Commissioner when determining an appropriate award of damages.

When a respondent is found to have engaged in an unlawful employment practice, ORS 659A.850(4)(a) gives the Commissioner the authority to order that respondent to "[p]erform an act or series of acts * * * that are reasonably calculated to carry out the purposes of [ORS chapter 659A], to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the complainant and others similarly situated[.]" Based on the circumstances described in the previous paragraph, the forum concludes that the $30,000 emotional distress damages award sought by the Agency is an appropriate exercise of the Commissioner's discretion.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of Respondent's violation of *former* ORS 659.410 and *current* ORS 659A.040, and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Northwest Pizza, 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 Summer Lucero in the amount of:

a) SIX THOUSAND FOUR HUNDRED EIGHTY-EIGHT DOLLARS AND FIFTY CENTS ($6,488.50), less appropriate lawful deductions, representing wages lost by Summer Lucero between November 5, 2001, and December 1, 2002, as a result of Respondent's unlawful practices found herein, plus interest at the legal rate on that sum from December 1, 2002, until paid, plus

b) THIRTY THOUSAND DOLLARS ($30,000), plus interest on that sum at the legal rate from the date of the Final Order until paid.

2) Cease and desist from discriminating against any employee based upon the employee's application for benefits or invocation or utilization of the procedures provided for in ORS chapter 656.

In the Matter of

RUBIN HONEYCUTT dba Mr. Ideal's

Case Nos. 10-03 and 81-03

Final Order of Commissioner Dan Gardner

Issued November 13, 2003

SYNOPSIS

The forum found that Claimant's daily time sheets, prepared, dated and signed weekly by Claimant, were the best evidence of the hours she worked for Respondent. Claimant's time sheets showed she worked 206 hours during the wage claim period and was paid $1,600 for those hours. The forum concluded that Respondent did not owe Claimant any wages and dismissed the Agency's Order of Determination. Additionally, the forum dismissed the Agency's Notice of Intent because of the lack of evidence establishing that Respondent failed to maintain and preserve payroll records showing the dates and hours Claimant worked and failed to provide such records to the Agency for inspection. ORS 653.025; ORS 652.140(2); ORS 653.045(1); ORS 653.045(2); OAR 839-020-030; OAR 839-020-0080; OAR 839-020-0083.

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 July 9, 2003, at the Oregon Department of Human Resources, Adult and Family Services Child Welfare Conference Room, located at 726 NE 7th Street, Grants Pass, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Garilynn Pitcock Evans ("Claimant") was present throughout the hearing and was not represented by counsel. Rubin Honeycutt ("Respondent") was present throughout the hearing and was not represented by counsel.

In addition to Claimant, the Agency called as witnesses: Candy Rosenberg (telephonic), computer consultant, and Eric Grosz (telephonic), mechanic.

Respondent testified on his own behalf and called no other witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-8 (generated before hearing), X-9 through X-14 (generated after hearing);

b) Agency exhibits A-1 through A-8 (filed with the Agency's case summary);

c) Respondent exhibits R-1 and R-2 (filed with Respondent'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 September 21, 2001, the Bureau of Labor and Industries received a wage claim form from Claimant stating Respondent had employed her from July 12 until October 27, 2000, failed to pay a 25% commission on two cars she sold, failed to pay her $6.50 per hour for all hours worked, and failed to pay her one and one half times her regular rate for overtime hours worked.

2) The Agency alleged and Respondent did not dispute that Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent at the time she filed her wage claim.

3) On March 14, 2002, the Agency issued Order of Determination No. 01-4211. The Agency alleged Respondent had employed Claimant during the period July 12 through October 27, 2000, failed to pay Claimant at least $6.50 per hour for each hour worked in that period, and was liable to Claimant for $2,735.50 in unpaid wages, including $312 in overtime wages for hours worked in excess of 40 in a given work week. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent, therefore, was liable to Claimant for $1,560 as penalty wages, plus interest. The Order of Determination 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. Respondent filed a timely answer wherein he denied any wages were owed and requested a hearing.

4) On April 10, 2003, the Agency requested a hearing. On April 16, 2003, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on July 9, 2003. 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.

5) On April 18, 2003, the Agency issued a Notice of Intent to Assess Civil Penalties. The Agency alleged Respondent failed to maintain and preserve payroll records and failed to make required payroll records available to the Commissioner for inspection. The Agency cited aggravating circumstances, including an allegation that Respondent falsified Claimant's payroll records, and proposed to assess civil pen-

alties of $2,000. Respondent filed a timely answer and request for hearing that stated, in pertinent part:

> "I admit I was an employer at all times herein material to this case.
>
> "In response to [the first allegation], I deny this charge since I still have Garilynn Evan's time sheets and records on file.
>
> "In response to [the second allegation], I deny this charge since I did provide these records when requested. They were signed, dated and maintained by Garilynn Evans, herself, while acting in the capacity of Office Manager.
>
> "I deny any and all Aggravating Factors. Due to my history of prior violations, I insisted on signed weekly time sheets to be kept and available for inspection. When requested, I supplied the Agency with available records. I deny manufacturing false records and did not deprive Garilynn Evans of her right to timely and full payment of wages."

6) On May 22, 2003, the Agency requested a hearing, and on June 11, 2003, filed a motion to consolidate the matters alleged in the Agency's Notice of Intent with the matters alleged in its Order of Determination. On June 12, 2003, the forum issued an order granting the Agency's motion and consolidating the cases for hearing on July 9, 2003.

7) On June 23, 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; 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 brief 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 July 1, 2003, and advised them of the possible sanctions for failure to comply with the case summary order. Both participants timely filed case summaries.

8) 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.

9) On July 11, 2003, on her own motion, and in order to fully and fairly adjudicate the matter before the forum, the ALJ reopened the evidentiary portion of the record to take additional evidence and ordered the Agency and Respondent to provide the following information by July 23, 2003:

> "1. The month and year Respondent provided Claimant Evans with a computer for use in her home;

"2. The month and year Respondent filed a court action against Claimant Evans seeking the return of his computer;

"3. The month and year Claimant Evans returned the computer to Respondent;

"4. The birth date of the child Claimant Evans was expecting during her employment with Respondent;

"5. A copy of the certificate of service showing the date a certified demand letter from Claimant Evans, Exhibit A-1 (pages 4 and 8), was delivered to Respondent;

"6. An affidavit from the Agency compliance specialist reciting the date(s) he or she requested payroll information pertaining to Claimant Evans from Respondent and the date and nature of Respondent's response, if any."

On July 14, 2003, the ALJ issued an addendum to the July 11 order that stated, in pertinent part:

"Additionally, the Agency and Respondent are hereby ordered to submit a document that includes * * * [t]he month and year Claimant applied for unemployment benefits *after* she terminated her employment with Respondent."

10) On July 21, 2003, the Hearings Unit received a letter from Respondent that stated, in pertinent part:

"As so ordered * * * the following information is being supplied with copies sent to the other participating parties:

"1. Month & Year Respondent provided Evans with computer: Approx. 3/01.

"2. Month & Year Respondent filed court action against Evans. 8/01.

"3. Month & Year Evans returned computer to Respondent: 3/02.

"4. I do not know the birth date of Evans child.

"5. I do not have a copy of certificate of service from demand letter.

"6. I received request for payroll information on 10/25/01 and responded with Time sheets and 1099 on 10/29/01.

"Enclosed is a document showing date unemployment was filed.

"Rubin Honeycutt"

A State of Oregon Employment Department Notice of Claim Determination (Potential Charges) ("Notice of Claim") accompanied Respondent's letter. The Notice of Claim states that Claimant filed for unemployment benefits on February 12, 2001, and her "last work day" was May 29, 2001. The ALJ received both documents as substantive evidence.

11) On July 23, 2003, Agency case presenter, Jeffrey Burgess, moved for an order extending the time to file a response to the interim orders issued on July 11 and 14, 2003. As grounds

for the extension, Burgess stated that:

> "1. Agency Case Presenter Peter McSwain is in need of additional time to gather the information sought by the Forum.
>
> "2. The undersigned was unable to reach Respondent to determine whether he had any objection to the extension requested herein.
>
> "3. An extension of two weeks, through and including August 6, 2003 should be sufficient to enable Mr. McSwain to complete and file the Response.
>
> "4. The requested extension should not significantly prejudice any party and is reasonable and appropriate under the circumstances. The interests of justice require that the extension be granted."

12) On July 24, 2003, the ALJ advised Respondent that he had until July 30, 2003, to file a written response to the Agency's motion. The Hearings Unit did not receive a response from Respondent.

13) On July 31, 2003, the Agency notified the Hearings Unit of Claimant's current mailing address and filed its Response to ALJ. The Agency's response stated in pertinent part:

> "To the extent the agency objects to or wishes to elaborate upon the reply by Respondent, the agency's RESPONSES are set forth in italics below.
>
> "1. * * * *The agency disagrees with Respondent's recollection on this subject. By 03/01, Respondent may have provided access to a computer in his home or office since Claimant was doing his taxes about that time. However, the purpose for which Claimant was allowed to take home the computer in question was so that Claimant could set about trying to sell Respondent's inventory on e-Bay. The computer was provided near the commencement of employment on or about July 12,200* [*sic*]. *This plan never was abandoned during Claimant's employ, though it never got under way. The reason Claimant continued to retain the computer after she left the employ of Respondent was that, believing earnestly that Respondent owed her considerable back pay, she felt that her chance of ever recovering was more secure if she held the computer as collateral. She checked with two computer stores during the period of controversy and learned that the fair market value of the computer and peripherals was $350. In Claimant's understanding, the small claims court ordered her to give back the computer and that Respondent await further resolution in this forum because the Claimant told the judge she did not claim to own the computer but was holding it for collateral. Claimant's best recollection is that, upon learn-*

ing Claimant had a prior claim for the same wages she was asking as a counterclaim, the judge in small claims dismissed the case in favor of its being resolved before the agency.

"2. * * * *The Agency agrees with Respondent. The* [small claims action] *was filed in Josephine County. It was number 0113101SC. Claimant was served with the complaint on 8-16-01. The Court date was 3-19-02. The matter was dismissed on 4-01-02.*

"3. * * * *The Agency agrees with Respondent* [as to the month and year Claimant returned the computer to Respondent].

"4. * * * [Claimant's child] *was born on 12/30/00*.

"5. * * * *It appears from the file that Respondent signed for receipt of a letter from Claimant on November 13, 200* [sic], *though the letter was apparently mailed on November 02, 2000 at a cost of $5.85. See attachment A hereto (2 pages).*

"6. * * * *The Agency relies on Agency Exhibits 3 and 4. Exhibit 3 is a (second) Notice of Claim sent to Respondent's 1800 Rogue River Highway address on October 25, 2001. It tells Respondent: 'IF YOU DISPUTE THE CLAIM, complete the enclosed Employer Response form and return it <u>together with the documentation which supports your position</u> . . . .' (Emphasis supplied). In its line twelve, at page 3A, the Response form calls for copies of time cards and other records to substantiate Respondent's dispute of the amount of the hourly claim. Both these documents, then, included requests for payroll information pertaining to Claimant Evans. The enclosed form was completed and submitted. Again, the Employer Documentation Check List calls for Time Cards and other Time records. It was introduced in evidence as Agency Exhibit 4. The Response Form and Check List were accompanied by pages 6 through 24 of Agency Exhibit 4, pages also included in Respondent's own exhibits. These purport to be the time cards and records for which the agency made demand through Agency Exhibit 3. All of the above documents came into evidence with no objection to their authenticity and all were presented with the Agency Case Summary well before hearing.*

"*As to these issues, the Agency's position rests solely on these documents having constituted a demand for pay records and Respondent's response having been insufficient under the law because, in the Agency view, the documents were known to be false, not reflective of actual hours worked.*

"*The Case Presenter understands that Compliance*

specialist Leslie Laing is out of the office until August 3, having left for Vacation July 21. Interviewed, Office Specialist Jana Gunn confirms that, though she has no independent recollection in particular, the Notice of Claim (WH-3), Wage Claim Investigation/Employer Response (WH-R), and its accompanying Employer Documentation Checklist (WH-3D) were all routinely used to give Notice of Claim and demand records of any Respondent disputing the amount of wage. If the above recitals are insufficient for the Administrative Law Judge to complete the record, the Agency requests opportunity to either submit an affidavit accordingly from the Compliance specialist or call her as a telephone witness.

"7. * * * *It appears from the attachment to Respondent's Response that Claimant applied for unemployment benefits on 02-12-01.*"

The Agency's response did not include an affidavit from Claimant attesting to any of the facts set forth by Agency Case Presenter McSwain. The response included a two page document, marked "Attachment A." The first page is a copy of a certified mail "Domestic Return Receipt" showing an "article" was addressed to: "Rubin Honeycutt, 1800 Rogue River Hwy, Grants Pass, Or 97524." The section that reads, "Complete this Section on Delivery" is blank. There is no "Date of Delivery" or "Signature" establishing receipt of the article. The second page is a copy of what apparently is the outside of a "Priority Mail" envelope addressed to "Rubin Honeycutt" with a "Certified Mail" sticker attached. The envelope was postmarked from Grants Pass, Oregon, on November 2, 2000. In the upper left hand corner, covering the sender's address is what appears to be a sticker dated "11/24/00" that says, "Notify Sender of New Address" and shows the following: "Pitcock' Garilynn, 734 Tami Rd., Grants Pass, OR 97526-5897." Each of the pages has a Bureau of Labor and Industries Medford Office date stamp showing a receipt date of October 5, 2001.

14) The evidentiary record closed on August 1, 2003.

15) The ALJ issued a proposed order on October 22, 2003 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

RULING ON AGENCY'S MOTION FOR EXTENSION OF TIME

On July 23, 2003, the Agency moved for additional time, until August 6, 2003, to file its response to the ALJ's Interim Order issued on July 11, 2003. OAR 839-050-0050(3) provides that an extension of time may be granted "where no other participant opposes the request." Respondent had the opportunity to object to the Agency's motion and did not do so within the time allowed.

Therefore, the Agency's motion is granted and the forum includes the Agency's Response to ALJ, dated July 31, 2003, in the evidentiary record.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Rubin Honeycutt operated a used car lot under the assumed business name of Mr. Ideal's in Grants Pass, Oregon.

2) Respondent hired Claimant sometime in June 2000 as an "office manager." Claimant's first work day was on or about June 26, 2000. The car lot opened at 9 a.m. and closed at 5 p.m. each day.

3) Claimant's duties included answering telephones, helping customers, and performing general clerical work.

4) Respondent told Claimant he would pay her $100 per week for approximately 15 hours per week, computed at the minimum wage rate of $6.50 per hour. Respondent did not care which or how many hours she worked each day as long as they totaled around 15 at the end of the work week.

5) Respondent required Claimant to keep a daily record of the hours she worked. He told Claimant he had not previously maintained necessary records showing his employees' work hours and had experienced some wage claims as a result. At Respondent's request, Claimant filled out, by hand, daily time sheets entitled "MR. IDEALS Daily Time Sheet" on which she was required to record the number of hours she worked each day and the total number of hours for each week ending on Friday. She filled out her time sheets every Friday, which was also payday. After she was paid and before she turned in her time sheet, she hand wrote "paid," along with her initials on the time sheet. Claimant recorded 35 hours between June 26 and July 12, 2000, on Respondent's daily time sheets and was paid in full for those hours.

6) Claimant worked for Respondent in 2001 after her child's birth in December 2000 and hand wrote her hours on the same or similar daily time sheets she used from June to October 2000. Respondent maintained copies of all of Claimant's time sheets, which show she worked for Respondent 11 hours in March, 32 hours in April, and 10.5 hours in May 2001. Respondent paid Claimant the minimum wage for those hours and she makes no claim for wages for the hours she worked March-May 2001.

7) The daily time sheets show 15 hours total per week for most weeks during the wage claim period between July and October 1999. The daily entries on the last 9 out of 10 weeks of time sheets add up to less than the 15 total per week listed at the bottom. For instance, on the time sheet dated "8/23 [to] 8/30," the entries for Monday through Thursday show the "time in" and "time out" as "9:00 [to] 11:00" and the entry for Friday shows "9:00 [to] 1:00,"

which totals 12 hours for the week. The daily entries for the nine weeks preceding Claimant's last week of work total from 10 to 13 hours per week, while the weekly totals show 15 hours. Claimant's daily entries for the final week ending October 27, 2000, add up to six hours, the same number that appears at the bottom of the time sheet for the "total per week."

8) Between July 12 and October 27, 2000, Respondent paid Claimant $100 per week, "sometimes more," regardless of the daily entry total, for 16 weeks. On at least one occasion, Respondent paid Claimant an additional $50.00 for repossessing a car for Respondent. With Respondent's permission, Claimant used his credit card to purchase baby clothes and to pay her cable bill while she was in his employ.

9) Claimant recorded 206 hours of work on her daily time sheets between July 12 and October 27, 2000. At the minimum wage rate of $6.50 per hour, Claimant earned $1,339 for the hours she recorded during that time period (206 hours x $6.50 per hour).

10) Between July 12 and October 27, 2000, Respondent paid Claimant gross wages totaling $1,600.

11) On a computer in her home, Claimant prepared time tables entitled "WEEKLY TIME SHEET [of] GARILYNN PITCOCK" that included "Time In" and "Time Out" each day and the total number of hours worked, daily and weekly. The computer printout indicates Claimant worked 8 hour work days, including four Saturdays, from 9 a.m. until 5 p.m. Claimant signed and wrote a date on each time table. Two of the time tables are identical except each has different dates handwritten on them and Claimant's signature is written slightly different on each. Both are for the period beginning August 2 through August 8, 2000 and show a 48 hour work week. Claimant signed both and wrote "August 9, 2000" on one and wrote what appears to be "August 10, 2000" on the other. Claimant also signed and wrote what appears to be "August 10, 2000" on the time table for the period beginning August 9 through August 15, 2000. The time tables show a total of 651 hours worked, from July 12 through October 27, 2000, including 32 overtime hours.

12) In or around March 2001, Respondent provided Claimant with a computer for home use which enabled her to remain home with her newborn while performing work for Respondent, including doing "e-bay" sales, helping him with "his income tax stuff and to get the 1099's out to his employees," and DMV registrations. Claimant did not have a computer in her home until Respondent provided her with one to use for his business. Some of the income tax work she performed for Respondent in 2001 was performed in his home.

13) After she left her employment in May 2001, Claimant

refused to return the computer to Respondent. In August 2001, Respondent filed a court action against Claimant seeking the return of his computer.

14) Claimant filed a wage claim in September 2001 and claimed Respondent owed her wages from July 12 through October 27, 2000. On her wage claim form she stated her first and last day of work was July 12 and October 27, 2000. She also stated that she worked 664 hours, was paid $1,600, and was still owed wages of $2,700. Additionally, she stated Respondent owed her $2,625 as a 25 percent commission on two cars she sold for him.

15) On October 25, 2001, the Agency notified Respondent of Claimant's wage claim and advised him to either pay the wages claimed or complete an "Employer Response" form stating his position and including any documentation in support of his position within 10 days of the "Notice of Wage Claim."

16) On October 29, 2001, Respondent sent the Agency: a completed employer response form; a Department of Treasury Form 1099 (2000) for "GARILYNN PITCOCK" showing "nonemployee compensation" totaling $1,908; and Claimant's handwritten daily time records. In his response, Respondent stated Claimant still had some of his property which included a "computer, printer, monitor, keyboard, [and] mouse." As a reason why he believed "the claimant wages are not owed," he stated: "She was paid each week. This is probably a result of our small claims suit against her." Claimant returned Respondent's computer by court order sometime in March 2002. The Agency also issued an Order of Determination against Respondent in March 2002.

17) Eric Grosz's testimony regarding his "impression" of Claimant's work schedule and his knowledge of the pay she received for the hours she worked was not reliable. Grosz acknowledged he performed minor repair work for Respondent on an "as needed" basis, sometimes working as few as two hours on a car and always outside the car lot office. The forum finds Grosz's opportunity to observe Claimant's actual work hours was limited. Additionally, his testimony about several discussions he had with Claimant *during her employment* regarding the "partial" wages Respondent paid her was inconsistent with an earlier statement he made to the Agency compliance specialist that, "[Grosz] didn't know about [Claimant's] wages until he saw her at the bank one day after her employment ended." The forum gave little, if any, weight to Grosz's testimony.

18) Candy Rosenberg's testimony pertaining to Claimant's work schedule and pay was not reliable. She was present at Respondent's car lot "off and on, as needed" as a contract "computer consultant" and had limited opportunity to observe Claimant's actual work hours. Her testimony that

she sometimes saw Claimant at the car lot in the morning and sometimes in the afternoon was a diluted version of her prior statement to the Agency compliance specialist who recorded that Rosenberg stated Claimant was "usually there 8-5 M-F and some Saturdays." The compliance specialist reported that Rosenberg also stated "[Claimant] frequently opened [the] lot, or *went back to lock up [when] Rubin called her*," which is not congruent with the first reported statement that Claimant was at the car lot from "8-5 M-F." Additionally, Rosenberg testified that Claimant, while in Respondent's employ, complained to her several times about not being paid for all hours worked and Rosenberg then advised her to keep a record of the hours she worked. However, in a prior statement to the Agency compliance specialist, summarized in a "Contact Report," Rosenberg said she talked with Claimant "vaguely about her *wage claim*." The report does not mention Claimant's complaints to Rosenberg or Rosenberg's purported advice to Claimant about keeping a record of her work hours. The forum infers from the reported statement that Rosenberg recalled a single discussion with Claimant, though "vague," about Claimant's wage claim. Notably, the wage claim was filed almost one year after Claimant first left her employment in October 2000. Rosenberg's apparently enhanced recall at hearing of discussions during Claimant's employment about Claimant's complaints pertaining to her pay is unconvincing and the forum gave little weight, if any, to her testimony.

19) Claimant's testimony was not credible. It was internally inconsistent, self serving, and contradicted earlier statements she made to the Agency. Moreover, her demeanor toward Respondent during the hearing, which ranged from inert hostility to mocking his statements under the auspices of jest, further negated her testimony's trustworthiness. When she filed her wage claim, she represented that she was employed by Respondent between July 12 and October 27, 2000.[1] She presented the Agency with a computer printout of her time records (17 pages) and claimed she was owed for all of the hours shown, less $1,600 Respondent paid to her during that period. She claimed she was owed not only $2,700 in wages, but also $2,635 in commission sales, a claim she later abandoned. At hearing, she testified that she filed a wage claim in November 2000, whereas documentary evidence presented at hearing showed that Claimant filed her wage claim and supporting documents with the Agency by facsimile transmission on September 17, 2001. There is no evidence that she faxed any time

[1] On the wage claim form, she claimed that her "first workday" was "7/12/00" and her "last workday" was "10/27/00."

sheets other than the computer time tables to the Agency.

During the subsequent wage claim investigation and at hearing, Respondent produced handwritten time sheets Claimant prepared each week during her employment showing that her first day of work was June 26, 2000, and that she performed work for Respondent during March, April, and May 2001, facts Claimant does not dispute. Contrary to her adamant assertion at hearing that she was "forced" to carefully manipulate her recorded "time in" and "time out" to end up with a 15 hour total at the end of the workweek, the records show that the specific hours she recorded each week more often than not add up to 13 hours or less, yet she always recorded and was paid for 15 hours at the end of each week. Claimant's inflation of her work hours undermined her ability to convince this forum that the computer version of her time records is the more accurate representation of the hours she actually worked. Overall, her testimony and demeanor were at odds with the facts in evidence and the forum has credited her testimony only where it is corroborated by credible evidence or is a statement against interest.

20) Respondent's brief testimony was more believable than Claimant's. Despite his obvious bias, Respondent's adamant claim that he paid Claimant for all of the hours she worked during her employment not only had the ring of truth, but was bolstered by Claimant's testimony. She agreed that he required her to keep time records because of previous wage claims he experienced. She acknowledged that she prepared the records written in her own hand and agreed that she had been paid in full for work she performed two weeks prior to the date she alleged was her "first workday" and for the three month period she worked for him in 2001. Respondent's testimony was not impeached in any way and the forum has credited it in its entirety.

ULTIMATE FINDINGS OF FACT

1) Respondent at all times material herein conducted a business in Oregon and employed one or more persons in the operation of that business.

2) Respondent employed Claimant between June 26, 2000, and May 27, 2001.

3) Respondent and Claimant agreed Claimant would be paid $6.50 per hour for approximately 15 hours per week.

4) At all times material herein, the state minimum wage was $6.50 per hour.

5) Respondent paid Claimant $1,600 for hours Claimant worked between July 12 and October 27, 2000.

6) Claimant worked 206 hours between July 12 and October 27, 2000.

7) Respondent paid Claimant all wages earned.

8) Respondent kept and maintained payroll records showing the

number of hours Claimant worked for Respondent.

9) Respondent provided those records to the Agency upon its request in October 2001.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 653.010(3)&(4) 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) Claimant was paid wages totaling $1,600 during her employment with Respondent, computed at the applicable minimum wage rate in accordance with ORS 653.025(3). There were no wages due Claimant at the time she ceased employment with Respondent. ORS 652.140(2).

4) Respondent maintained and preserved required payroll records pertaining to Claimant's actual hours worked and made them available to the Agency upon its request in compliance with ORS 653.045(2).

5) 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, the Agency's Order of Determination, and the Agency's Notice of Intent to Assess Civil Penalties filed against Respondent.

OPINION

CLAIMANT'S WAGE CLAIM

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 she 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).

There is no dispute that Respondent employed Claimant during the wage claim period or that Claimant was entitled to no more than minimum wage for the hours she worked. The only issues are whether Claimant worked hours for which she was not properly compensated and, if so, the amount and extent of those hours. Claimant bears the burden of proving she performed work for which she was not properly compensated. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 56 (1999).

ORS 653.045 requires an employer to maintain payroll records. Here, there is no dispute that Respondent required Claimant to record her daily hours and weekly totals on time sheets he provided for that purpose. Moreover, Respondent and Claimant agree that he required the time sheets because he failed to keep time records for previous employees

and incurred wage claims as a result. Respondent produced those records during the wage claim investigation at the Agency's request and it is Claimant's threshold burden to establish that the records are "inaccurate or inadequate." *See In the Matter of Graciela Vargas*, 16 BOLI 246 (1999), *citing Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

Claimant maintains she was forced to sign and submit "falsified" time sheets each week for almost four months in order to receive the $100 per week Respondent promised her. She further maintains she kept a separate contemporaneous record of her actual hours on a computer in her home that shows her work hours exceeded by two thirds those she recorded on the daily time sheets Respondent required her to fill out and sign each week. The forum finds her assertions unbelievable.

First, there is no credible independent corroboration for the hours she claims on the computer time records, which appear to have been generated en masse. Witnesses who testified on Claimant's behalf lacked actual knowledge of her work hours and gave inconsistent and unreliable testimony. Curiously, Claimant did not maintain computer records or claim Respondent owed wages for the two-week period she worked prior to her purported "first workday" in July 2000 or for the three-month period she worked in 2001 for Respondent. However, Claimant's hand written time sheets for those periods show similar work hours to those recorded on the ones dated July 12 to October 27, 2000, including several randomly recorded "days off." In contrast, the computer generated time records show a steady pattern of eight-hour workdays, including a few Saturdays, with no recorded days off.

Second, Claimant's contention that she falsified the handwritten time sheets because she needed the job and was afraid no one else would hire her because of her pregnancy flies in the face of her claim that she quit her job on October 27, 2000, because Respondent was not paying her properly. Moreover, evidence shows that after she gave birth in December 2000, she returned to Respondent's employ in March 2001 and worked three additional months, despite his alleged failure to pay a purported two thirds of her earnings for four months the previous year. Ultimately, she waited until September 2001, to file her wage claim, which was after Respondent filed suit for the return of his computer. None of those facts are consistent with someone who is desperate for money and must falsify time sheets to receive a mere $100 per week for purported 40 hour work weeks.

Finally, her claim that she prepared the computer generated time records weekly between July and October 2000 is contradicted by her testimony that she did not have a computer of her own in her

home during her employment with Respondent, and that he provided her with a computer "when she had the baby" so she could perform work for him at home. Claimant gave birth in December 2000 and undisputed evidence shows Claimant performed work for Respondent in March, April, and May 2001. Respondent's contention that he gave her a computer to use in her home in about March 2001 is consistent with those facts and is more believable than Claimant's self-serving attempt to place the computer in her home during the time she claims she prepared a separate set of time records. Evidence shows Claimant still had Respondent's computer on September 17, 2001, when she filed her wage claim and submitted the computer time records to the Agency. Consequently, the forum finds that Claimant generated the computer time records well after she quit her employment with Respondent in May 2001.

CONCLUSION

Evidence shows Respondent agreed to pay Claimant minimum wage for no more than 15 hours per week; that he required her to record her hours and affirm each week that she was paid in full; and that during Claimant's employment which began in June 2000 and ended in May 2001, she consistently prepared weekly time sheets that showed she was paid minimum wage or more for 15 hours or less per week. Claimant filed her wage claim in September 2001, almost a year after she claims she was not properly compensated by Respondent, and only after Respondent filed a legal action against her. At that time she provided the Agency with time records that could not have been prepared between July and October 2000. Respondent, on the other hand, produced time sheets that Claimant admits were maintained contemporaneously at Respondent's direction. The preponderance of evidence supports Respondent's theory that Claimant filed her wage claim in response to the legal proceeding he initiated to recover his computer. Claimant failed to prove Respondent's records were inaccurate or inadequate and the forum concludes that Claimant was properly compensated for all of the hours she performed work for Respondent.

RESPONDENT'S RECORD KEEPING

A. Failure to Maintain and Preserve Payroll or Other Records

Other than its general allegation that Respondent violated ORS 653.045(1) and OAR 839-020-0080, the Agency presented no evidence and made no argument from which the forum can conclude that Respondent generally failed to make, maintain, and preserve required payroll or other records containing information and data with respect to Claimant.

B. Failure to Make Records Required to be Preserved and Maintained Available for Inspection by the Commissioner

The Agency specifically alleged that on October 29, 2001, it requested "production of such records or other items to support Respondent's resistance to [Claimant's] wage claim" and that "Respondent made documents available but they were falsified records." There is no dispute that the Agency requested specific documents from Respondent on the date alleged and that Respondent produced the requested records. The only issue is whether Respondent knowingly produced falsified records. As previously discussed, there is no reliable evidence that Claimant worked more hours than she recorded on the handwritten time sheets she submitted each week to Respondent. Instead, evidence shows Respondent had a particular incentive to maintain and preserve accurate time records and that he did so by requiring Claimant to fill out and sign weekly time sheets showing her time in and out each day and her total hours for the week. Despite the length of time that passed before Claimant filed her wage claim, Respondent produced Claimant's records in response to the Agency's request. Claimant, who may have presumed the records were long gone by that time, was forced to explain the extraordinary discrepancy between the hours she recorded on her handwritten time sheets and those she provided to the Agency via computer printouts. The forum finds her explanation of the discrepancy both disingenuous and peculiar, in that by believing her explanation the forum must also believe she intentionally created false time records. It is axiomatic that her admission to falsifying time records makes her explanation of the discrepancy unbelievable. The forum declines to give credence to Claimant's characterization of her handwritten time records and finds that Respondent kept proper records in conformity with his statutory duty and made them available to the Agency as required.

ORDER

NOW, THEREFORE, as Respondent has been found not to owe Claimant wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 01-4311 against Rubin Honeycutt be and is hereby dismissed.

FURTHERMORE, as Respondent has been found not to have violated ORS chapter 653 provisions governing the making and preserving of required payroll records, the Commissioner of the Bureau of Labor and Industries hereby orders that the Notice of Intent issued on April 18, 2003, against Rubin Honeycutt be and is hereby dismissed.

In the Matter of

BARBARA BRIDGES and Audio Unlimited, LLC

Case No. 18-02

Final Order of Commissioner Dan Gardner

Issued December 17, 2003

SYNOPSIS

Where the Agency failed to establish by a preponderance of evidence that Complainant, a male, had been subjected to an offensive and hostile work environment, had his pay and hours reduced because he complained of sexual harassment, or was constructively discharged because he opposed Respondent Bridges's alleged unlawful employment practices, the Commissioner dismissed the complaint and specific charges. *Former* ORS 659.030(1)(a), (b), & (f); *former* OAR 839-007-0550(1)&(3).

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 December 17, 2002, in the Oregon Employment Department Seven Peaks Conference Room located at 1007 SW Emkay Drive, Bend, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Troy Fraley ("Complainant") was present throughout the hearing and was not represented by counsel. Anthony Albertazzi, Attorney at Law, represented Barbara Bridges and Audio Unlimited LLC ("Respondents"). Respondent Barbara Bridges was present for part of the hearing.

In addition to Complainant, the Agency called as witnesses: Jennifer Fraley, Complainant's wife; James Polley, Respondent Bridges's former employee and Complainant's brother-in-law; and Robert A. Smith, Complainant's friend.

In addition to Respondent Barbara Bridges, Respondents called as witnesses: Jamie Lewis, Respondent Bridges's former employee, and John Wilson, formerly known as John Casey, Bridges's former husband.[1]

The forum received as evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to hearing);

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[1] While married to Bridges, John Wilson used the name "John Casey." To avoid confusion, Wilson is referred to by the name he was using at all times material herein - John Casey.

b) Agency exhibits A-1 through A-13 and A-20 (submitted prior to 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 1, 2000, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging he was the victim of the unlawful employment practices of Respondent Bridges. On January 31, 2001, Complainant filed an amended complaint adding an additional respondent, Audio Unlimited LLC. On February 27, 2001, Complainant filed a second amended complaint alleging that Respondent Bridges aided and abetted Respondent Audio Unlimited LLC's harassment of Complainant. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations of the complaint.

2) On May 9, 2002, the Agency submitted to the forum Specific Charges alleging Respondents discriminated against Complainant by subjecting him to a course of conduct by Respondent Bridges designed to harass, embarrass, humiliate and intimidate him, which conduct was offensive and unwelcome, creating a hostile and intimidating work environment because he was male, in violation of *former* ORS 659.030(1)(b). The Agency further alleged that Complainant's pay and work hours were significantly reduced in violation of *former* ORS 659.030(f) because he objected to the offensive and unwelcome conduct and that he was compelled to quit his employment due to the intolerable working conditions created by Respondent Bridges, in violation of *former* ORS 659.030(1)(a). The Agency also requested a hearing.

3) On May 14, 2002, the forum served on Respondents the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth December 17, 2002, 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 28, 2002, Respondents, through counsel, timely filed an answer to the Specific Charges and alleged certain affirmative defenses.

5) On October 3, 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); a brief statement of any defenses to the claim (for Respondents 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 December 6, 2002, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On November 7, 2002, Respondents filed their case summary.

7) On December 6, 2002, the Agency timely filed a request for an extension of time to file its case summary. On the same date, the forum granted the Agency's request and extended the time for filing a case summary, or in Respondents' case, a supplemental, to December 12, 2002.

8) At the start of hearing, the Agency and Respondents stipulated to the following facts:

a) Respondent Bridges conducted her principal business in Oregon from June 1999 through December 12, 1999, under the assumed business name of Audio Unlimited and employed one or more persons in Oregon;

b) Complainant filed a verified complaint with the Civil Rights Division on March 1, 2000, alleging he was the victim of unlawful employment practices by Respondent Bridges. On or about January 31, 2001, the complaint was amended to include Audio Unlimited LLC as a respondent and amended again on February 27, 2001, to add Respondent Bridges as a co-respondent for aiding and abetting the unlawful practices;

c) On March 1, 2001, the Civil Rights Division found substantial evidence of unlawful employment practices on the part of both Respondents relating to the original verified complaint;

d) Respondent Bridges, as the sole organizer, registered with the Corporations Division as Audio Unlimited LLC, a domestic limited liability company, which company has since been the successor to Respondent Bridges's sole proprietorship operating under the assumed business name of Audio Unlimited; and

e) Complainant began working for Respondent Bridges prior to the opening of her retail business in Bend, Oregon, in June 1999.

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

10) The ALJ issued a proposed order on November 17, 2003, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. At the Agency's request, the ALJ extended the deadline for filing exceptions until December 17,

2003. Neither the Agency nor Respondents filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Bridges owned and operated a retail business that included the sale and installation of automobile accessories and sound equipment under the assumed business name of Audio Unlimited. In March 2001, Bridges registered her business with the Oregon Corporation Division as a Limited Liability Company ("LLC"), indicating that a single manager managed the company. After she formed the LLC, Bridges continued the same business in the same location using the same employees. In June 2001, Bridges liquidated the LLC because the business was not profitable and the company had continued to lose money.

2) Bridges's business was located in a converted warehouse in Bend, Oregon. For several weeks before the business opened, Complainant, his brother-in-law, James Polley, and Paul Smith helped Bridges and her husband, John Casey, remodel the warehouse. Complainant helped build the "sound room" to display "high end products" and painted the concrete floors. He worked an average of 10 to 11 hours per day, six or seven days per week. Bridges provided lunch for everyone each day. Complainant was not on Bridges's payroll during that time and he did not record the hours he worked. Complainant was enthusiastic about helping Bridges start up the business because he had a long time "dream" to manage a "car stereo shop."

3) When Bridges opened for business on or about June 1, 1999, she hired Complainant, a male, as "install bay manager." His duties included overseeing the day to day operation of the "install bay" and ordering product. In June or July 1999, Complainant hired his brother-in-law, James Polley, to work full time as an installer and salesperson. The store opened at 10 a.m. each day and closed at 7 p.m.

4) Bridges and Complainant agreed he would receive $1,500 per month in salary, plus a 50% commission based on the store's gross installations. When he began his employment, Complainant borrowed between $2,000 and $6,000 from Bridges to buy a car and make a house trailer payment. Complainant's wife cleaned the store after hours to pay off some of the debt owed to Bridges and Complainant agreed to work off the remainder. Bridges's "payroll register," which begins in June 1999, shows that checks were issued to Complainant every two weeks in the following amounts during the months that he was on salary: $1,043.98 on July 16; $1,175.13 on July 30; $860.33 on August 13; $805.64 on August 27; $983.23 on September 10; and $767.04 on September 24.

5) Business was slow at the beginning, but picked up after the store's "Grand Opening" in early July 1999 and after Bridges began an advertising campaign at Com-

plainant's suggestion. Since 1994, and before Bridges employed him, Complainant had worked for a local radio station as an "on air personality." Complainant used his contacts in the radio industry to obtain radio advertising for the business. Complainant prepared and produced the advertising with Bridges's endorsement. In exchange for the first month's advertising, Complainant installed mobile broadcast units in three vans belonging to local radio stations.

6) Complainant's experience with car audio equipment included working on cars as a teenager and working at Sounds on Wheels, an automobile sound accessory business, for about one and one half years.

7) During his employment, Complainant drove Bridges's truck "a time or two" and installed some of the store inventory in his own vehicle to promote the store's products.

8) Bridges maintained an informal work atmosphere. After the doors opened in June 1999, morale was "incredible" and "everyone was clicking" and focused "on the goal." Complainant thought Bridges was a "nice lady" and he and other employees often referred to her as "mom." Complainant thought the workplace at that time was "fun and friendly."

9) On or about July 4, 1999, Bridges touched Complainant's hair and told him she wished her husband would let his hair grow long because she thought it was "sexy." Sometime during his employment, Complainant told Bridges that he liked the way her feet looked in sandals and that her "little feet were sexy."

10) Sometime prior to July 4, 1999, Bridges approached Complainant as he was bent over installing an alarm in her truck and stated that she would "recognize that butt anywhere."

11) Polley described Bridges as a "touchy feely" employer who expressed her feelings verbally and by "touching" or "patting" her employees. Polley also heard Bridges make a remark about Complainant's "rear" and overheard Bridges comment on the "rears" of other male employees. One day, instead of his usual baggy shorts, Polley wore a pair of snug fitting shorts and Bridges remarked that she liked the shorts because she could see his "ass." That was the only comment she made to Polley of that nature and he "let it roll off [his] back." He didn't "think anything" of the comments she made to anyone else.

12) Sometime after June 28, 1999, Bridges's general manager, Paul Smith, quit working for Bridges. Around October or November 1999, Bridges hired Jamie Lewis as general manager. Bridges had heard "good reports of his ability" and decided to give him an opportunity to "turn the store around." She told him that he could hire whomever he needed, including a "good installer." Lewis hired at least two

people after he became general manager.

13) From June through December 1999, Bridges's husband, Casey, was the store's fabrication manager. He constructed and sold stereo speaker "enclosures," handled shipping and receiving, and helped run the sales floor. Before Lewis was hired as general manager, Casey was the "jack of all trades" around the store. When Lewis began "phasing in" in November, Casey began "phasing out" and participating less in the store's day to day operation. Eventually, Casey went to work as a manager for a former employer. Casey regularly observed Bridges and Complainant together and never saw them interacting in a sexually inappropriate manner. Complainant never complained to Casey about Bridges's conduct and never told Casey to "keep an eye on [his] wife." Casey never observed Bridges making physical contact with any of the employees and none of them ever complained to him about Bridges's conduct in the workplace.

14) The employees listed on Bridges's payroll register are all males. Paul Smith does not appear on the payroll after June 28, 1999. Jamie Lewis's name appears on the payroll for the first time on November 5, 1999. John Casey appears on the payroll from July through December 1999. James Polley appears on the payroll from July until October 8, 1999. David Haxton appears on the payroll from July until September 10, 1999.

15) Sometime prior to September 30, 1999, Complainant, with Bridges's consent, began working part time as a deejay for his previous employer. He worked for the radio station "on air" from 2 p.m. until 6 p.m. At first, Bridges had no problem with Complainant working a second job, but later she began to perceive that Complainant was not working many hours at the store and she discussed her concerns with him on several occasions. Complainant believed that other employees, particularly David Haxton, a salesperson who had a key to the store, could handle the store when Complainant was not there and that he could come in after his "air shift" and "tie up any loose ends."

16) In or around early October 1999, Bridges's husband, Casey, arrived at work with two "envelopes." He gave one to Complainant that contained a note dated September 30, 1999, that stated:

> "To: Troy Fraley
>
> "Dated: 9-30-99
>
> "This is a letter to inform you that effective admittedly [*sic*] that you will be an hourly employee at the rate of TEN DOLLARS per hour. And as of this time you will be required to fill out a time card.
>
> "Signed
>
> "Bobbee Bridges
>
> "Owner LLC"

The other contained a lay-off letter, which he gave to Polley. Despite Bridges's signature at the bottom of the lay-off letter, Polley believed Casey had written it because it contained spelling errors and Bridges was in the hospital at the time. However, he believed she may have signed it. Polley doubted that lack of work was the real reason for his lay-off, because business was good at that time. He perceived that Casey had another motive to let him go and that it was related to Casey's concerns about his own job security.

17) After he became an hourly employee, Complainant continued to prepare and produce radio advertisements for Bridges while continuing to work part time for Bridges and the radio station. Bridges paid Complainant around $600, in addition to his hourly wage, for the radio advertisements.

18) After Complainant became an hourly employee, Bridges's payroll register shows Complainant was issued checks every two weeks totaling $1,466.23 in October 1999, $909.43 in November, and $255.59 in December 1999.

19) Complainant's employment ended on or about December 12, 1999. Immediately thereafter, he began working for the radio station full time. At the radio station he earned a base salary of $1,600 per month, plus separate payments for remote broadcasts. At most, he earned between $2,600 and $2,800 per month at the radio station.

20) On several key points, Complainant's testimony was evasive, internally inconsistent, and contrary to prior statements he made to the Agency during its investigation.

DURATION OF SEXUAL HARASSMENT

Complainant first testified that Bridges sexually harassed him from the beginning of his employment until the day he left on December 12, 1999, despite his purported direct request to her two months prior that she stop the harassment immediately. He later testified that the work atmosphere was "fabulous, fun and friendly" during the first month of his employment and that it was July or August before Bridges began to make sexual overtures toward him and that after he objected to her conduct on September 29, 1999, she quit talking to him and avoided him completely until he left his employment over two months later. His later testimony also contradicted a document he filed previously with the Agency describing the "harm or employment action" about which he filed his complaint, in which he stated: "From almost my first day of employment on the first of June, Mrs. Bridges, the owner of Audio Unlimited, began speaking very sexual remarks to me and even became physical in the way of running her fingers through my hair and saying 'I wish John would grow his hair long (John Casey is her husband), it's just so sexy.'"

Based on those inconsistencies, the forum cannot determine when the alleged harassment began or when it ended. Moreover, the inconsistencies weaken Complainant's allegations that the harassment actually occurred.

WAGE AGREEMENT

Complainant's testimony that Bridges agreed to pay him $3,000 per month in salary, plus a commission on "whatever the install bay took in," conflicts with his prior statement to the Agency that he and Bridges agreed to a salary of $1,500 per month, plus commission. The forum accepts as fact that Complainant and Bridges agreed to the latter because Complainant's original statement to the Agency is consistent with Bridges's testimony and documentary evidence showing amounts Bridges paid to Complainant while he was employed. On a related issue, Complainant testified that when he started his employment, he borrowed $2,000 from Bridges as an advance on his "would be" payroll. However, in an earlier statement to the Agency he said Bridges loaned him $6,000 with the understanding that he would "pay it back in work on her vehicle as a demo" after he told her when she hired him that he "needed a loan to catch up." Complainant's self-serving testimony at hearing about his pay and the loans he received casts further doubt on his credibility.

TERMINATION OF EMPLOYMENT

Finally, Complainant's markedly diverse statements regarding the circumstances under which he left his employment cannot be resolved. He first testified that on December 13, 1999, he was returning to work at the store after finishing his radio station job when he was involved in an automobile accident around 6 or 6:30 p.m. He described the nature of the accident and his physical condition in great detail and later stated that because there were no injuries he proceeded to work only to find that he was "locked out." He stated that Lewis and Casey met him at the door with a message from Bridges that his services were no longer required and he was no longer employed. Complainant stated he was "obviously upset" after his dismissal because he believed he was one of "the major factors" in starting the business. He asserted that neither Bridges nor Casey had any prior experience in the business and he felt they "used" him to get the business started and then "discarded" him when he was no longer needed. On cross-examination he acknowledged a written statement he supplied to the Agency that represented he had "resigned" his employment. During redirect, in an attempt to reconcile his conflicting statements, Complainant provided the following narrative:

> "I was issued a check from Miss Bridges for the radio ads that I had produced to supplement the change. As I told her when I received that letter that I was an hourly employee that I would be charging her then for, uh, I actually spoke with Jamie Lewis first, and he recom-

> mended I speak to Miss Bridges about that pay plan in that she would be charged for the ads. She agreed and said that would be fine. And I said, well, I have two ads and I submitted a bill to her for those. She wrote me a check and I immediately took it to the bank, deposited it or tried to deposit it, and the check was cancelled, there was a stop payment. I drove back to the store and, um, was you know, going to resign at that point, but they would not let me in so I took that as terminated. * * * I went there with the intention of getting my toolbox, my tools, and leaving."

Notably, the only mention of Complainant's last day of work in the Agency's written record of its investigative interview with Complainant is a brief note that states:

> "Complainant left December 12th. Complainant had talked to an attorney early in December. She said Complainant should stay, but Complainant was physically ill and losing sleep.
>
> "Complainant was just being ignored. The employees wouldn't listen to him.
>
> "Bobbi asked for Complainant's key back on approximately December 7th. She said she just wanted management to have the keys."

Since the Agency investigator was not called to testify, the forum infers from that record that the investigator recorded everything of significance that Complainant stated regarding the termination of his employment. Based on those irreconcilable inconsistencies, the forum finds there is no credible evidence upon which to determine how Complainant's employment ended.

The forum concludes that Complainant's testimony, at best, was unreliable and the forum gave it weight only where it was consistent with credible evidence in the record or was a statement against interest.

21) Jennifer Fraley was not an impartial witness because she is Complainant's wife with a stake in the outcome of her husband's case. Her brief testimony was stilted and appeared rehearsed. Her purported observations were not specific and she gave no testimony about how she had the opportunity to make those observations. Additionally, when testifying about Complainant's pay reduction, she first testified that Complainant came home with a letter stating his wages were reduced immediately after he told Bridges he objected to her purported conduct. Shortly thereafter, in a different context, she stated that Complainant's pay was reduced two days after his meeting with Bridges. Because she was inconsistent and had reason to shade the truth, the forum gave little weight to her testimony. The forum did credit Fraley's statement that she cleaned the business premises in order to work off a debt she and

Complainant owed Bridges because it is consistent with Bridges's and Complainant's testimony. The forum, however, believes Bridges's testimony that she never saw Fraley in the workplace because the cleaning was done after business hours when Bridges was not present. Bridges's testimony was more credible than Fraley's on that point because it was plausible and not refuted by any evidence in the record.

22) James Polley's testimony was generally credible. Although he was Complainant's brother-in-law, he did not overly exaggerate or embellish his testimony when he had the opportunity. However, his observations were somewhat vague. He opined that Bridges was "more than a boss," who was "definitely more of a hands on type of person - she would say what she was feeling, but would also touch." He described her "touching" by stating she occasionally "patted" employees, but did not specify where, when, or how she touched or patted employees. He also testified that he observed her touching "the hair" but "didn't think anything of it." He did not say whose hair she was touching, but, based on the context of his testimony, the forum infers it was Complainant's hair. His testimony that he heard Bridges make a comment about Complainant's "rear" and occasionally commented on the tight fit of some employees' pants was straightforward and believable. Also credible was his testimony that Bridges commented to him, on one occasion only, that she liked Polley's snug fitting shorts because she could see his "ass." Other than his statement that he, personally, let her comment "roll off [his] back," Polley did not testify that Complainant complained to him or anyone else about Bridges's conduct in the workplace. Overall, Polley's testimony was reasonably reliable and the forum credited it in its entirety.

23) Robert Smith's testimony was generally reliable. As Complainant's high school friend he was not necessarily neutral, but he demonstrated no particular bias by his demeanor or testimony. His statement that he once saw Bridges "try to follow [Complainant] into the install bay" as Complainant was heading toward the restroom, which was located in the install bay, was believable, if not particularly significant. He readily acknowledged that he was too far away to hear any words exchanged between Complainant and Bridges, but he did notice Complainant closing the restroom door as Bridges stood outside the door. Overall, he did not exaggerate the extent of his personal observation and the forum credited his testimony in its entirety.

24) Jamie Lewis's testimony was credible. He did not appear biased toward Bridges and showed no particular animosity toward Complainant. His testimony was direct, consistent, and not impeached in any way. The forum credited his testimony in its entirety.

25) John Wilson's testimony was credible. Although he and Bridges had recently ended their marriage by contested divorce, he exhibited no bias toward or against her. He also displayed no animosity toward Complainant. His memory for specific dates was poor, but overall his testimony was straightforward and confined to his personal observations and knowledge. His testimony was not impeached and the forum has credited it in its entirety.

26) During the hearing, Barbara Bridges appeared fatigued and somewhat affected by the medication she was taking to offset the effects of chemotherapy. She had difficulty recalling specific dates and events and her testimony, at times, was vague. She was adamant, however, that she had not patted Complainant on the buttocks and that he had not told her that her behavior was inappropriate in a sexual way. Her testimony that she remembered only "patting him on the back – not on the butt, but on the back - to get his attention" when she needed information from him was believable. If Polley, who credibly testified that he observed Bridges touching or patting employees, had observed her patting any employees on the buttocks, including Complainant, he would have presumably attested to that observation since where she touched or patted Complainant is a key issue in this case. That he did not lends some credence to Bridges's testimony. Additionally, Bridges's statement that Complainant commented on her small feet in sandals and thought they looked "sexy" rang true and was not rebutted. The forum accepts her testimony on that point as fact. Although her testimony was affected by her obvious bias and interest in the outcome of this proceeding, the forum credited it where it was consistent with or not refuted by other credible evidence in the record.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Barbara Bridges ("Bridges"), a female, owned and operated a retail business under the assumed business name of Audio Unlimited and was an Oregon employer with one or more employees.

2) On March 28, 2001, Bridges organized and registered Respondent Audio Unlimited LLC as a limited liability company. Bridges liquidated the LLC in June 2001, because it was not profitable.

3) At all times material, Bridges employed Complainant, a male, and was his immediate supervisor.

4) Between June and October 1999, Bridges sometimes touched or patted her male employees while talking to them or to get their attention.

5) Between June and October 1999, Bridges occasionally made comments about how her male employees' "rears" looked in tight pants and on at least one occasion, commented on Complainant's "rear."

6) On or about July 4, 1999, Bridges touched Complainant's hair and remarked that she wished her husband would grow long hair because it is "sexy."

7) On at least one occasion, Complainant told Bridges that he liked her small feet and thought they were sexy.

8) There is no credible evidence to conclude Bridges's conduct was offensive and unwelcome to Complainant.

9) There is no credible evidence to conclude Complainant complained to Bridges about offensive conduct directed toward him because of his gender.

10) Bridges changed Complainant from a salaried to an hourly employee because he was working four hours per day for another employer and was not working sufficient hours to warrant a salaried position.

11) Complainant voluntarily left his employment on December 12, 1999.

CONCLUSIONS OF LAW

1) At times material herein, Bridges was an employer subject to the provisions of *former* ORS 659.010 to ORS 659.110. *Former* ORS 659.010(6).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659A.800.

3) Bridges did not subject Complainant to unwelcome sexual conduct directed toward him because of his sex, thereby creating a hostile, intimidating, and offensive work environment and making that environment an explicit term or condition of Complainant's employment with Bridges, in violation of *former* ORS 659.030(1) (b).

4) Bridges did not intentionally create or maintain discriminatory working conditions related to Complainant's gender that were so intolerable that he was compelled to resign because of them, in violation of *former* ORS 659.030(1) (a).

5) Bridges did not reduce Complainant's pay or work hours because he opposed unlawful employment practices, in violation of *former* ORS 659.030(f).

6) Pursuant to ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and the complaint against any respondent not found to have engaged in any unlawful practices charged.

OPINION

The Agency alleges Respondent Bridges ("Bridges") unlawfully discriminated against Complainant in the terms and conditions of his employment by subjecting him to a sexually hostile work environment and by using her authority as Complainant's supervisor to reduce Complainant's pay and number of work hours after he refused to submit to the

harassment. The Agency further alleges that because of the sexually hostile work environment and Complainant's reduction in pay and work hours that resulted from Complainant's refusal to submit to the harassment, Complainant was forced to quit his employment. Additionally, the Agency alleges that the tangible employment action that resulted from Complainant's refusal to submit to sexual harassment also constitutes retaliation on the part of Bridges. The Agency seeks a judgment of $25,290 in back wages and $20,000 in mental suffering damages against Bridges, Audio Unlimited LLC, as Bridges' successor-in-interest, and Bridges, as an aider and abettor to the LLC. The forum determined that Complainant's testimony was not credible on key issues and the Agency failed to make a prima facie case of discrimination.

TERMS AND CONDITIONS OF EMPLOYMENT

Former ORS 659.030(1) stated, in pertinent part:

> "For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:
>
> " * * * * *
>
> "(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Former OAR 839-007-0550(1) provided:

> "Sexual harassment is unlawful discrimination on the basis of gender. Sexual harassment includes the following types of conduct:
>
> "(a) Unwelcome sexual advances, requests for sexual favors or other conduct of a sexual nature when such conduct is directed toward an individual because of the individual's gender; and
>
> "(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
>
> "(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual.
>
> "(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of * * * creating an intimidating, hostile, or offensive working environment."

A. Tangible Employment Action – Former OAR 839-007-0550(1)(a)

Under *former* OAR 839-007-0550(3), "an employer is liable for sexual harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against the individual." Here, the Agency was required to show: (1) Bridges was an employer subject to *former* ORS 659.010 to

659.110; (2) Bridges employed Complainant; (3) Complainant is a male; (4) Bridges, as Complainant's employer and direct supervisor, directed unwelcome sexual advances, requests, or conduct toward Complainant because he is male; (5) Bridges significantly changed Complainant's employment status by reducing his pay and his work hours; and (6) Bridges did so because Complainant rejected her unwelcome sexual advances. The first three elements are not in dispute.

There is also no dispute that Complainant received a written notice signed by Bridges, dated September 30, 1999, that changed his status from a salaried to an hourly employee at the rate of $10 per hour. Complainant contends Bridges made the change because he objected to her sexual advances on September 29, 1999, and immediately thereafter Bridges significantly reduced his wages and the number of hours he worked, forcing him to take a second job at the radio station. Bridges, on the other hand, claims she converted his salary to hourly because Complainant had been working four hours per day at the radio station prior to the September 30 letter and was not working enough hours at the store to justify the salary she was paying him.

Complainant acknowledged he worked for the radio station from 2 until 6 p.m. each day during hours that Bridges's store was open for business. He also agreed that Bridges questioned the number of hours he was devoting to his second job, that she perceived he was not working enough hours for her, and that they had several discussions about her concerns. In a prior statement to the Agency, Complainant defended his absences from the store by stating he felt David Haxton, a sales person with a key to the store, could handle the store when he was not there and could "run things regarding the installers." Haxton does not appear on Bridges's payroll register after September 10, 1999. From that fact, the forum infers that Haxton left his employment with Bridges prior to September 30, 1999, and that Complainant's discussions with Bridges about his absences from work due to the hours he spent working at the radio station must also have occurred before that date. The forum concludes, therefore, that Complainant began working a second job at the radio station prior to Bridges's letter dated September 30, 1999, and that there is a correlation between his absences from work due to an additional part time job and Bridges's decision to convert his employment status from a salaried to an hourly employee. Consequently, the Agency has the burden of proving that Bridges's legitimate, nondiscriminatory reason for the change in Complainant's pay status is not the true reason, but rather a pretext for retaliating against him because of his objection to sexual harassment.

There is no credible evidence from which the forum can infer or conclude that Complainant objected to or rejected Bridges's purported sexual advances on September 29, 1999, the day before he alleges Bridges's husband, John Casey, gave him the letter changing his pay status. Other than Complainant's wife, whose testimony was found to be not credible, no other witness corroborated Complainant's assertion that he complained to Bridges on that date or that he complained about her conduct to her or anyone else at any other time during his employment. In fact, based on Polley's credible testimony that Bridges was in the hospital when Casey delivered Polley's lay-off letter, the same day Complainant received his letter from Bridges, it is unlikely that Bridges was even present at the store on the date Complainant claims he confronted her. Because Complainant's credibility was substantially impaired by his internally inconsistent and contradictory testimony, his unsubstantiated assertion is not sufficient to overcome Bridges's reason for converting Complainant's salary to an hourly rate.

The Agency failed to prove that Bridges's asserted legitimate nondiscriminatory reason for changing Complainant's pay status was pretext for discrimination.

B. Intimidating, Hostile, or Offensive Work Environment - Former OAR 839-007-0550(1)(b)

In order to prevail on its hostile environment claim, the Agency must present evidence to show: (1) Bridges was an employer subject to *former* ORS 659.010 to 659.110; (2) Bridges employed Complainant; (3) Complainant is a member of a protected class; (4) Bridges made unwelcome sexual advances, requests for sexual favors, or engaged in unwelcome conduct of a sexual nature directed toward Complainant because of his gender; (5) the unwelcome conduct was so severe or sufficiently pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive work environment; and (6) Complainant suffered harm as a result of the unwelcome conduct. *See In the Matter of Western Stations Co.*, 18 BOLI 107 (1999). Respondents did not assert any of the affirmative defenses available under *former* OAR 839-007-0550(4).[2] The first

[2] "Where sexual harassment by a supervisor with immediate * * * authority over an individual is found to have occurred but no tangible employment action was taken * * * the employer is liable if the employer knew of the harassment unless the employer took immediate and appropriate corrective action [or] if the employer should have known of the harassment * * * unless the employer can demonstrate * * * that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and * * * that the complaining

three elements are not disputed. The remaining elements are not supported by credible evidence.

In this case, there is sufficient evidence to support that Bridges touched or patted her employees on occasion, touched Complainant's hair on one occasion and remarked that she wished her husband had long hair because she thought it was "sexy," made occasional comments to male employees about the appearance of their "rears" in "tight pants," and made one comment to Complainant that she would "recognize that butt anywhere." While there is no evidence to support that Bridges's touching per se was based on gender, the forum infers by the nature of her comments to Complainant and others about their "rears" that her comments were directed to her employees, including Complainant, because they were male. However, the key element to any sexual harassment claim is whether the alleged conduct is unwelcome. Here, because Complainant's credibility is at issue, the forum must go beyond his allegation and evaluate his own conduct to determine if it was consistent with his claim that Bridges's conduct was unwelcome.

First, Complainant's conduct in the workplace may have given Bridges the impression that he welcomed or invited her attentions. Evidence shows Complainant was one of a small all-male group of employees that was closely involved with Bridges and her business before it opened its doors in June 1999. Evidence also shows that the work atmosphere evolved from friendships that developed when Bridges, Wilson, Smith, Polley, and Complainant remodeled the warehouse together as a shared project. Moreover, Complainant's depiction of a "fun and friendly" workplace in which he was comfortable enough to call Bridges "mom," borrow a substantial sum of money from her, use store inventory for his personal enjoyment, and banter with Bridges about her "sexy" feet, implies a casual atmosphere conducive to mixed messages and misunderstanding.

Second, Complainant's claim that he made a contemporaneous complaint to Bridges on September 29, 1999, is not supported by credible evidence. Although they had the opportunity to observe Complainant's demeanor and actions in the workplace, neither Polley nor Smith testified that any employee, including themselves or Complainant, was offended by Bridges's conduct or complained to each other or to Bridges about the conduct. Casey, who worked full time in the store and regularly observed Complainant, Bridges, and other employees interact, credibly testified that he had not observed Bridges making inappropriate sexual contact with Complainant or other employees

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individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

and that none of Bridges's employees had complained to him about her conduct in the workplace. Other than Complainant's wife, who has an obvious bias and pecuniary interest in her husband's complaint, no other witness corroborated Complainant's claim that he objected to Bridges's conduct.

Finally, even after he allegedly objected to her conduct in late September 1999, Complainant continued to work for Bridges until mid-December 1999. In the interim, and despite the alleged "hostile work environment," Complainant continued to prepare radio advertisements for Bridges and to divide his time between the store and the radio station as he did before the alleged complaint. His internally inconsistent and contradictory testimony about when the harassment started and when it ended further negates his ability to convince this forum that he was offended by Bridges's conduct.

Based on the totality of the circumstances in this particular record, and in the absence of credible evidence that Bridges's conduct toward Complainant or any other employee was unwelcome, the forum concludes that Bridges did not create or maintain a sexually intimidating, hostile, or offensive work environment.

RETALIATION

Former ORS 659.030 stated, in pertinent part:

> "For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:
>
> " * * * * *
>
> "(f) For any employer * * * to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * *."

In order to establish a prima facie case of retaliation, the Agency is required to prove that (1) Complainant opposed an unlawful employment practice; (2) Bridges made an employment decision that adversely affected Complainant; and (3) there is a causal connection between Complainant's opposition and Bridges's adverse employment action. In this case, there is no credible evidence to support any of those elements.

First, Complainant's uncorroborated testimony is insufficient to sustain a finding that Complainant complained to Bridges about her conduct in the workplace or that he requested her to stop particular conduct the day before her husband gave him a note changing him from a salaried to an hourly employee. Second, there is insufficient evidence to establish that Bridges significantly reduced Complainant's pay or work hours as the Agency alleged in its charging document. As discussed previously, evidence shows Bridges converted Complainant from a salaried to an hourly employee at a $10 per hour rate based upon Complainant's

decision to work four hours per day at a local radio station during the store's regular hours. Bridges's payroll records show that Complainant's earnings decreased after October 8, 1999, only because he continued to work part time for the radio station and was paid for the hours he actually worked for Bridges. Complainant set his own schedule and determined how he divided his time between the store and the radio station. Bridges was not obliged to continue paying him on a salary basis if he changed the terms of their agreement by working fewer hours at the store. Notably, Complainant's pay would have exceeded his original salary had he worked a minimum 40 hour work week at the $10 per hour rate (40 x $10 per hour = $400 per week x 4 weeks = $1,600 per month). Absent a preponderance of evidence supporting the first two elements, the third also fails.

CONSTRUCTIVE DISCHARGE

Respondents are liable for a constructive discharge only if it is established that Bridges (1) intentionally created or maintained discriminatory working conditions related to Complainant's gender that were (2) so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them, (3) Bridges desired to cause Complainant to leave his employment as a result, or knew or should have known that Complainant was certain, or substantially certain, to leave his employment as a result of the working conditions, and (4) Complainant left his employment as a result of the working conditions. *Former* OAR 839-005-0035. The Agency failed to establish those elements by a preponderance of credible evidence.

As previously stated, the Agency failed to establish that Bridges subjected Complainant to hostile working conditions because of his gender, or that the terms and conditions of his employment changed to his detriment because he complained about those conditions, or that Bridges intentionally created or maintained the conditions. Moreover, Complainant's conflicting versions of his last day of employment significantly impaired his overall credibility and negated any possible finding that Complainant left his employment because of the alleged working conditions.

ORDER

NOW, THEREFORE, as Respondents **Barbara Bridges** and **Audio Unlimited LLC** have not been found to have engaged in any unlawful practice charged, the Complaint and the Specific Charges filed against Respondents are hereby dismissed under the provisions of ORS 659A.850.

In the Matter of
ELISHA, INC.

Case No. 24-02
Final Order of Commissioner Dan Gardner
Issued December 23, 2003

SYNOPSIS

Four wage claimants were employed at Respondent's motel and lived at the motel during their employment. Respondent claimed all four were excluded from the coverage of Oregon's minimum wage laws under ORS 653.020(9) because they were engaged in the management or maintenance of Respondent's motel. Respondent claimed it was also entitled to a setoff for the fair market value of the claimants' lodging. The Commissioner found that none of the claimants was engaged in the management or maintenance or Respondent's motel, but allowed a setoff for lodging for two of the claimants. The Commissioner awarded a total of $53,826.03 in unpaid wages and $6,355 in penalty wages to claimants. ORS 653.020(9), ORS 652.140(2), *former* ORS 652.150, ORS 652.610; ORS 653.035(1); OAR 839-020-0004(17), OAR 839-020-0025(1)(2)(3) & (7), OAR 839-020-0042.

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 December 3, 4, and 5, 2002, at the State of Oregon offices located at 94145 Fifth Place, Gold Beach, Oregon. The hearing reconvened on January 17, 2003, at the Bureau's Eugene office, with Respondent participating by telephone. On that date, Francine Geers testified and the participants made closing arguments.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, a case presenter employed by the Agency. Claimants Angel and Brenda Dominguez (hereafter "Claimants Dominguez" when referred to jointly and "A. Dominguez" and "B. Dominguez" when referred to individually), and David and Vicki Thomas ("Claimants Thomas" when referred to jointly, and "D. Thomas" and "V. Thomas" when referred to individually) were present during their own testimony and at other times during the hearing. Claimants were not represented by counsel. Respondent was represented by attorney at law David S. Tilton. Carlata Bennett, Respondent's registered agent, was present throughout the hearing as the individual designated to assist Respondent in the presentation of its case.

The Agency called as witnesses: Angel and Brenda Dominguez and David and Vicki Thomas, wage claimants; and Susan Foster Cohen[1], vocational consultant, as an expert witness (telephonic). Respondent called as witnesses: Carlata Bennett, Clinton Bennett, and Clifford Bennett, shareholders; Elizabeth Bennett, Respondent's bookkeeper; and Francine Geers, vocational consultant, as an expert witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing);

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

c) Respondent exhibits R-1 through R-21[2] (submitted prior to hearing), and R-22 through R-25 (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.

[1] Hereafter, Cohen is referred to as "Foster" because of her stated preference to be called Susan Foster.

[2] Only pages 3 and 6 of R-20 were received, and only page 1 of R-21 was received.

FINDINGS OF FACT – PROCEDURAL

1) On August 10, 2000, Claimants A. and B. Dominguez and D. and V. Thomas filed wage claims with the Agency alleging that Respondent 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 April 27, 2001, the Agency issued Order of Determination No. 00-3444 based upon the wage claim filed by the claimants A. and B. Dominguez and the Agency's investigation. The Order of Determination alleged that Respondent Elisha, Inc. dba Econo Lodge at Gold Beach owed a total of $57,185.14[3] in unpaid wages and $3,120[4] in 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

[3] The Order of Determination sought $41,374.30 for A. Dominguez for work performed from June 5, 1999, to July 12, 2000, and $15,810.84 for B. Dominguez for work performed from June 5, 1999, to October 31, 1999.

[4] The Order of Determination sought $1,560.00 each for Claimants Dominguez.

the charges, or demand a trial in a court of law.

5) On April 27, 2001, the Agency issued Order of Determination No. 00-3446 based upon the wage claim filed by Claimant D. Thomas and the Agency's investigation. The Order of Determination alleged that Respondent Elisha, Inc. dba Econo Lodge at Gold Beach owed a total of $3,905.85 in unpaid wages for work performed from April 16, 1999, through July 31, 2000, and $1,680 in 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.

6) On April 27, 2001, the Agency issued Order of Determination No. 00-3447 based upon the wage claim filed by Claimant V. Thomas and the Agency's investigation. The Order of Determination alleged that Respondent Elisha, Inc. dba Econo Lodge at Gold Beach owed a total of $2,924.82 in unpaid wages for work performed from September 26, 1999, through June 3, 2000, including 26.5 hours of overtime, and $1,692 in 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.

7) On May 4, 2001, Respondent filed an answer and request for hearing through counsel. Respondent denied the substantive allegations of all four wage claims and asserted its entitlement to reasonable attorney fees. Respondent alleged the following three affirmative defenses:

a) Claimants were employees who were domiciled at multi-unit accommodations designed to provide other people with temporary or permanent lodging, for the purpose of maintenance, management or assisting in the management of same, and are therefore excluded from the provisions of ORS 653.010 to 653.261 pursuant to ORS 653.020(9).

b) Claimants had a rental agreement with Respondents in which the claimants agreed to allow a set-off for rent and the value of goods and services they received.

c) Respondent was financially unable to pay the claimants' wages or compensation for hours in which they did not actually work during the time they were employed.

8) On August 29, 2002, the Agency filed a "BOLI Request for Hearing" with the forum.

9) On August 29, 2002, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimants stating the time and place of the hearing as December 3, 2002, at the State of Oregon offices, 94145 Fifth Place, Gold Beach, 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.

10) On October 3, 2002, 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 and any wage and penalty calculations (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); and a statement of any agreed or stipulated facts. The forum ordered the participants to submit case summaries no later than November 22, 2002, and notified them of the possible sanctions for failure to comply with the case summary order.

11) Respondent filed its case summary, with attached exhibits, on November 21, 2002. The Agency filed its case summary, with attached exhibits, on November 22, 2002.

12) On November 25, 2002, the Agency filed a supplemental case summary stating that "Susan Foster, Certified Vocational Counselor, will be a witness for the wage claimants."

13) At the outset of the hearing, the ALJ then explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

14) During the hearing, Respondent objected when the Agency called Susan Foster as an expert witness. Respondent's objection was two-fold. First, because the Agency had not named Foster as a witness in its initial case summary, and second, because the Agency's supplemental case summary failed to state that Foster was being called as an expert witness or state Foster's qualifications and the substance of the facts and opinions to which she was expected to testify. The ALJ ruled that Foster could testify, but that Respondent was entitled to a continuance for the purpose of providing the testimony of its own expert witness.

15) The hearing adjourned at approximately 2:30 p.m. on December 5, 2002, after the ALJ scheduled a conference call with Mr. Tilton and Mr. McSwain for December 9 to determine if Respondent wished to call an expert witness.

16) On December 9, 2002, the ALJ held a telephonic conference with Mr. McSwain and Mr. Tilton, and Tilton stated that Respondent would call an expert witness. Subject to confirmation of the availability of Respondent's expert witness, the hearing was tentatively scheduled to reconvene at 10:30 a.m. on January 17, 2003.

17) Respondent's expert witness testified and closing ar-

guments were made on January 17, 2003. The evidentiary record of the hearing closed on January 17, 2003.

18) The ALJ issued a proposed order on February 25, 2003, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed exceptions on March 4, 2003. Respondent's exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

RESPONDENT AND THE BENNETT FAMILY

1) At all times material herein, Respondent Elisha, Inc. was an Oregon corporation doing business as Econo Lodge at Gold Beach in Gold Beach, Oregon, and an employer who suffered or permitted its employees, including Claimants, to work and engaged the personal services of one or more employees, including Claimants.

2) At all times material herein, Respondent was a motel and a multi-unit accommodation within the meaning of ORS 653.020(9) with 38 rooms available to rent to the public.

3) At all times material herein, Carlata Bennett, Don Bennett, Clinton Bennett, Clifford Bennett, and Dory Bennett were Elisha, Inc.'s shareholders.

4) During Claimants' employment with Respondent, Respondent had two payroll periods every month. The first was from the 1st to the 15th, the second from the 16th to the end of the month.

5) During Claimants' employment with Respondent, Respondent's employees were allowed to have a guest stay for free in Respondent's rooms if there were vacancies and the employees cleaned the room.

6) In late 1998, Respondent chose to become a franchise of "Choice Motels." This required considerable remodeling to meet franchise standards. Prior to Claimants' employment, Respondent remodeled 20 of its rooms to meet franchise standards. In the summer of 1999, Respondent remodeled the rest of its rooms to meet franchise standards. Don Bennett and Carlata Bennett, whose primary residence is in Willamina, Oregon, lived in Gold Beach most of the summer of 1999 during the remodeling, moving back to Willamina in October 1999.

7) During Claimants' employment with Respondent, Don and Clifford Bennett did all the remodeling work, construction, plumbing, electrical work, carpentry, and repair work on Respondent's facility.

8) During Claimants' employment, Clifford Bennett lived in a house close to Respondent's motel, oversaw housekeeping at Respondent's motel, and made sure that everyone was doing their job and "that operations flowed smoothly."

9) On July 1, 2000, Clinton Bennett assumed the management duties that Clifford Bennett had been performing.

10) In 1999 and 2000, the Bennett family held periodic meetings to discuss the status of Respondent's business and to make future plans for the business. The four wage claimants did not attend these meetings and were not part of the decision-making process concerning Respondent's business operation. All decisions concerning setting motel rates and any significant expense to be incurred by Respondent were made by the Bennett family. Respondent's advertising was done by Elizabeth or Clifford Bennett. Respondent's bookkeeping was done by Elizabeth Bennett. After Labor Day 1999, Carlata Bennett phoned Clifford Bennett and Claimants Dominguez almost every day to see how things were going at the motel regarding the number of guests, how many maids were used that day, and whether any repairs were needed.

11) The four wage claimants were supervised by and reported to one or more members of the Bennett family throughout their employment with Respondent.

12) At Christmas 1999, the entire Bennett family went to Bend for Christmas vacation and Claimants Dominguez and Thomas were left in charge. Their job was to just to keep things going, and they had no authority to change Respondent's policies.

13) "Big" motels have three regular eight-hour shifts for their employees at nights. Those employees do not usually live on the motel's premises. The employees stay up all night, stay in uniform, and work all night long by the hour. Smaller "mom and pop" motels[5] typically offer a "package deal" to night shift employees because they can't afford to pay hourly wages to employees who only check in a few guests and do no other work during the night.

14) In 1999, Respondent suffered a net loss of $21,801. Respondent spent $39,966 in salaries and wages (less employment credits), $12,062 on repairs and maintenance, $2,597 on rents, $30,618 on taxes and licenses, and $11,428 on advertising.

15) In 2000, Respondent suffered a net loss of $22,354. Respondent spent $37,636 in salaries and wages (less employment credits), $22,456 on repairs and maintenance, $3,906 on rents, $58,666 on taxes and licenses, and $12,863 on advertising.

CLAIMANTS THOMAS

16) In the spring of 1999, Claimants Thomas were living in one of Respondent's units and paying rent to Respondent. At the time, V. Thomas was working as a housekeeper at another local motel. Respondent needed another

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[5] Carlata Bennett characterized Respondent's motel as a "mom and pop" motel.

housekeeper and hired V. Thomas to perform that job, agreeing to pay her $7.25 per hour. As a housekeeper, V. Thomas stripped and cleaned rooms, emptied trash, and made beds.

17) On May 17, 1999, Claimants Thomas agreed with Carlata Bennett and her family to a "package wrap around"[6] deal. There were several parts to the agreement. First, D. Thomas was hired as groundskeeper, a job that had previously been done by Clifford or Clinton Bennett, at the agreed rate of $7.00 per hour. Second, Claimants Thomas moved into Room 245, a larger unit with two rooms that included a full kitchen, bathroom, and ocean view. It was agreed that Claimants Thomas would pay $750 per month rent for Room 245, which included laundry and all utilities, as well as an ocean view. It was further agreed that Claimants Thomas would each work for half the rent, so long as D. Thomas worked enough hours to cover half of the rent. Claimants Thomas lived in Room 245 from May 17, 1999, until May 25, 2000.

18) While Claimants Thomas occupied Room 245, its standard overnight rental rate was as follows: May 1999 - $54.95; June 1999 - $74.95; July/August 1999 - $98.95; September 1999 - $74.95; October 1999 through May 25, 2000 - $54.95. The value of Room 245 between June 5, 1999, and April 1, 2000, if rented by guests on a nightly basis, was $24,424.10.

19) Claimants Thomas's rent was overdue when they agreed to the "package wrap around deal" with the Bennetts, and Respondent would have evicted them in the absence of their "deal."

20) D. Thomas worked as Respondent's groundskeeper until on or about May 7, 2000, when he voluntarily quit Respondent's employment. His job duties included mowing the lawn, caring for Respondent's plants, pruning and shaping trees, picking up branches off the ground, raking and picking up leaves, spraying weeds, weeding, hosing off the parking lot, and pruning ivy. He occasionally stripped rooms or did laundry when he was caught up with the groundskeeping or when Respondent's housekeepers were really busy and was paid $6.50 per hour for this work. He did not supervise anyone, lacked the authority to hire or fire, and did no repair work or work to make Respondent's physical property operate more efficiently. If he observed maintenance problems in Respondent's rooms, he noted them on a report to Don or Cliff Bennett.

21) While employed by Respondent, D. Thomas performed 1216.95 hours of work at $7 per hour, earning $8,518.65 in gross wages. He also performed 60.48

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[6] In her testimony, Carlata Bennett frequently referred to the arrangements with Claimants Dominguez and Thomas as a "package wrap around" or "package deal."

hours of work stripping rooms at $6.50 per hour, earning $393.12 in gross wages. Altogether, D. Thomas worked 1,277.43 hours and earned $8,911.77 in gross wages.

22) From May 17 to November 14, 1999, Respondent deducted $750 from the paychecks of Claimants Thomas for rent. From November 15, 1999, until May 15, 2000, Respondent deducted rent from D. Thomas's paychecks in the amount of $750 per month, less the rent credit earned by V. Thomas for her night shift work.[7]

23) Respondent paid D. Thomas a total of $5,217.60 by check or cash during his employment. An additional $3,607.60 was deducted from his pay as rent. Altogether, he was paid $8,825.20 by check, cash, or rent credit. The difference between the wages earned by D. Thomas ($8,911.77) and gross wages and rent credit he received ($8,825.20), is $86.57.

24) Penalty wages for D. Thomas are computed as follows: $8,911.77 (*total earned during wage claim period*) ÷ 1216.95 (*total number of hours worked during wage claim period*) = $6.98 per hour (*average hourly* wage) x 8 hours = $55.84 (*average daily wage*) x 30 days = $1,675.

25) V. Thomas worked as a housekeeper for Respondent until November 15, 1999. She was Respondent's "head housekeeper" for a period of time before November 15, 1999,[8] but was still paid $7.25 per hour for her housekeeping work. As head housekeeper, she decided how many rooms needed cleaning and divided the rooms between the housekeepers at work that day, then cleaned rooms herself and inspected the rooms cleaned by other housekeepers. As head housekeeper, she spent 75 percent of her time cleaning rooms.

26) On November 15, 1999, V. Thomas's job duties changed. Through the Jobs Plus program, she began working as Respondent's daytime front desk clerk, for which she was paid $6.50 per hour, plus working office night shifts in relief of A. Dominguez. As front desk clerk, she checked guests in, assigned rooms, took reservations, balanced the till, and added up the hours on her timecards and timecards of the other housekeepers. She performed no repairs or work to make Respondent's physical property operate more efficiently, supervised no one, and had no authority to hire or fire. She also continued to do occasional cleaning at $7.25 per hour. When she worked night shift, she was Respondent's only employee on duty and worked in the office from 6 p.m. until ap-

[7] *See* Finding of Fact 26 – The Merits, *infra*.

[8] Neither participant presented any reliable evidence to establish the dates or hours that V. Thomas worked as head housekeeper. There was no evidence that she worked as head housekeeper after November 15, 1999.

proximately 10 p.m.,[9] then closed the office, balanced the till, and took the night bell to her room for the night. While she was in the office, she performed the same duties that Claimants Dominguez did during their night shift.[10] After 10 p.m., she could sleep but remained on call to wake up and assist guests who rang Respondent's night bell. The night bell was rarely rung after the office closed and she did not check in any guests after the office was closed. In the morning, she also prepared continental breakfast, working until 7 a.m. She worked alone during these shifts. For each night shift she worked, Respondent agreed to and did pay her a 2.5 percent commission for every room she rented and credited $55 towards her rent, in lieu of pay. V. Thomas did this night shift work until May 15, 2000, working 27 night shifts in all.[11] She received no pay for this night shift work other than $391.40 in commissions and $1485 (27 night shifts x $55 = $1485) in rent credits.

27) V. Thomas was paid in full for her housekeeping work and for her work as daytime front desk clerk.

28) V. Thomas voluntarily quit Respondent's employment on May 25, 2000.

29) V. Thomas earned $2,281.50 for her 27 night shifts (27 shifts x 13 hours = 351 hours x $6.50 per hour = $2,281.50). She was paid a total of $391.40 in commissions and $1,485 in rent credits.

30) Penalty wages for V. Thomas are computed as follows: 30 days x 8 hours = 240 x $6.50 per hour = $1,560.

31) Claimants Thomas had two children who occupied various separate rooms on a number of occasions between October 4, 1999, and May 25, 2000. Claimants Thomas cleaned the children's rooms after each occupancy.

32) Claimants Thomas never signed an authorization for Respondent to make any deductions from their wages.

CLAIMANTS DOMINGUEZ

33) In June 1999, Respondent advertised in the newspaper for a "couple to work night shift." On June 5, 1999, Claimants Dominguez, a married couple, responded to Respondent's ad. Carlata and Don Bennett inter-

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[9] Claimant Thomas testified that she worked until 10 p.m. Respondent's records indicate that she "balanced out" Respondent's till each shift between 10 and 11 p.m., except for one occasion when she balanced out after 11 p.m. and five occasions when she balanced out before 10 p.m.

[10] *See* Findings of Fact 38-39 – The Merits, *infra*.

[11] The forum bases its conclusion that V. Thomas worked 27 night shifts on Exhibit R-11, Respondent's summary showing the identity of the persons who worked each night shift during the employment of Claimants Dominguez.

viewed and hired them that same day.

34) Claimants Dominguez were hired to work the night shift in Respondent's office six nights a week. Their primary duty was to check in guests.

35) The Bennetts agreed to pay Claimants Dominguez a "package deal" that consisted of a 2.5 percent commission for all guests whom they checked in, plus free use of an apartment adjoining the motel office, paid utilities, including cable television and local telephone calls, and free use of Respondent's laundry facilities every Friday in lieu of $6.50 per hour. The Bennetts did not discuss the value of the "package deal" with Claimants Dominguez. At hearing, Respondent presented evidence that the total value of the "package deal" was $1195 per month, and that the room occupied by A. and B. Dominguez rented for $40 per night from October 4, 1999, through March 27, 2000.

36) Before Respondent hired Claimants Dominguez, Respondent had employed only one person to work the night shift. From that experience, the Bennetts found that one person on night shift created a problem because of the stress caused by the need for one person to be on the premises at all times. They concluded that hiring a couple might work better.[12] Carlata and Don Bennett suggested to Claimants Dominguez that one of them get another job so they could earn enough money to support their family, as Respondent's job didn't pay enough to support a family.

37) Crystal Ripley, Respondent's office manager, and the Bennetts provided on the job training to Claimants Dominguez during their first two to three weeks on the job.

38) Throughout their employment with Respondent, Claimants Dominguez performed the following duties on night shift: showing rooms to potential guests, having guests fill out registration forms, taking guests' money, answering Respondent's telephone and taking telephone reservations from guests, logging reservations into Respondent's computer (A. Dominguez only), assisting guests in checking out, making up a "maid sheet" in the morning for Respondent's head housekeeper showing the occupancy status of Respondent's rooms, providing guests with extra towels or pillows, giving guests toilet plungers or "plunging" toilets for them, replacing light bulbs, replacing televisions that did not work, balancing out Respondent's

[12] Carlata Bennett specifically testified that "we had learned in the past when one person gets strapped into the motel, they become tired; they get to the point that they get tired of being there all the time and so it created a problem, so we thought if we went with a couple, that both would be able to handle it at their discretion, needing only one at a time. We have only one person there now. We have had all years since then."

till each night before leaving the office, and preparing continental breakfast in the morning. On each night shift they worked, Claimants Dominguez were Respondent's only employees on duty.

39) During their night shift, one or both Claimants Dominguez were always in Respondent's office from the time it started until around 10 p.m., when they locked the office. They balanced Respondent's till after the office was closed, then went into their apartment for the night. They kept a bell in their room and were on call to assist guests who had already checked in or prospective guests who rang Respondent's night bell until relieved in the morning by one of the Bennetts or a day shift desk clerk. After 11 p.m., Claimants Dominguez could sleep, but at least one had to be on the premises at all times during their work shift and within hearing range of the bell, and one had to respond to the bell. They usually took turns in answering the bell. Another employee took the receivables that came in during the night shift to the bank the next morning.

40) After the office closed, Claimants Dominguez were seldom called on to assist guests who had already checked in. They checked in a total of 82 guests after the office closed between June 12, 1999 and July 11, 2000.

41) Shortly after Claimants Dominguez were hired, the Bennetts gave them the option of cleaning rooms and doing laundry at $6.50 per hour during the day to earn additional money. Claimants Dominguez often exercised this option and were paid $6.50 per hour for every hour that they performed this work.

42) Claimants Dominguez's night shift work started at 6 p.m. in June 1999, at 5 p.m. in July and August 1999, and at 6 p.m. after Labor Day 1999. It ended at 10 p.m. from June 5 through June 11, 1999; at 6:30 a.m. from June 12, 1999, until the end of September 1999; and at 9 a.m. from October 1-31, 1999.

43) When business was brisk, Claimants Dominguez often simultaneously performed night shift duties. For example, while A. Dominguez was helping a guest in the office, B. Dominguez might be helping a guest on the phone.

44) Throughout the employment of Claimants Dominguez, Respondent's office door was locked from 10 p.m. until 6 a.m. in the summer, and 9 p.m. until 6 a.m. in the winter, when the office opened for continental breakfast. However, Respondent kept its "open" sign lit 24 hours a day, even if there were no vacancies, so that any guest who needed assistance after office hours could get help.

45) One of the Bennetts began preparing continental breakfast at 6:30 a.m. and opened Respondent's office at 7 a.m. between June 5 and the end of September 1999.

46) Claimants Dominguez did no plumbing, electrical work, carpentry, or other types of construction, repairs, or work to make Respondent's physical property operate more efficiently. On one occasion, A. Dominguez painted a room during Respondent's remodeling project.

47) From October 1 until October 31, 1999, A. Dominguez or B. Dominguez usually prepared continental breakfast and were responsible for Respondent's guests until 9 a.m.

48) Claimants Dominguez had some authority to negotiate room rates, but were only authorized to go as low as $49.99 in the summer and $29.99 in the winter. Claimants Dominguez lacked the authority to change or ignore any of Respondent's other policies.

49) Claimants Dominguez had the authority to refuse to rent to potential guests.

50) If a guest complained about his or her room, Claimants Dominguez had the authority to move them to another room, which could include an upgrade.

51) While Claimants Dominguez were employed by Respondent, the head housekeeper would bring in a list of supplies needed by the motel and put it in the office. Outside salesmen from janitorial companies regularly came to Respondent's office and picked up the lists from the employee on duty in the office. The salesmen then ordered the supplies and had them delivered to Respondent. Cliff and Beth Bennett purchased the food supplies for Respondent's continental breakfasts at Costco, except for milk, which was purchased out of town by the Bennetts.

52) When Claimants Dominguez called in housekeepers in the morning, they relied on Respondent's set policy that one housekeeper was to be called in for every ten rooms that needed cleaning.

53) B. Dominguez voluntarily quit Respondent's employment on October 31, 1999, but continued living with A. Dominguez at Respondent's apartment.

54) From November 1, 1999, through July 11, 2000, A. Dominguez performed the same night shift duties that he and B. Dominguez had previously performed together, including preparing continental breakfast.

55) There was no evidence presented to indicate that Claimants Dominguez had any supervisory authority, including the authority to hire and fire, during their employment with Respondent.

56) For three months during his employment with Respondent, A. Dominguez went to Taekwondo classes in Brookings twice a week with Clifford Bennett, leaving for class at 4:45 p.m., and arriving back at Respondent's motel at about 7 p.m.[13]

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[13] No evidence was presented as to the specific time period that A. Dominguez attended Taekwondo

57) The value of the room occupied by A. and B. Dominguez between June 5, 1999, and April 1, 2000, if rented by guests on a nightly basis, was $7,240.

58) Claimants Dominguez continued living in Respondent's apartment until April 1, 2000, at which time they rented another apartment in Gold Beach for $350 per month. Effective July 12, 2000, A. Dominguez voluntarily quit Respondent's employment. Between April 1 and July 11, 2000, he was required to sleep in his former apartment adjoining Respondent's office during his night shift. He did not live in that apartment during the day.

59) Pursuant to Respondent's policy,[14] Claimants Dominguez's children lived rent-free in Respondent's vacant rooms during a large part of A. Dominguez's employment with Respondent. Claimants Dominguez stripped and cleaned these rooms after use by their children. The room occupied by Claimants Dominguez's oldest son could not be rented because the plumbing did not work.

60) Respondent did not create or maintain a record of the hours worked by Claimants Dominguez on night shift, and Claimants Dominguez did not maintain a contemporaneous record of the hours that they worked. However, Respondent did maintain a record showing the time that persons working night shift during the employment of Claimants Dominguez "balanced out" each night and the identity of that person. The forum has relied on Respondent's record to determine the number of night shifts worked by Claimants Dominguez. Where Respondent's record does not identify the employee who worked a particular night and Claimants Dominguez allege they worked that night, the forum has credited them as having worked that night.

61) Claimants Dominguez worked the following number of night shifts between June 5 and October 31, 1999: June (23), July (27), August (27), September (25), and October (27), for a total of 129 night shifts.

62) The basic night shift schedule worked by Claimants Dominguez during their joint employment was the following: June 5 to June 11, 1999 (6 p.m. to 10 p.m.); June 12 to July 2, 1999 (6 p.m. – 6:30 a.m./12.5 hours per shift); July 3 – October 1, 1999 (5 p.m. – 6:30 a.m./13.5 hours per shift); and October 2 to October 31, 1999 (6 p.m. – 9 a.m./15

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classes. The forum infers that A. Dominguez attended 24 classes (12 weeks x 2 classes per week). Since it is Respondent's burden to establish claimed hours that were not worked and Respondent has not presented any evidence as to the dates, the forum has further inferred that A. Dominguez attended these classes during a period of time when he started work at 6 p.m. and subtracted 24 hours from its computation of the total overtime hours worked by A. Dominguez.

[14] *See* Finding of Fact 7 – The Merits, *supra*.

hours per shift). Where the calendar of hours worked created by Claimants Dominguez indicated fewer hours on a shift, the forum has used the lesser figure in its calculations of their hours worked.

63) Claimants Dominguez each worked the following hours on night shift in each workweek[15] between June 5 and October 31, 1999: June 5 -11 (29); June 12-18 (75); June 19-25 (75); June 26 – July 2 (75); July 3-9 (78); July 10-16 (91); July 17-23 (91); July 24-30 (78); July 31-August 6 (78); August 7-13 (91); August 14-20 (52); August 21-27 (91); August 28-September 3 (78); September 4-10 (78); September 11-17 (91); September 18-24 (78); September 25-October 1 (91); October 2-8 (82); October 9-15 (82); October 16-22 (82); October 23-29 (82); October 30-31 (30).

64) B. Dominguez worked 859 hours of straight time and 819 hours of overtime on night shift between June 5 and October 31, 1999. Calculated at $6.50 per hour, she earned $5,583.50 for her straight time work. Calculated at $9.75 per hour, she earned $7,985.25 for her overtime work. In total, she earned $13,568.75. The only pay she received for this work was $454.40 in commissions.

65) A. Dominguez worked the following number of night shifts between November 1, 1999, and July 11, 2000: November (21), December (22), January (22), February (26), March (26), April (23), May (24), June (23), and July (7), for a total of 194 night shifts.

66) A. Dominguez's basic night shift work schedule between November 1, 1999, and July 11, 2000, was 6 p.m. to 9 a.m., for a total of 15 hours per shift. Where the calendar of hours worked created by A. Dominguez indicates fewer hours per shift, the forum has used the lesser figure in its calculations of his hours worked.

67) A. Dominguez worked the following hours on night shift in each workweek from November 1, 1999, through July 11, 2000: November 1-5 (45)[16]; November 6-12 (73); November 13-19 (58); November 20-26 (73); November 27-December 3 (58); December 4-10 (58); December 11-17 (73); December 18-24 (88); December 25-31 (88); January 1-7 (88); January 8-14 (88); January 15-21 (88); January 22-28 (58); January 29-February 4 (73); February 5-11 (73) February 12-18 (103); February 19-25 (103); February 26-March 3 (88); March 4-10 (88);

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[15] Claimants Dominguez began work for Respondent on June 5, a Saturday. Since there is no evidence in the record as to Respondent's workweek, the forum has determined that their workweek began on Saturday, the day Claimants Dominguez began work, and ended on the next Friday. *See In the Matter of Burrito Boy, Inc.,* 16 BOLI 1, 13 (1997)

[16] This workweek began on October 30, giving Claimant Dominguez 35 hours of overtime for the workweek of October 30-November 5.

March 11-17 (103); March 18-24 (73); March 25-31 (103); April 1-7 (88); April 8-14 (88); April 15-21 (73); April 22-28 (58); April 29-May 5 (73); May 6-12 (88); May 13-19 (88); May 20-26 (73); May 27-June 2 (88); June 3-9 (88); June 10-16 (88); June 17-23 (88); June 24-30 (88); July 1-7 (73); July 8-14 (58).

68) In total, A. Dominguez worked 2,269 hours of straight time and 2,289 hours of overtime on night shift between June 5, 1999, and July 11, 2000. Calculated at $6.50 per hour, he earned $14,748.50 for his straight time work. Calculated at $9.75 per hour, he earned $22,317.75 for his overtime work. In total, he earned $37,066.25.

69) Respondent paid A. Dominguez $798.32 in commissions for his night shift work in 1999, and $1,140.52 in commissions for his night shift work in 2000, for a total of $1,938.84.

70) On or about May 15, 2000, A. Dominguez gave two weeks' notice to Respondent and Respondent placed an ad in the newspaper for a replacement. A week later, A. Dominguez asked for his job back. He also asked for a $350 raise for his night shift work to pay the rent on the Dominguez's new apartment, to which the Bennetts agreed. On May 20, 2000, Respondent gave A. Dominguez a $350 paycheck. On June 20, 2000, Respondent gave A. Dominguez another $350 paycheck.

71) On July 16, 2000, Respondent issued a final paycheck to A. Dominguez in the amount of $146.77.

72) Respondent owes B. Dominguez $13,114.35 in unpaid wages that are due and owing.

73) Respondent owes A. Dominguez $35,127.41 in unpaid wages that are due and owing.

74) Respondent owes Claimants Dominguez each $1,560 in penalty wages, computed as follows: 30 days x 8 hours = 240 x $6.50 per hour = $1,560.

75) Claimants Dominguez never signed an authorization for Respondent to make any deductions from their wages.

EVIDENCE PRESENTED BY EXPERT WITNESSES

76) The U.S. Department of Labor publishes a document entitled "Dictionary of Occupational Titles" ("DOT"). It provides a detailed description of various occupations and is relied on as the "bible" by vocational rehabilitation counselors in determining the suitability of a particular occupation for clients. DOT's various job descriptions provide a summary of work duties and activities and reflect jobs that actually exist. Many of them overlap.

77) DOT's job descriptions all contain an SVP ("specific vocational preparation") rating, from 1-10. The SVP is the combined amount of training and work experience generally necessary to acquire the skills to perform the

described job. However, the fact that a person's combined training and work experience rates an SVP lower than the SVP rating for any particular DOT job description does not per se mean that they will be unable to perform that job.

78) The DOT contains a job description (187.117-038) for "Manager, Hotel Or Motel," that states, in pertinent part:

> "Manages hotel or motel to ensure efficient and profitable operation: Establishes standards for personnel administration and performance, service to patrons, room rates, advertising, publicity, credit, food selection and service, and type of patronage to be solicited. * * * Allocates funds, authorizes expenditures, and assists in planning budgets for departments. Interviews, hires, and evaluates personnel. Answers patrons' complaints and resolves problems. Delegates authority and assigns responsibilities to department heads. Inspects guests' rooms, public access areas, and outside grounds for cleanliness and appearance. Processes reservations and adjusts guests' complaints when working in small motels or hotels."

This DOT specifies an SVP time of "7." An SVP of "7" requires 2-4 years of vocational preparation time.

79) The only two duties contained in DOT's job description for "Manager, Hotel or Motel" that were performed by Claimants Dominguez or V. Thomas on night shift were: "Answers patrons' complaints and resolves problems" and "Processes reservations and adjusts guests' complaints when working in small motels or hotels."

80) The DOT contains a job description (238.367-038) for "Hotel Clerk" that states, in pertinent part:

> "Performs any combination of following duties for guests of hotel or motel: Greets, registers, and assigns rooms to guests. Issues room key * * * Transmits and receives messages, using telephone or telephone switchboard. Answers inquiries pertaining to hotel services; registration of guests; and shopping, dining, entertainment, and travel directions. Keeps records of room availability and guests' accounts, manually or using computer. Computes bill, collects payment, and makes change for guests. * * * Makes and confirms reservations. May post charges, such as room * * * or telephone, to ledger, manually or using computer. * * *"

This DOT specifies an SVP of "4." An SVP of "4" indicates 3-6 months of vocational preparation time.

81) While working night shift, Claimants Dominguez and V. Thomas performed all the duties listed in the DOT's "Hotel Clerk" job description.

82) The DOT contains a job description (406.684-014) for "Groundskeeper, Industrial Commercial" that states, in pertinent part:

> "Maintains grounds of * * * commercial * * * property, performing any combination of following tasks: Cuts lawns, using hand mower or power mower. Trims and edges around walks, flower beds, and walls, using clippers, weed cutters, and edging tools. Prunes shrubs and trees to shape and improve growth or remove damages leaves, branches, or twigs, using shears, pruners, or chain saw. Sprays lawn, shrubs, and trees with fertilizer, herbicides, and insecticides, using hand or automatic sprayer. Rakes and bags or burns leaves, using rake. Cleans grounds and removes litter, using spiked stick or broom. * * * Plans grass, flowers, trees, and shrubs, using gardening tools. Waters lawn and shrubs, using hose or by activating fixed or portable sprinkler system. * * * May perform variety of laboring duties, common to type of employing establishment."

This DOT specifies an SVP of "3." An SVP of "3" indicates 1-3 months of vocational preparation time.

83) D. Thomas's duties as groundskeeper were among the duties listed in the DOT description for "Groundskeeper, Industrial Commercial."

84) Conducting or supervising something as a business, especially the executive function of planning, organizing, coordinating, directing, controlling, and supervising the business activity with responsibility for results, is consistent with vocational experts' understanding of what management is and with job descriptions of management positions set out in the DOT. An assistant manager does the same type of duties, with less responsibility. A managerial position is one that ultimately makes decisions, that exercises leadership, allocates human resources, handles hiring and firing, and impacts the financial decisions of the business.

85) No evidence was presented related to training and work experience of D. Thomas and Claimants Dominguez prior to their employment with Respondent. V. Thomas was employed as a motel maid at the time Respondent hired her, but no other evidence was presented related to her prior training and work experience.

CREDIBILITY FINDINGS

86) Angel Dominguez's testimony was credible concerning his daily work schedule and the duties that he performed. However, Respondent's contemporaneous documentation showing the night shifts Dominguez worked was a more reliable record than the record of shifts worked that Dominguez created after his employment, and the forum has relied on Respondent's documentation wherever it

conflicted with Dominguez's record.

87) Brenda Dominguez's testimony was credible concerning her daily work schedule and the duties that she performed. However, Respondent's contemporaneous documentation showing the night shifts B. Dominguez worked was a more reliable record than the record of shifts worked that Angel Dominguez created on B. Dominguez's behalf after her employment, and the forum has relied on Respondent's documentation wherever it conflicted with Dominguez's record.

88) Vicki Thomas's testimony was extremely confusing concerning the method by which she kept her timecards and the means by which she calculated her unpaid wages. She also testified, in contrast to A. Dominguez's credible testimony, that A. Dominguez worked the day shift immediately following her night shift. Her testimony regarding her own duties on night shift between 6 p.m. and 7 a.m., the basis of her wage claim, was consistent and unimpeached and the forum has credited it in its entirety. However, Respondent's contemporaneous documentation showing the night shifts she worked was a more reliable record than the record of shifts worked that Angel Dominguez created on her behalf after her employment, and the forum has relied on Respondent's documentation to determine the number of night shifts she worked. The forum has also credited Carlata Bennett's testimony that V. Thomas was credited $55 per night shift towards her rent over V. Thomas's that she was only credited $50 based on documentation contained on V. Thomas's timecards.

89) David Thomas testified credibly concerning the number of days he worked per week, his job duties, and the extent of his authority and responsibilities. However, the calendar of hours worked that A. Dominguez created on his behalf contemporaneous with the filing of his wage claim was only an estimate and differed from the work time shown on his timecards. The forum has relied on Respondent's summary of D. Thomas's timecards to establish the exact number of hours he worked and the amounts he was paid.

90) Carlata Bennett was a credible witness and the forum has credited her testimony except on one issue, the extent of authority Claimants Dominguez had to lower room rents. This was based on her conflicting assertions that Claimants Dominguez had unlimited authority to lower room rents to whatever level it took to keep a guest from taking their business to another motel and that they had the authority to lower room rents "within reason" to keep prospective guests.

91) Clinton and Elizabeth Bennett were credible witnesses and the forum has credited their testimony in its entirety.

92) Clifford Bennett's testimony that Claimant A. Dominguez was given the option of doing groundskeeping was inconsistent with the testimony of every other witness. Also, his testimony that Claimants Dominguez had "no limitations" on their authority to lower room rates to keep customers was not credible. The forum has credited the remainder of his testimony.

93) Susan Foster and Francine Geers, both vocational rehabilitation counselors, testified as expert witnesses for the Agency and Respondent, respectively, as to the proper job classification of the four wage claimants. Their qualifications as vocational experts were roughly equivalent. Foster testified that Claimants Dominguez and V. Thomas did not manage or assist in managing and that D. Thomas did not perform maintenance. As might be expected, Geer expressed opposite opinions. Although both articulated rational reasons to support their opinions, the forum has given more weight to Foster's testimony for two primary reasons. First, Geer's opinion focused primarily on job descriptions in the DOT, and concluded that Claimants Dominguez and V. Thomas were engaged in management or assisting management because they performed several functions listed in the DOT's description for "Manager, Hotel Or Motel." In contrast, Foster's opinion was based on her expert understanding of "management" in the real world of work and in the DOT. She clearly articulated the duties and responsibilities that would justify classifying an employee as engaging in "management" or "assisting in management" and the reasons why Claimants Dominguez and V. Thomas did not fit into those categories. Second, Geer testified that the "purpose" of a maintenance person living on a motel's premises was so that he or she could perform repairs whenever needed. There was no testimony that D. Thomas ever performed any repairs. Geer also testified that a "live-in" manager would make management decisions and would have to be able to deal with any issue that arose. This does not comport with the actual job duties and discretion allotted to Claimants Dominguez and V. Thomas during night shift.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Elisha, Inc. was an Oregon corporation doing business as Econo Lodge at Gold Beach in Gold Beach, Oregon, and an employer who suffered or permitted its employees, including Claimants, to work and engaged the personal services of one or more employees, including Claimants.

2) At all times material herein, Respondent was a motel and a multi-unit accommodation within the meaning of ORS 653.020(9) with 38 rooms available to rent to the public.

3) Claimant V. Thomas was employed by Respondent from

spring 1999 until May 25, 2000, when she quit Respondent's employment. From November 15, 1999, through May 15, 2000, she worked 27 shifts as night shift clerk. On each of these shifts, she was Respondent's only employee on duty and worked in Respondent's office from 6 p.m. until approximately 10 p.m. before returning to her room in Respondent's motel for the night. After 10 p.m. she was free to sleep, but was on call to wake up and assist any guests who rang Respondent's night bell until 7 a.m. the next morning. She was not a manager and did not assist in the management of Respondent's motel. She performed no repairs or work to make Respondent's physical property operate more efficiently. During her 27 night shifts, she earned $2,281.50 and received $1485 in rent credits and $391.40 in commissions.

4) D. Thomas worked as Respondent's groundskeeper from May 17, 1999, until on or about May 7, 2000, when he quit Respondent's employment. His primary job duties were those of a laborer and he did not perform any repairs or work to make Respondent's physical property operate more efficiently. He did not manage or assist in the management of Respondent's business. He earned $8,911.77 in gross wages and received $8,825.20 in gross wages and rent benefits.

5) On May 17, 1999, Claimants Thomas and Respondent agreed that Claimants Thomas would pay $750 per month rent for the apartment that they occupied in Respondent's motel, which included all utilities, and that Respondent would deduct this amount from their paychecks. Subsequently, V. Thomas agreed to work as relief clerk on night shift in exchange for a $55 rent credit for each night shift and a commission on each room she rented.

6) Respondent owes V. Thomas $1,890.10 in unpaid, due and owing wages for her night shift work.

7) Respondent owes D. Thomas $3,694.17 in unpaid, due and owing wages.

8) Respondent's failure to pay V. Thomas all wages due and owing was willful and Respondent owes V. Thomas $1,560 in penalty wages.

9) Respondent's failure to pay D. Thomas all wages due and owing was willful and Respondent owes D. Thomas $1,675 in penalty wages.

10) Respondent hired both Claimants Dominguez on June 5, 1999, to work Respondent's night shift in Respondent's office, with the primary duty of checking in guests. Respondent agreed to pay Claimants Dominguez a 2.5 percent commission for all guests whom they checked in, plus free use of an apartment adjoining the motel office, paid utilities, except for their telephone, and free use of Respondent's laundry facilities every Friday in lieu of $6.50 per hour.

11) The specific duties performed by Claimants Dominguez on night shift included showing rooms to potential guests, having guests fill out registration forms, taking guests' money, answering Respondent's telephone and taking telephone reservations from guests, logging the reservations into Respondent's computer, assisting guests in checking out, making up a "maid sheet" in the morning for Respondent's head housekeeper showing the occupancy status of Respondent's rooms, providing guests with extra towels or pillows, giving guests toilet plungers or "plunging" toilets for them, replacing light bulbs, replacing televisions that did not work, balancing out Respondent's till each night before leaving the office, and preparing continental breakfast in the morning. On each night shift they worked, Claimants Dominguez were Respondent's only employees on duty.

12) Between June 5 and October 31, 1999, Claimants Dominguez were jointly responsible for night shift duties from the time their night shift started until it ended in the morning. They kept a bell in their room and were on call to assist guests who rang Respondent's night bell until relieved by the day shift office clerk or one of the Bennetts each morning. They could sleep after 11 p.m., but at least one had to be on the premises at all times during night shift and within hearing range of the bell, and one of them had to respond to the bell. They were required to sleep in their apartment in Respondent's motel.

13) The night shift worked by A. and B. Dominguez extended from 6 p.m. until 10 p.m. from June 5-11, 1999; from 6 p.m. until 6:30 a.m. from June 12 to September 30, 1999; and from 6 p.m. until 9 a.m. from October 1 until October 31, 1999.

14) B. Dominguez quit Respondent's employment on October 31, 1999, but continued living in the apartment with A. Dominguez. From November 1, 1999, through July 11, 2000, the night shift worked by A. Dominguez extended from 6 p.m. until 9 a.m. A. Dominguez quit Respondent's employment on July 11, 2000.

15) Claimants Dominguez did not perform any repairs or work to make Respondent's physical property operate more efficiently and did not manage or assist in the management of Respondent's business.

16) B. Dominguez worked 859 hours of straight time and 819 hours of overtime on night shift between June 5 and October 31, 1999. Calculated at $6.50 per hour, she earned $5,583.50 for her straight time work. Calculated at $9.75 per hour, she earned $7,985.25 for her overtime work. In total, she earned $13,568.75. The only pay she received for this work was $454.40 in commissions, leaving $13,114.35 in unpaid wages that are due and owing.

17) A. Dominguez worked 2,269 hours of straight time and 2,289 hours of overtime on night shift between June 5, 1999, and July 11, 2000. Calculated at $6.50 per hour, he earned $14,748.50 for his straight time work. Calculated at $9.75 per hour, he earned $22,317.75 for his overtime work. In total, he earned $37,066.25. Respondent paid A. Dominguez $798.32 in commissions for his night shift work in 1999, and $1,140.52 in commissions for his night shift work in 2000, for a total of $1,938.84. Respondent owes A. Dominguez $35,127.41 in unpaid wages that are due and owing.

18) Respondent's failure to pay all wages due and owing to A. and B. Dominguez was willful and Respondent owes Claimants Dominguez each $1,560 in penalty wages.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Elisha, Inc. was an employer and Claimants Dominguez, and Claimants Thomas were employees 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, Respondent employed Claimants.

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, ORS 653.040, ORS 653.256, ORS 653.261.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant David Thomas all wages earned and unpaid by May 12, 2000, five days after he voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes D. Thomas $3,694.17 in unpaid, due and owing wages.

4) Respondent is liable for $1,675 in penalty wages to Claimant David Thomas. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

5) Respondent violated ORS 652.140(2) by failing to pay Claimant Vicki Thomas all wages earned and unpaid by June 1, 2000, five days after she voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes V. Thomas $1,890.10 in unpaid, due and owing wages.

6) Respondent is liable for $1,560 in penalty wages to Claimant Vicki Thomas. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

7) Respondent violated ORS 652.140(2) by failing to pay Claimant Angel Dominguez all wages earned and unpaid by July 18, 2000, five days after he voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes A. Dominguez $35,127.41 in unpaid, due and owing wages.

8) Respondent is liable for $1,560 in penalty wages to Claimant Angel Dominguez. *Former*

ORS 652.150; *former* OAR 839-001-0470(1).

9) Respondent violated ORS 652.140(2) by failing to pay Claimant Brenda Dominguez all wages earned and unpaid by November 5, 1999, five days after she voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes B. Dominguez $13,114.35 in unpaid, due and owing wages.

10) Respondent is liable for $1,560 in penalty wages to Claimant Brenda Dominguez. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

11) 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 four wage claims by four persons who worked at Respondent's motel. 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).

ANGEL AND BRENDA DOMINGUEZ

The claims of Claimants Dominguez only involve the work they performed on night shift. Respondent agreed to pay Claimants Dominguez a commission on room rentals, plus allowing them to live in Respondent's motel apartment free of charge, in exchange for their night shift duties. The Agency alleges that Claimants Dominguez are entitled to the statutory minimum wage of $6.50 per hour, including overtime at the rate of $9.75 per hour, from the time their night shift started each day until they were relieved of duties the next morning.

A. Claimants Dominguez were not excluded employees under ORS 653.020(9).

Respondent argued that Claimants Dominguez were excluded from Oregon's minimum wage and overtime requirements based on the exclusion provided in ORS 653.020(9). That language reads:

> "ORS 653.010 to 653.261 does not apply to any of the following employees:
>
> "(9) An individual domiciled at multiunit accommodations designed to provide other people with temporary or permanent lodging, for the

> purpose of maintenance, management or assisting in the management of same."

Respondent and the Agency stipulated that Claimants Dominguez were individuals "domiciled at multiunit accommodations designed to provide other people with temporary or permanent lodging." The issue is whether or not their domicile was "for the purpose of maintenance, management or assisting in the management" of Respondent's motel. If the domicile of Claimants Dominguez was for one of these purposes, their wage claims, which are based on Oregon's minimum wage law, must be dismissed. If not, Claimants Dominguez are owed a substantial amount of unpaid wages.

Where statutory interpretation is required, the forum must attempt to discern the legislature's intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). To do that, the forum first examines the text and context of the statute. *Id.* The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature's intent. *Id.* Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. *Id*. at 611. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. *Id.* The forum may also consider legislative history, but only if the intent of the legislature is not clear from a text and context inquiry.[17] Relying on *PGE*, the forum begins its analysis of ORS 653.020(9) by an examination of the statutory text and context.

ORS 653.020(9) creates a statutory exclusion from minimum wage and overtime for employees in the shoes of Claimants Dominguez whose domicile is "for the purpose of maintenance, management or assisting in the management" of the multiunit accommodations in which they are domiciled. The words "maintenance" and "management" are not defined in ORS Chapter 653 or BOLI's administrative rules, nor is the phrase "assisting in the management." There is no case law on point. Because these words are not defined anywhere in the statute or related statutes and they are words of common usage, the forum ascribes to them their plain, natural and ordinary meaning. *Young v. State of Oregon,* 161 Or App 32, 36, *rev den* 329 Or 447 (1999) (citing *PGE* at 611).

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[17] Even if the intent of the legislature was not clear from a text and context inquiry, an inquiry into legislative history would not aid the forum in determining the intent of the legislature when it adopted the statutory exclusion under consideration. The management and maintenance exclusion was adopted by the legislature in 1977 in Enrolled HB 2312, 1977 Oregon Laws, Ch. 238, Sec. 1(11). The written minutes and exhibits accompanying HB 2312 and tapes of related legislative hearings contain no references to this exclusion.

The ordinary meaning of "management" is "the conducting or supervising of something (as a business); *esp* **:** the executive function of planning, organizing, coordinating, directing, controlling, and supervising any industrial or business project or activity with responsibility for results." *Webster's Third New Int'l Dictionary* 1372 (unabridged ed 1993). The forum adopts this definition for the purpose of determining if Claimants Dominguez fall within the "management" exclusion in ORS 653.020(9). To fall in the category of an employee who "assist[s] in management," that employee must also perform management functions, albeit at a level of lesser responsibility. The duties and responsibilities of Claimants Dominguez were undisputed and are described in detail in Findings of Fact 38-39, and 46-52 – The Merits. None of those duties or responsibilities fit within *Webster's* definition of "management" or lend support to Respondent's alternate claim that Claimants Dominguez assisted in management by performing management functions of lesser responsibility.

The forum likewise rejects the opinion of Geer, Respondent's vocational expert, that Claimants Dominguez were managers or "assistant managers" based on the fact that they answered and remedied guests' complaints about their rooms and processed reservations, duties that are among those listed in the DOT description for "Manager, Hotel Or Motel." The forum notes that reservation processing is also a duty listed under DOT's description of "Hotel Clerk" and that most of the duties performed by Claimants Dominguez fit within DOT's "Hotel Clerk" description.

Undisputed evidence that Clifford Bennett supervised Respondent's operation during the day and that all decisions having more than a minimal financial impact on Respondent's motel were made by the Bennetts, with no input from Claimants Dominguez, further supports the conclusion[18] that the work performed by Claimants Dominguez does not fit within the meaning of "management" contained in ORS 653.020(9).

In its answer, Respondent also asserts that Claimants Dominguez were employed for the purpose of "maintenance" of Respondent's facility. The ordinary meaning of "maintenance" is "the labor of keeping something (as building or equipment) in a state of repair or efficiency." *Webster's* at 1362. The forum adopts this definition for the purpose of determining if Claimants Dominguez fall within the "maintenance" exclusion in ORS 653.020(9). There was no evidence that B. Dominguez ever performed any duties on night shift that could possibly fit within

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[18] Claimants Dominguez had the discretionary authority to lower room rates to a sum set by the Bennetts if necessary to keep a customer, but there was no evidence presented that the Bennetts delegated any other authority to them to make policy or financial decisions impacting Respondent's business operation.

this definition. A. Dominguez occasionally changed light bulbs or plunged toilets when guests requested his help, and painted one room to assist Respondent in their remodeling. According to Respondent's vocational expert, a maintenance person is someone who performs "repairs." Here, all actual repairs and upkeep were performed by Don and Clifford Bennett. The forum rejects Respondent's argument that changing light bulbs or plunging toilets on an occasional basis transforms an employee who has no other maintenance duties into an employee who is employed "for the purpose of maintenance."

In conclusion, Respondent bears the burden of proving, by a preponderance of the evidence, that Claimants Dominguez fall within one of the statutory exclusions set out in ORS 653.020(9). Respondent did not meet that burden, and the forum finds that Claimants Dominguez were not excluded from coverage by Oregon's minimum wage and overtime laws.

B. Claimants Dominguez are entitled to Oregon's minimum wage rate.

The Bennetts agreed to pay Claimants Dominguez a "package deal" that consisted of a 2.5 percent commission for all guests whom they checked in, plus free use of an apartment adjoining the motel office, paid utilities, including cable television and local telephone calls, and free use of Respondent's laundry facilities every Friday in lieu of $6.50 per hour. As there is no evidence that Claimants Dominguez and Respondent agreed to a higher wage rate, the forum concludes that any wages owed to Claimants Dominguez should be computed at the statutory minimum wage rate of $6.50 per hour. *In the Matter of Toni Kuchar*, 23 BOLI 265, 274 (2002).

C. Claimants Dominguez performed work for which they were not properly compensated.

Respondent argued that even if Claimants Dominguez fall outside the purview of ORS 653.020(9), they were still properly compensated for their work. Respondent's argument is based on two premises. First, that Respondent is entitled to a setoff for the fair market value of the lodging and facilities provided to Claimants Dominguez, which Respondent states was $1195 per month. Second, that Claimants Dominguez only worked a total of 27 hours per week in Respondent's summer season and a total of 30 hours per week the rest of the year. Respondent's arguments must fail for reasons discussed below.

1. Respondent was not entitled to a setoff.

ORS 653.035(1) allows an employer to deduct from the minimum wage "the fair market value of lodging, meals, or other facilities or services furnished by the employer for the private benefit of the employee." Lodging and other facilities or services "are fur-

nished for the private benefit of the employee when [they] are not required by the employer." OAR 839-020-0025(7). Lodging and other facilities or services are "required by the employer when * * * [t]he provision of lodging or other facilities or services is necessary in order for the employer to maintain an adequate work force at the times and locations the employer needs them." OAR 839-020-0025(7)(d). In this case, Respondent provided lodging and facilities to Claimants Dominguez so that they would be available on Respondent's premises to Respondent's guests or prospective guests at all times during the night. On the nights Claimants Dominguez worked, no one else was available to assist Respondent's guests. Claimants Dominguez could not have met Respondent's availability requirement if they had not lived in Respondent's apartment, leaving Respondent without an "adequate work force." Consequently, the forum concludes that the lodging and facilities that Respondent provided to Claimants Dominguez was for Respondent's benefit, not for the private benefit of Claimants Dominguez.[19]

In addition, Respondent claims that the value of lodging provided to the children of Claimants Dominguez should be set off against the wages of Claimants Dominguez. The forum rejects this claim based on Respondent's undisputed policy of allowing relatives of Respondent's employees to stay for free in vacant rooms if the employees cleaned the rooms. Claimants Dominguez followed this policy in allowing their children to stay in Respondent's vacant rooms. Also, undisputed evidence showed that the rooms occupied by the Dominguez's oldest son could not be rented because its plumbing didn't work.

2. "Work" performed by Claimants Dominguez.

Respondent's calculations of the hours worked by Claimants Dominguez is based on two faulty assumptions. First, that Claimants Dominguez only "worked" from 6 to 10 p.m. in the summer, and from 6 to 9 p.m. and 7:30 to 9 a.m. in the winter, with an extra 30 minutes credited for each shift to account for the average number of night interruptions. Second, that because the night shift job could be performed by only person and had been in the past, Respondent was only required to pay the wages that one employee working those hours would have received.

WORK TIME

Claimants Dominguez's night shift began at 5 p.m. in the summer and at least one of them was in the office balancing accounts after 10 p.m. almost every night of

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[19] *See, e.g., In the Matter of Rainbow Auto Parts and Dismantlers,* 10 BOLI 66, 72-73 (1991) (where claimant occupied a mobile home located on the business property and acted as night watchman at respondent's request, the mobile home was not a facility furnished for the employee's private benefit.)

their joint employment. A. Dominguez frequently "balanced out" after 9 p. m. and often later than 10 p.m. after B. Dominguez quit Respondent's employment. The evidence was undisputed that Claimants Dominguez slept after they went to their apartment for the night except when they were interrupted by guests who had already checked in or guests seeking to check in. The Agency contends that this sleep time should count as work time, while Respondent asserts that Claimants Dominguez should only be credited as having worked the actual time that their sleep was interrupted by guests. The forum relies on OAR 839-020-0042 to resolve this conflict. Its relevant provisions state:

> "Under certain conditions an employee is considered to be working even though some of his/her time is spent in sleeping or in certain other activities.
>
> "* * * * *
>
> "Employees residing on employer's premises * * *: An employee who resides on his/her employers' premises on a permanent basis * * * is not considered as working all the time he/she is on the premises. Ordinarily, he/she may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he/she may leave the premises for purposes of his/her own. To determine the exact hours worked, any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted."

The key phrases in this rule are "reasonable agreement" and "complete freedom from all duties." There was no evidence of any agreement between the Bennetts and Claimants Dominguez as to the hours that would be counted as work time. The only agreement was the general hours that Claimants Dominguez would be in the office each shift and that one of them would be available at whatever time during the night a guest or potential guest needed help. Respondent did not instruct Claimants Dominguez that only one of them should be available during the night, and they both answered the night bell. Although their nocturnal interruptions may have varied in frequency, neither ever had "complete freedom from all duties" after they went to bed at night. After B. Dominguez quit, A. Dominguez had sole responsibility for Respondent's guests throughout the night. Under OAR 839-020-0042, the sleeping time of Claimants Dominguez must be counted as work time.

RESPONDENT WAS REQUIRED TO PAY FOR THE WORK TIME OF BOTH CLAIMANTS DOMINGUEZ

Respondent hired both A. and B. Dominguez because Respondent's prior experience of employing a single person on night shift had been less than satisfactory. As stated earlier, the agreement between the Bennetts and Claimants Dominguez was

that either A. or B. Dominguez would always be available. During the Dominguez's joint employment, the Bennetts did not designate specific shifts that either A. or B. Dominguez were responsible for and never instructed either A. or B. Dominguez not to work a particular shift. Consequently, both considered themselves as available for work throughout their shift. It is an employer's duty to exercise control and see that work is not performed if it does not want work to be performed. OAR 839-020-0040(4). Any work that is "suffered or permitted" is work time. OAR 839-020-0040(2). The forum concludes that both Claimants Dominguez were entitled to be paid for all hours in their scheduled night shifts. Based on ***Respondent's*** minimal estimate of work hours per shift, this work time amounts to 54 hours per week (27 hours x 2) from June to August 1999, 60 hours per week (30 hours x 2) in September and October 1999, and 30 hours per week from November 1999 to July 2000. This comes to a total of 1292 hours worked on night shift.[20] At $6.50 per hour, Claimants Dominguez earned $14,898. They received only $2,393.24 in commissions for this work. When the value of the lodging, services and facilities received by Claimants Dominguez is discounted, Claimants Dominguez received considerably less in commissions[21] than they earned. This satisfies the third element of the Agency's prima facie case.

D. Amount and extent of work performed by Claimants Dominguez.

The forum relies on Respondent's contemporaneous record showing the identity of persons who "balanced out" each night during the employment of Claimants Dominguez to determine the specific night shifts they worked. Where Respondent's record does not identify the employee who worked a particular night shift and Claimants Dominguez allege they worked that night, the forum has credited them with having worked that night.

Findings of Fact 61 through 68 – The Merits show the forum's calculations of the amount of work performed by Claimants Dominguez and the amounts earned by each. Summarized, Claimants Dominguez were both credited with work hours of 6 to 10 p.m. from June 5-11, 1999; from 6 p.m. to 6:30 a.m. from June 12 to July 2, 1999; from 5 p.m. to 6:30

[20] This total is based on the assumption that Claimants Dominguez worked 54 hours in each of 13 weeks and 60 hours in each of 8 weeks, and that A. Dominguez worked 30 hours in each of 37 weeks.

[21] ORS 653.035(2) allows employers to "include commission payments as part of the applicable minimum wage." Since the "package deal" agreed to by Claimants Dominguez and Respondent was in lieu of minimum wage, the forum has credited the commissions received by Claimants Dominguez toward the minimum wage owed to them.

a.m. from July 3 to October 1, 1999; and from 6 p.m. to 9 a.m. from October 2-31, 1999. A. Dominguez was credited with work hours of 6 p.m. to 9 a.m. from November 1, 1999, to July 11, 2000.

The forum concedes that this calculation of work hours is not exact. Where the forum concludes that an employee performed work for which he or she was not properly compensated, it is the employer's burden to produce records to prove the precise hours involved. *In the Matter of Westland Resources,* 23 BOLI 276, 286 (2002). In this case, those records would show the exact times that the night shifts of Claimants Dominguez started and ended each day of their employment. Respondent did not maintain this type of record. Where an employer does not produce the relevant 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." *Id.* Here, the forum has relied primarily on records produced by Respondent to establish the particular night shifts worked by Claimants Dominguez and upon testimony by the Bennetts and Claimants Dominguez to establish the approximate beginning and ending time of each of those shifts. Based on undisputed evidence concerning the terms and conditions of the employment of Claimants Dominguez and the application of the law to those facts, the forum has credited Claimants Dominguez as having worked all the hours between the beginning and end of their night shift, including the time they were sleeping. The net result is that Respondent owes A. Dominguez $35,127.41 and B. Dominguez $12,114.35 in unpaid wages.

DAVID THOMAS

Respondent contends that D. Thomas was excluded from Oregon's minimum wage requirements because he was "domiciled" at Respondent's motel "for the purpose of maintenance." ORS 653.020(9).

Respondent and the Agency stipulated that Claimants Thomas were "domiciled at multiunit accommodations designed to provide other people with temporary or permanent lodging." The issue is whether D. Thomas's employment was "for the purpose of maintenance" of Respondent's motel.

The forum has already determined that the word "maintenance," as used in ORS 653.020(9), means "the labor of keeping something (as building or equipment) in a state of repair or efficiency."[22] There is no evidence that D. Thomas ever

[22] The forum again notes that Respondent's vocational expert testified that the purpose of having a maintenance person on the premises is so they can do repairs whenever needed.

performed any repairs or work to make Respondent's physical property operate more efficiently and undisputed testimony that Don and Clifford Bennett performed all repairs and upkeep on Respondent's motel. D. Thomas's job was that of a laborer doing groundskeeping duties such as mowing the lawn, pulling weeds, and pruning bushes. These duties do not fall within the definition of "maintenance" that the forum has adopted. Consequently, the forum concludes that D. Thomas was not subject to exclusion from Oregon's minimum wage requirements under ORS 653.020(9).

Undisputed evidence and the ALJ's calculations established that D. Thomas worked 1216.95 hours at $7 per hour and 60.48 hours at $6.50 per hour, earning $8,911.77 in gross wages. He was paid a total of $5,217.60 by check or cash. An additional $3,607.60 was deducted from his pay as rent that Respondent claims as a lawful setoff, bringing his total compensation to $8,825.20 if the forum determines that Respondent is entitled to its claimed setoff. If so, Respondent still owes D. Thomas $86.57 in unpaid, due and owing wages ($8,911.77 - $8,825.20 = 86.57). If not, Respondent owes D. Thomas $3,694.17 in unpaid wages. The forum must consider several statutes and administrative rules in making this determination.

As a starting point, ORS 653.035 and OAR 839-020-0025(1) allow employers to deduct from the minimum wage the "fair market value of lodging, meals or other facilities or services furnished by the employer for the private benefit of the employee." OAR 839-020-0025(3) provides, in part, that "[t]hese provisions apply to all facilities or services furnished by the employer as compensation to the employee regardless of whether the employer calculates charges for such facilities or services as additions to or deductions from wages." OAR 839-020-0025(7) provides that lodging or other facilities or services are furnished for the private benefit of the employee when they are not required by the employer and sets out four specific circumstances when the employer will be deemed to have "required" lodging. Those circumstances are:

> "(a) Acceptance of the lodging or other facilities or services is a condition of the employee's employment; or
>
> "(b) The expense is incurred by an employee who must travel away from the employee's home on the employer's business; or
>
> "(c) The acceptance of the lodging * * * is involuntary or coerced; or
>
> "(d) The provision of the lodging * * * is necessary in order for the employer to maintain an adequate work force at the times and locations the employer needs them."

A review of the facts shows that none of these circumstances apply to D. Thomas. He was already

living in one of Respondent's units with V. Thomas when Respondent hired him. It was unnecessary for him to live at Respondent's motel in order for him to perform his groundskeeper or housekeeping work. There is no evidence that Respondent required him to live at Respondent's motel as a condition of his employment or that his acceptance of the lodging and free utilities in Room 245 was involuntary or coerced. The forum concludes that D. Thomas's lodging and utilities were for the "private benefit" of D. Thomas under ORS 653.035 and OAR 839-020-0025(7).

OAR 839-020-0025(2)(a) provides that "fair market value" may be established by the employer's showing of "[t]he amount actually and customarily charged for comparable * * * lodging, facilities or services to consumers who are not employees of the employer." In this case, that amount was $24,424.10,[23] calculated at seasonal overnight rates. There was no evidence that Respondent had a monthly rate for Room 245 for guests. Respondent charged V. and D. Thomas $750 month for rent, laundry and utilities, and deducted $3,607.60 from D. Thomas's check for approximately half the rent. D. and V. Thomas's testimony that they were able to rent a much larger apartment for $450 per month after leaving Respondent's employment is irrelevant to a determination of "fair market value" under OAR 839-020-0025(2)(a). The amount deducted from D. Thomas's check was far less than half of the fair market value of Room 245, and the forum concludes that Respondent met its burden of showing that the amount of the deduction met the "fair market" requirement of ORS 653.035(1).

An employer who has met the conditions of ORS 653.035(1), OAR 839-020-0025(1), OAR 839-020-0025(7), and OAR 839-020-0025(2)(a) has an additional hurdle to clear. OAR 839-020-0025(5) provides, in pertinent part, that "[t]he provisions of section (1) of this rule apply only when the following conditions are continuously met: (a) The employer has met the conditions of ORS 652.310(3)[.]" ORS 652.310(3) sets out additional requirements that must be satisfied before an employer can "deduct * * * any portion of an employee's wages" and lists five circumstances in which deductions are allowed. Subsection (b) is the only circumstances applicable to this case. It allows deductions if they "are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books." OAR 839-020-0025(3) interprets ORS 652.610(3)(b) in the following language:

> "In order for the employer to be able to claim credit toward the minimum wage for providing

[23] *See* Finding of Fact 18 – The Merits, *supra*. This averages out to about $2,000 per month for the 12 months that Claimants Thomas lived in Room 245.

> meals, lodging or other facilities or services furnished to an employee, the deduction of these costs must have been authorized by the employee in writing, the deduction must have been for the private benefit of the employee, and the deduction must be recorded in the employer's books * * * in accordance with the provisions of ORS 652.610."

Here, the evidence was undisputed that neither D. nor V. Thomas wrote an authorization for Respondent to deduct rent from their paychecks. Accordingly, the forum concludes that the conditions of ORS 652.610 and OAR 839-020-0025(3) were not met and that Respondent was not entitled to deduct rent from D. Thomas's wages or to claim a rent credit toward the minimum wage.

As an affirmative defense, Respondent argues it is entitled to a setoff for the amount of rent deducted from the wages of D. and V. Thomas. ORS 652.610(4) provides that "[n]othing in this section * * * shall * * * diminish or enlarge the right of any person to assert and enforce a lawful setoff * * * on due legal process." Assuming, *arguendo*, that ORS 652.610(4) applies to these facts, Respondent's defense must fail because the rent deductions or credits are not a "setoff." The Oregon Supreme Court has defined "setoff" as a "money demand by the defendant against the plaintiff arising upon contract and constituting a debt *independent of and unconnected with the cause of action* set forth in the complaint." *Rogue River Management Company v. Shaw,* 243 Or 54, 59 (1966) (internal quotation marks omitted; emphasis in original). In this case, there was no debt, as the rent in question had already been paid, and the wages in question were dependent on and connected with the wage claims of Claimants Thomas. In conclusion, Respondent owes D. Thomas $3,694.17 in unpaid, due and owing wages ($8,911.77 gross earned wages - $5,217.60 cash payments = $3,694.17).

VICKI THOMAS

During her wage claim period, V. Thomas worked as a housekeeper, day shift office clerk, and night shift relief for Claimants Dominguez. Her claim is based solely on the night shifts that she worked in relief for Claimants Dominguez.

Respondent raised its ORS 543.020(9) affirmative defense again, arguing that V. Thomas was excluded from Oregon's minimum wage and overtime requirements because she lived at Respondent's motel "for the purpose of maintenance, management or assisting in the management [of the motel]."

V. Thomas's job duties and responsibilities on night shift are set out in detail in Finding of Fact 26 – The Merits. There is no evidence that she performed any "maintenance" duties. Her duties were essentially the same as those performed on night shift by Claimants Dominguez, and the forum rejects

Respondent's argument that she engaged in "management" or "assist[ed] in management" for the same reasons that it rejected Respondent's identical argument regarding Claimants Dominguez.

The Agency alleged that V. Thomas's night shift lasted from 6 p.m. until 7 a.m. and that V. Thomas should be credited with working 13 hours each shift. Respondent argued that V. Thomas's only "work" time was the time she spent in the office, and that the $55 rent credit she received for each night shift was more than ample to compensate her for this time, calculated at $6.50 per hour. For the same reasons stated in the section of this Opinion discussing the wage claims of Claimants Dominguez, the forum agrees with the Agency and finds that V. Thomas worked 13 hours on each of her night shifts. Based on Respondent's records, the forum has determined that V. Thomas worked 27 night shifts in all, for a total of 351 hours. In total, she earned $2,281.50 on night shift (351 hours x $6.50 per hour = $2,281.50). She received $391.40 in commissions and $1485 in rent credits (27 shifts x $55 = $1485). For the same reasons stated in the section of this Opinion discussing the wage claim of D. Thomas, the forum disallows the $1485 as setoff against V. Thomas's earned wages. The forum allows the commission received by V. Thomas to be applied to the minimum wage due to her.[24]

In conclusion, Respondent owes V. Thomas $1,891.10 in unpaid, due and owing wages ($2,281.50 gross earned wages - $391.40 commissions = $1,890.10).

PENALTY WAGES

The Agency sought penalty wages for all four claimants. Under ORS 652.150, 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. *Westland Resources,* 23 BOLI at 280. Respondent, through the Bennetts, was aware of the hours worked and duties performed by all four wage claimants. The forum infers from this knowledge that Respondent acted voluntarily and as a free agent in failing to pay the four wage claimants all the wages they earned. Respondent's failure to apprehend the correct application of the law and Respondent's actions based on this incorrect application does not exempt Respondent from a determination that it willfully failed to pay wages earned and due to the claimants. *In the Matter of Scott Miller,* 23 BOLI 243, 262 (2002). The forum therefore concludes

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[24] *See* fn. 21, *supra.*

that Respondent's failure to pay claimant's wages was willful.

Respondent raised the statutory affirmative defense of financial inability to pay the wages at the time they were earned, providing evidence of net losses in 1999 and 2000. However, the tax forms that showed the net losses also showed that Respondent spent substantial sums on repairs and maintenance, rents, taxes and licenses, and advertising in those years. No financial inability exists if an employer continues to operate a business or chooses to pay certain debts and obligations in preference to employee's wages. *In the Matter of Debbie Frampton,* 19 BOLI 27, 41 (1999). Consequently, the forum assesses penalty wages in the amount of $1,560 for Claimants Dominguez and V. Thomas and in the amount of $1,675 for D. Thomas. The forum's penalty wage computations are set out in Findings of Fact 24, 30, and 75 – The Merits.

ATTORNEY FEES

Respondent claimed attorney fees in its answer. There is no provision for attorney fees in the statutes or rules governing the contested case hearing in this matter, and Respondent's request is denied.

RESPONDENT'S EXCEPTIONS

Respondent filed several exceptions. The forum addresses them in the order Respondent presented them.

First, Respondent excepted to the ALJ's conclusion that Claimants Dominguez and Thomas were not exempt from Oregon's minimum wage and overtime requirements under ORS 653.020(9). Respondent cited *Baxter v. MJB Investors,* 128 Or App 338, 876 P2d 331 (1994) in support of its exception. In *Baxter*, the court stated "the only employees who undeniably fit within [the terms of ORS 653.020(9)] are hotel, motel and apartment managers who live on the premises." *Baxter* simply restates the obvious and does not assist Respondent's case. Respondent's problem in this case is not that the ALJ ignored *Baxter* in the Proposed Order, but that Claimants Dominguez and Thomas were not "managers."

Respondent cites *State ex rel Dunn v. Ayers,* 112 Mont. 120, 113 P2d 785, 788 (1941) for the proposition that "assisting in the management," as used in ORS 653.020(9), equals "an assistant" who is "an employee whose duties are to help his superior and who must look to him for his authority to act." The forum rejects this argument for two reasons. First, this forum is not bound by decisions of Montana courts. Second, Respondent's argument would exclude every employee working at a motel who is also domiciled at the motel from the coverage of Oregon's minimum wage and overtime requirements, in that all employees work under the direction of a manager and assist the manager in following his or her direction. Had the legislature

intended this result, it could have easily written ORS 653.020(9) to cover all employees of a multiunit accommodation who were also domiciled there. It did not. The fact that the legislature used the words "assisting in the *management*," not "assisting the *manager*" further denotes that the exemption was only intended to apply to individuals who actually perform management duties, not all individuals who take direction from management. (emphasis added)

The Proposed Order correctly interprets ORS 653.020(9) and properly states why none of the wage claimants are exempt from Oregon's minimum wage and overtime laws under its provisions. Respondent's exception is overruled.

Second, Respondent excepts to the ALJ's conclusion that Claimant David Thomas was not domiciled "for the purpose of maintenance" of Respondent's motel. Respondent relies on the DOT's description of "Groundskeeper," which begins with the phrase "[m]aintains grounds of * * * commercial property" and also includes the phrase "[m]ay perform ground maintenance duties, using tractor equipped with attachments * * *" to support this conclusion. DOT's description gives the forum a broader perspective on D. Thomas's duties but is not determinative of whether D. Thomas performed "maintenance" duties as contemplated by ORS 653.020(9). That determination must be made by a *PGE* analysis, which the ALJ correctly performed in the Proposed Order. Furthermore, there was no evidence that D. Thomas ever operated a tractor, and Finding of Fact 83 – The Merits has been modified to reflect this. Respondent's exception is overruled.

Third, Respondent's exception that, prior to the Proposed Order, BOLI's consistent interpretation of ORS 653.020(9), as stated in writing by an employee of its Technical Assistance Division, was that ORS 653.020(9) applied to managers, assistant managers, and maintenance employees. R presented no actual evidence that it relied on this statement and did not raise an estoppel defense. The ALJ's conclusion that Claimants Dominguez and Thomas were not managers or maintenance employees, and did not assist in the management of Respondent's motel is not at odds with Respondent's exception. Respondent's exception is overruled.

Fourth, Respondent contends its failure to pay Claimants Dominguez and Thomas was not "willful" and Respondent should not have to pay penalty wages. Respondent does not disagree with the definition of "willful" that the forum has traditionally relied on. However, Respondent contends that "when the agency affirmatively misstates its position to employers, and an employer affirmatively acts upon the agency's misstatements then the willfullness (sic) element is specifically negated because of the Respondent's detrimental reliance on the

agency's misstatements." Here, there is no evidence that the agency made any misstatements that Respondent relied upon. Instead, Respondent incorrectly applied the law. Respondent's exception is overruled.

Fifth, Respondent excepts to the conclusion that it was financially able to pay, in that it relied on the advice of the agency in setting Claimants' wages. This exception has no basis in law or fact and is overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and penalty wages it owes as a result of its violations of ORS 652.140 (2), the Commissioner of the Bureau of Labor and Industries hereby orders **Elisha, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Angel R. Dominguez in the amount of THIRTY SIX THOUSAND SIX HUNDRED EIGHTY SEVEN DOLLARS AND FORTY ONE CENTS ($36,687.41), less appropriate lawful deductions, representing $35,127.41 in gross earned, unpaid, due, and payable wages and $1,560 in penalty wages, plus interest at the legal rate on the sum of $35,127.41 from August 1, 2000, until paid, and interest at the legal rate on the sum of $1,560 from September 1, 2000, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Brenda L. Dominguez in the amount of FOURTEEN THOUSAND SIX HUNDRED SEVENTY FOUR DOLLARS AND THIRTY FIVE CENTS ($14,674.35), less appropriate lawful deductions, representing $13,114.35 in gross earned, unpaid, due, and payable wages and $1,560 in penalty wages, plus interest at the legal rate on the sum of $13,114.35 from December 1, 1999, until paid, and interest at the legal rate on the sum of $1,560 from December 1, 1999, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for David L. Thomas in the amount of FIVE THOUSAND THREE HUNDRED EIGHTY NINE DOLLARS AND SEVENTEEN CENTS ($5,389.17), less appropriate lawful deductions, representing $3,694.17 in gross earned, unpaid, due, and payable wages and $1,675 in penalty wages, plus interest at the legal rate on the sum of $3,694.17 from September 1, 2000, until paid, and interest at the legal rate on the sum of $1,675 from October 1, 2000, until paid.

(4) A certified check payable to the Bureau of Labor and Industries in trust for Vicki L. Thomas in the amount of

THREE THOUSAND FOUR HUNDRED FIFTY DOLLARS AND TEN CENTS ($3,450.10), less appropriate lawful deductions, representing $1,890.10 in gross earned, unpaid, due, and payable wages and $1,560 in penalty wages, plus interest at the legal rate on the sum of $1,890.10 from July 1, 2000, until paid, and interest at the legal rate on the sum of $1,560 from August 1, 2000, until paid.

In the Matter of

ADESINA ADENIJI, dba Oregon Janitorial

Case No. 16-04

Final Order of Commissioner Dan Gardner

Issued February 18, 2004

SYNOPSIS

Respondent suffered or permitted Claimant to work 363 hours, including 251 straight time hours and 112 overtime hours between January 21 and March 4, 2003. Calculated at the minimum wage, Claimant earned $2,891.10 and was only paid $1,700. Respondent was ordered to pay Claimant $1,191.10 in unpaid, due and owing wages. Respondent's failure to pay the wages was willful and Respondent was ordered to pay $1,656 in penalty wages and $1,656 in civil penalties. ORS 652.140(1), ORS 652.150, ORS 653.025(3), ORS 653.055; OAR 839-010-0470.

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 ("BOLI") for the State of Oregon. The hearing was held on December 16 and 17, 2003, at BOLI's Eugene office 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 Domas, an employee of the Agency. Wage claimant Dennis Moore ("Claimant") was present and was not represented by counsel. Adesina Adeniji ("Respondent") was present and was not represented by counsel.

The Agency called the following witnesses: Claimant; Margaret Pargeter, Agency compliance specialist; and Armando Ebuka (telephonic), Claimant's former co-worker and Respondent's former employee.

Respondent called himself as his only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-7, A-12 through A-17, and A-20 (submitted prior to hearing).

c) Respondent exhibits R-1 through R-7 were offered 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 May 20, 2003, Claimant filed a wage claim with the Agency alleging that Respondent 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) On June 23, 2003, Miles Vincent filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

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

5) On July 22, 2003, the Agency issued Order of Determination No. 03-1793 based upon the wage claims filed by Claimants Moore and Vincent. The Order of Determination alleged that Respondent owed a total of $2,088.13 in unpaid wages,[1] plus interest, $3,619.20 in penalty wages,[2] plus interest, and civil penalties of $3,619.20,[3] 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.

6) On August 15, 2003, Respondent filed an answer. On August 27, 2003, Respondent filed a request for hearing.

7) On October 30, 2003, the Hearings Unit issued a Notice of Hearing setting the hearing for December 16, 2003.

8) On November 10, 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

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[1] The Agency alleged that Moore was entitled to $1,944.93 and Vincent was entitled to $143.20 in unpaid wages.

[2] The Agency alleged that Moore was entitled to $1,963.20 and Vincent was entitled to $1,656 in penalty wages.

[3] The Agency alleged that Moore was entitled to $1,963.20 and Vincent was entitled to $1,656 in civil penalties.

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 wage and penalty calculations (for the Agency only). The forum ordered the participants to submit case summaries by December 5, 2003, and notified them of the possible sanctions for failure to comply with the case summary order. Respondent received the case summary order.

9) On December 3, 2003, the Agency filed its case summary. Respondent did not file a case summary because he perceived the case would settle before hearing.

10) On November 28, 2003, the Agency moved for a discovery order requiring Respondent to provide the Agency with documents related to Claimant's employment with Respondent that included, among other things, all documents showing dates and hours worked by Claimant, all payments made by Respondent to Claimant, and Claimant's complete personnel records. Respondent did not object and on December 8, 2003, the ALJ issued a discovery order requiring Respondent to provide the Agency with the documents requested in the Agency's motion no later than December 12, 2003. Respondent received the order before December 12, 2003. Respondent produced no documents in response to the discovery order because he perceived the case would settle before hearing and because he had attached some of the documents sought by the Agency to his original Answer.

11) 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.

12) During the hearing, the Agency moved to dismiss the wage claim of Miles Vincent without prejudice. The ALJ granted the Agency's motion.

13) During the hearing, Respondent offered exhibits R-1 through R-7. The Agency objected on the grounds that the exhibits all contained information that should have been included in Respondent's case summary and that was also subject to the forum's discovery order. The ALJ sustained the Agency's objection and did not admit Respondent's exhibits. The ALJ allowed Respondent to make an offer of proof concerning each exhibit. This ruling is affirmed for reasons stated in the proposed opinion.

14) During the hearing, the Agency moved that Respondent's testimony concerning the specific contents of Exhibits R-1 through R-7 be disregarded as an appropriate sanction for Respondent's failure to submit a case summary or comply with the ALJ's discovery order. The ALJ reserved ruling on this motion until the proposed or-

der. The Agency's motion is **GRANTED**. All testimony given by Respondent that concerns the specific contents of Exhibits R-1 through R-7 is regarded by the forum solely as an offer of proof and the forum has not considered it in this Final Order.

15) On January 29, 2004, 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 Adesina Adeniji owned and operated a janitorial business out of Eugene, Oregon, under the assumed business name of Oregon Janitorial and was an employer who employed at least one person in the state of Oregon.

2) On or about January 21, 2003, Respondent and Claimant agreed that Claimant would perform janitorial work for Respondent at the pay rate of $60 per shift. Respondent and Claimant agreed that Claimant would be an independent contractor.

3) In January, February, and March 2003 Respondent had contracts with various businesses in Oregon, including Starbucks, Circle K, Bed Bath & Beyond, and Office Depot, to perform janitorial work at their retail business stores. These stores were located in a number of different cities in Oregon, including Eugene, Albany, Sweet Home, Corvallis, Stayton, Independence, Salem, Tigard, Gresham, Portland, Medford, and Ashland. Respondent's contracts called for him to service each store twice a month after each store was closed for the night and before it opened the next morning.

4) Claimant's first day of work was Tuesday, January 21, 2003. In January 2003, he worked eight shifts for Respondent. In February 2003, he worked 22 shifts for Respondent. In March 2003, he worked three shifts for Respondent. In all, Claimant worked 33 shifts.

5) While working for Respondent, Claimant's primary coworker was Armando Ebuka, who worked most of Claimant's shifts with him. Claimant also worked a few shifts with Respondent.

6) Claimant and Ebuka reported for work on each shift at approximately 5 p.m. at Respondent's house. At Respondent's house, they received a map and work order from Respondent detailing the work they were to perform that night and giving them directions to the job sites. Claimant and Ebuka then checked Respondent's van to make sure it had all the equipment they needed to perform their work. Finally, Respondent would give them gas money and they would go to a gas station and fill the van with gas and check the oil before leaving for their first job site.

7) At the job sites, Claimant and Ebuka's regular duties con-

sisted of cleaning windows, power washing the walks outside the store, and washing each store's floor mats. Sometimes they also mopped and cleaned the inside of the stores.

8) Claimant wrote down the time he and Ebuka arrived at and left each store on the work order given to them by Respondent at the beginning of their shift. After Claimant and Ebuka completed their work, they drove back to Eugene. When they arrived at Respondent's house, they left the van and the completed work orders.

9) Respondent had a large wall calendar on which he wrote down the time that Claimant and Ebuka returned from work at the end of each shift.

10) Claimant and Ebuka worked an average of 11 hours per shift.[4]

11) In total, Claimant worked 363 hours for Respondent (33 shifts x 11 hours) between January 21 and March 4, 2003.

12) Respondent did not have a regular work week.

13) Based on a work week that began on Tuesday and ended the next Monday,[5] Claimant worked 251 straight time hours and 112 overtime hours, earning a total of $2,891.10 computed at Oregon's minimum wage of $6.90 per hour (251 x $6.90 = $1,731.90; 112 x $10.35 = $1,159.20; $1,731.90 + $1,159.20 = $2,891.10).

14) Respondent paid Claimant $1700 for his work. Claimant was paid in three separate checks issued on February 10, 2003 ($420), February 20, 2003 ($660), and March 5, 2003 ($620). No deductions were taken from Claimant's checks. The printed notation "Nonemployee compensation:Payment to Subcontr" appears on two of Claimant's pay stubs.

15) Claimant's last day of work for Respondent was March 4, 2003. He quit without notice because he believed Respondent was not paying him all the wages he had earned.

16) On June 2, 2003, the Agency sent a "Notice of Wage Claim" form letter to Respondent's correct address stating that Claimant had filed a wage claim with BOLI alleging that Respondent owed him "[u]npaid statutory

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[4] This figure is drawn from Ebuka's credible testimony that he and Claimant worked "10-12" hours per night and Claimant's near contemporaneous statement on his wage claim form that he "worked 10-13 hours per day (Average)".

[5] *See In the Matter of Burrito Boy, Inc.,* 16 BOLI 1, 13 (1997) (where a respondent has not established a work week for purposes of computing overtime and has not established the beginning day of the employee's work week, the forum considers the work week to begin on the day the employee commenced work and to end seven consecutive days later).

minimum and overtime wages of $1,944.92 at the rate of $6.90 per hour from January 21, 2003 to March 4, 2003."

17) Pargeter was assigned to investigate Claimant's wage claim. On June 24, 2003, she sent a letter to Respondent's correct address stating, among other things, that Claimant's wage claim had been assigned to her for resolution, that she had reviewed the information submitted by Respondent and Claimant, and that she had concluded that Claimant was an employee, not an independent contractor. In the letter, Pargeter instructed Respondent to:

> "Please take one of the following actions by July 7, 2003:
>
> "1. Submit to me a check payable to Dennis Moore in the gross amount of $1,944.93, along with an itemized statement of lawful deductions, if any.
>
> "2. Submit to me evidence he did not work the hours claimed, or that he has been paid.
>
> "3. Submit evidence my computations are incorrect."

Respondent has not paid Claimant any additional wages since he filed his wage claim and owes Claimant $1,191.10 in unpaid wages.

18) Penalty wages, computed in accordance with ORS 652.150, equal $1,656 ($6.90 per hour x 8 hours x 30 days).

19) Claimant only used Respondent's tools and equipment in performing work for Respondent. Claimant drove or rode in Respondent's van to and from Respondent's job sites.

20) Respondent was the only business Claimant worked for between January 21 and March 4, 2003.

21) Claimant had no financial interest in Respondent's business.

22) Claimant's job duties required no specific skills other than the on-the-job training provided by Respondent, and Claimant had no professional license or business cards.

23) Respondent did not set any limit on the length of time Claimant would work for him.

24) Claimant's testimony was credible regarding the type of work that he performed and stores that he cleaned, his pay agreement with Respondent, and the dates that he worked. However, his claim that he averaged 13.5 hours work per shift was inconsistent with the more contemporaneous statement on his wage claim that he "worked 10-13 hrs. per day" and with Ebuka's more credible statement that he and Claimant averaged "10-12 hours" per shift. Based Claimant's more contemporaneous statement on his wage claim and Ebuka's testimony, the forum has credited Claimant with having worked an average of only 11 hours per shift.

25) Ebuka was a credible witness. He had nothing to gain

from the proceeding and the forum has credited his testimony in its entirety.

26) Pargeter was a credible witness and the forum has credited her testimony in its entirety.

27) Respondent's testimony was internally consistent for the most part. However, his credibility regarding the hours worked by Claimant was undermined by his failure to provide existing original records in his control[6] subject to the ALJ's discovery order that would have provided conclusive evidence as to Claimant's start and finish time each shift. The number of hours worked by Claimant was the key issue in this case. Respondent's failure to produce those original records has caused the forum to discredit his testimony on this issue in its entirety except where it was corroborated by Claimant's or Ebuka's testimony.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Adesina Adeniji owned and operated a janitorial business out of Eugene, Oregon, under the assumed business name of Oregon Janitorial and was an employer who employed at least one other person in the state of Oregon.

2) Respondent hired Claimant on or about January 21, 2003, and suffered or permitted Claimant to work for him from January 21, 2003, through March 4, 2003. Claimant was not an independent contractor.

3) Respondent and Claimant agreed that Respondent would pay Claimant $60 per shift.

4) In all, Claimant worked 33 shifts for Respondent, averaging 11 hours per shift.

5) Claimant worked 363 hours for Respondent, including 251 straight time hours and 112 overtime hours.

6) Claimant earned a total of $2,891.10 and had only been paid $1,700 at the time of the hearing. Respondent owes Claimant $1,191.10 in unpaid wages.

7) On June 2, 2003, and June 24, 2003, the WHD sent written notices to Respondent's correct address demanding that Respondent send a check for Claimant's unpaid wages in the respective amount of $1,944.92 and $1,944.93. Respondent did not pay Claimant any more wages after receiving these letters.

8) Penalty wages, computed in accordance with ORS 652.150, equal $1,656 ($6.90 per hour x 8 hours x 30 days).

9) Respondent failed to pay Claimant the minimum wage to which Claimant was entitled under

[6] Respondent actually brought his original wall calendar to the hearing, but did not offer it into evidence, and there was no evidence to suggest that the daily work orders filled out by Claimant during his employment and given to Respondent had been destroyed or were not presently under Respondent's control.

ORS 653.055 and Claimant is entitled to civil penalties of $1,656.

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 653.025.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid by March 11, 2003, five days, excluding Saturdays and Sundays, after Claimant quit. Respondent owes Claimant $1,191.10 in unpaid, due and owing wages.

4) Respondent is liable for $1,656 in penalty wages to Claimant. ORS 652.150; OAR 839-001-0470(1).

5) Respondent is liable for $1,656 in civil penalties to Claimant. ORS 653.055.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages, and the penalty wages and civil penalties, plus interest on these sums until paid. ORS 652.332.

OPINION

INTRODUCTION

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 Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) 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, 262-63 (2000).

A. Respondent employed Claimant.

Respondent asserted at hearing that Claimant was an independent contractor and not Respondent's employee. Respondent bears the burden of proving this affirmative defense. *In the Matter of Rubin Honeycutt,* 23 BOLI 224, 232 (2002). Respondent based his defense on the agreement that Claimant would be paid $60 per shift, his insistence that Claimant would purchase his own liability insurance, and the fact that Claimant signed a W-9 at Respondent's request.

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 Ann L. Swanger*, 19 BOLI 42, 53 (1999). The focal point of the test is "whether the al-

leged employee, as a matter of economic reality, is economically dependent upon the business to which [he] renders [his] 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.*

In this case, Respondent set Claimant's work schedule; Claimant had no investment in the business, used only Respondent's equipment in performing his duties, and had no opportunity for profit or loss; the skill and initiative required of him to perform his janitorial duties was minimal; there was no fixed date for Claimant's employment to cease; and Claimant worked for no one else besides Respondent during the wage claim period. All these factors indicate an employer-employee relationship. Consequently, the forum concludes that Respondent was Claimant's employer and that Claimant was not an independent contractor.

B. Claimant was entitled to Oregon's minimum wage.

Claimant and Respondent both testified that Respondent agreed to pay Claimant $60 per shift. Respondent contends that Claimant was only entitled to $60 per shift based on that agreement. Respondent is wrong. An agreement to pay at a fixed rate includes the statutory requirement to pay the minimum wage, and an employee's compensation, however calculated, must result in the employee being paid at least the minimum wage for all hours worked. *In the Matter of Mary Stewart-Davis,* 13 BOLI 188, 198 (1994); ORS 653.025. Here, Claimant was entitled to be paid the minimum wage rate of $6.90 per hour for all hours that were less than 40 in any given work week, and $10.35 per hour ($6.90 x 1.5) for all hours worked over 40 in any given work week.

C. Claimant performed work for which he was not properly compensated.

Claimant was paid a total of $1,700. At $6.90 per hour, this means Claimant was paid for approximately 246 straight time hours of work. The Agency established that Claimant worked a total of 263 hours. At $6.90 per hour, Claimant earned a minimum of $1,814.70. This calculation alone, which does not factor in the overtime hours Claimant worked, establishes that Claimant was not paid for all of the work he performed.

D. The amount and extent of Claimant's work.

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 had records and was ordered to produce them, but failed to do so before the hearing. Instead, at hearing Respondent produced summary records reflecting the hours and dates worked by Claimant, but not the originals from which the summaries were purportedly derived and there was no evidence that Respondent did not possess the original documents.[7] In contrast, the Agency provided the credible testimony of Ebuka, Claimant's co-worker, that he and Claimant had worked "10-12" hours per shift, from which the forum concluded that Claimant averaged 11 hours per shift. Respondent did not dispute the days Claimant claimed to have worked, except for his claim that Claimant and Ebuka drove all the way to Grants Pass one night and back without doing any janitorial work. Respondent also testified credibly that Claimant worked fewer than 11 hours several different nights in Eugene, but did not establish the dates or that Claimant's overall average was less than 11 hours per shift.

Under OEC Rule 311(c),[8] Respondent's failure to produce Claimant's original work orders and Respondent's original calendar creates a statutory presumption that the evidence contained in it would have been adverse to Respondent.[9] OEC Rule 308 provides that "a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is

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[7] *See* fn. 6, *supra*.

[8] *See In the Matter of Dan Cyr Enterprises,* 11 BOLI 172, 179 (1993) (the forum may draw on the Oregon Evidence Code for guidance in a matter not addressed in OAR 839-050-0000 *et seq*).

[9] OEC Rule 311(c) creates a presumption that "[e]vidence willfully suppressed would be adverse to the party suppressing it."

more probable than its existence." Respondent did not meet this burden.

Based on Claimant and Ebuka's credible testimony and the presumption that Respondent's original records did not support Respondent's claims, the forum concludes that Claimant worked 33 shifts in total, for 363 total hours. Using the work week methodology set out in Finding of Fact 13 – The Merits, the forum has determined that Claimant worked 252 hours of straight time, for which he was entitled to be paid $1,731.90, and 112 hours of overtime, for which he was entitled to be paid $1,159.20, for total earnings of $2,891.10. Claimant was only paid $1,700 and is owed $1,191.10 in due and unpaid wages.

RESPONDENT'S EXHIBITS

At hearing, Respondent sought to introduce seven exhibits related to Claimant's wage claim. Four of them were provided with Respondent's original answer and request for hearing. Six of the seven were summaries prepared by Respondent showing hours worked and jobs performed by Claimant and amounts paid to Claimant, and the seventh was a copy of a W-9 purporting to show that Claimant was an independent contractor. The Agency objected to their admission based on Respondent's failure to provide them with a case summary or to provide them to the Agency in response to the ALJ's discovery order. The Agency further objected because Respondent did not provide the original documents on which the summaries were based and those original documents, which were subject to the discovery order, were not provided to the Agency before or during the hearing and Respondent gave no excuse for not providing them. Finally, the Agency argued it would be prejudiced by the receipt of the exhibits that had been attached to Respondent's answer inasmuch as the Agency had no way of knowing that Respondent intended to rely on them at the hearing without a case summary.

OAR 839-050-0210(5) provides that the ALJ may:

> "refuse to admit evidence that has not been disclosed in response to a case summary order, unless the participant that failed to provide the evidence offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10).

OAR 839-050-0200(11) provides that the ALJ may:

> "refuse to admit evidence that has not been disclosed in response to a discovery order or subpoena, unless the participant that failed to provide discovery shows good cause for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10)."

OAR 839-050-0020(10) defines "good cause" as follows:

> "[U]nless otherwise specifically stated, * * * a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. 'Good cause' does not include a lack of knowledge of the law including these rules."

Respondent stated that he did not provide the exhibits in a case summary or comply with the discovery order were because he believed the case would settle and because he had provided some of the exhibits with his answer. These excuses do not constitute either a satisfactory reason or good cause.[10] The only question is whether not receiving the exhibits would violate the ALJ's duty to conduct a "full and fair inquiry."

Respondent gave no reason for not providing the **original** documents from which the information on exhibits R-1 and R-3 through R-7 were purportedly derived. Without the original documents to assess the accuracy of Respondent's summaries, the Agency would be placed at a tremendous disadvantage that could not be cured by a continuance, but only by production of the original documents. Respondent had an opportunity to produce those original documents before and during the hearing and chose not to. Consequently, the forum concludes that Respondent had a 'full and fair" hearing, inasmuch as the forum's rejection of his exhibits was ultimately caused by his own failure to produce his original documents.

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). Claimant left work from Respondent's house each day, worked from the schedule that Respondent had prepared, and concluded his work shift at Respondent's house, noting his work time on Respondent's daily work order that he left for Respondent. Consequently, the forum has no doubt that Respondent was aware of Claimant's hours of work. There was no evidence that Respondent acted other than voluntarily or as a free agent in not paying Claimant Oregon's minimum wage for the work he performed during the

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[10] *See, e.g., In the Matter of Contractor's Plumbing Service, Inc.,* 20 BOLI 257, 260 (2000) (respondent not allowed to introduce certain documents when it had not filed a case summary where the Agency had received copies of those documents prior to hearing but had chosen not to include them in its case summary)

wage claim period. Instead, the evidence shows that Respondent underpaid Claimant based on his perception that Claimant was an independent contractor. This misguided perception is not a defense to an award of penalty wages, and the forum finds that Claimant is entitled to penalty wages.

Claimant voluntarily quit without advance notice, and his wages became due on March 11, 2003, five days after his last day at work and not counting Saturday or Sunday. More than 12 days have elapsed since written notice of Claimant's wage claim was sent to and received by Respondent, and more than 30 days have elapsed since Claimant's last workday. Penalty wages are therefore assessed and calculated pursuant to ORS 652.150 (8 hours x $6.90 per hour x 30 days = $1,656).

CIVIL PENALTIES UNDER ORS 653.055

Where a Respondent pays an employee "less than the wages to which the employee is entitled under ORS 653.010 to 653.261," the forum may award civil penalties to the employee. ORS 653.055; *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001); *In the Matter of TCS Global Corp.,* 24 BOLI 246, 260 (2003). Oregon's minimum wage requirements are contained in ORS 653.025 and fall within the range of wage entitlement encompassed by ORS 653.055. The Agency established by a preponderance of the evidence that Respondent failed to pay Claimant at least the minimum wage of $6.90 per hour for every hour Claimant worked. Therefore, Respondent is liable for $1,656 in civil penalties as provided in ORS 652.150. This figure is computed by multiplying $6.90 per hour x 8 hours x 30 days.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages Respondent owes as a result of his violation of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Adesina Adeniji** 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 Dennis E. Moore in the amount of FOUR THOUSAND FIVE HUNDRED THREE DOLLARS AND TEN CENTS ($4,503.10), less appropriate lawful deductions, representing $1,191.10 in gross earned, unpaid, due and payable wages, $1,656 in penalty wages, and $1,656 in civil penalties, plus interest at the legal rate on the sum of $1,191.10 from April 1, 2003, until paid, and interest at the legal rate on the sum of $3,312 from May 1, 2003, until paid.

In the Matter of
MAGNO-HUMPHRIES, INC.

Case No. 38-02
Final Order of Commissioner Dan Gardner
Issued February 18, 2004

SYNOPSIS

Respondent failed to timely file an answer and a notice of default issued. Respondent did not timely file a request for relief from default and was not permitted to present evidence or examine witnesses at the hearing pursuant to OAR 839-050-0330(3). The forum found that the Agency established a prima facie case and concluded that Respondent denied Complainant Oregon Family Medical Leave ("OFLA") by terminating her while she was absent from work due to an OFLA qualified health condition. The forum determined that Respondent should pay Complainant $22,400 in lost wages, $18,000 for mental suffering, and $2,585.31 in lost medical benefits. *Former* ORS 659.470(1); *former* 659.472(1); *former* 659.478; *former* 659.492(1); *former* 659.010 to 659.110; 659A.780; *former* and *current* OAR 839-009-0210(14)(d); *former* and *current* OAR 839-009-0320(2).

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 February 11, 2003, in the W.W. Gregg Hearings Room located at 800 NE Oregon Street, Portland, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Bonnie Hopperstad ("Complainant") was present throughout the hearing and was not represented by counsel. Magno-Humphries, Inc. ("Respondent"), after being duly notified of the time and place of the hearing and of its obligation to file an answer within 20 days of the issuance of the Formal Charges, failed to file an answer as required. The ALJ found Respondent in default and Respondent was thereby precluded from presenting evidence or argument at the hearing. After Respondent's request for relief from default was denied, attorney Terrence Kay filed an appearance on Respondent's behalf. The day before the hearing, Respondent, through counsel, filed a motion to set aside the order of default and order denying relief from default, which the ALJ denied. Neither Respondent nor its counsel was present at the hearing.

In addition to Complainant, the Agency called as witnesses: Peter Martindale, Senior Civil Rights Investigator and Barbara

Hopperstad, Complainant's mother.

The forum received as evidence:

a) Administrative exhibits X-1 through X-18 (generated prior to or during hearing);

b) Agency exhibits A-1 through A-10 (submitted prior to hearing) and A-11 and A-12 (submitted during 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 9, 2001, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of the unlawful employment practices of Respondent. On January 14, 2002, the Agency amended the complaint to correct a typographical error.[1] After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations of the complaint.

2) On August 21, 2002, the Agency submitted Formal Charges to the forum alleging Respondent discriminated against Complainant by refusing to grant her family medical leave in violation of *former* ORS 659.492. The Agency further alleged that Respondent terminated Complainant because of absences caused by her serious health condition in violation of *former* ORS 659.492 and *former* and *current* OAR 839-009-0320. The Agency also requested a hearing.

3) On August 22, 2002, the forum served the Formal Charges on Respondent together with the following: a) a Notice of Hearing setting forth February 11, 2003, 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) A copy of the Formal Charges, together with items a) through d) of Procedural Finding 3 above, were sent by certified mail, postage prepaid, to Respondent's last known address (supplied by the Agency), pursuant to OAR 839-050-0030(1) as follows:

Thelma M. Humphries, President

Magno-Humphries, Inc. dba

Magno-Humphries Laboratories Incorporated

8800 SW Commercial

PO Box 230626

[1] The original complaint misspelled Respondent's name.

Tigard, Oregon 97223

Thelma Magno
Registered Agent
Magno-Humphries, Inc.
8800 SW Commercial
PO Box 230626
Tigard, Oregon 97223

On August 30, 2002, the Hearings Unit received two US Postal Service Certified Mail Receipts that were signed by the recipient (signature illegible) showing delivery to both addresses.

5) The "Instructions" on the Notice of Hearing (item a) in Finding 3, the Summary of Contested Case Rights and Procedures (item b) in Finding 3, and the Contested Case Hearing Rules (item c) at OAR 839-050-0130(1) in Finding 3, provide that an answer must be filed within 20 days of the issuance of the charging document. All three also provide that a corporation must be represented either by counsel or an authorized representative at all stages of the hearing, including filing an answer, and that before a person may appear as an authorized representative, the person must file a letter authorizing the person to appear on behalf of the corporation. The Hearings Unit did not receive any correspondence from Respondent within 20 days of the issuance of the charging document.

6) On September 16, 2002, Agency case presenter Cynthia Domas mailed a letter to Respondent's registered agent that stated, in pertinent part:

> "Pleased be advised that the Agency will seek a default in the above matter if you do not file an Answer within ten (10) days from the date of this letter."

7) On Monday, September 30, 2002, the Hearings Unit received a letter sent by facsimile transmission from Thelma Magno that stated in pertinent part:

> "Magno-Humphries respectfully dissagree [*sic*] with the findings of the Bureau. Please see attached summary on dates we have on [*sic*] our files that was submitted to your office and also a telephone/conference meeting. We were not given the privilege of having a hearing in person.
>
> "I have been in business for 22 years and nothing like this has ever happened. I am a small business trying to survive this unhealthy economy[.] Last May I have [*sic*] to cut down 1/3 of my employees especially in production, management and packaging because of loss of business and income.
>
> "We were not informed on how serious her condition is – a lot of times she just call-in sick with no reason – when ask [*sic*] on the day that she was warned – is there anything we can do to help on your condition – she never said that she is really sick.

> "I have employees that had been here 20 years and they can testify that we do not treat our employees like this. This is not fair that we should be accused of some things that is [*sic*] not true. I apologize for the delay of this reply (I have a serious business to run).
>
> "May we request a formal hearing – and we wanted all the paper (medical papers) from the hospital or her doctor to be submitted. If I have to hire a lawyer – I will – this is important to us that this be resolved in appropriate way.
>
> "Hope to hear from you soon."

The letter, dated September 28, 2002, included an attachment that appears to be a log documenting dates that Complainant was absent from work due to illness and dates that she returned to work with a doctor's note. The letter did not include a certificate of service indicating that it had been served on the Agency.

8) On October 1, 2002, the Hearings Unit received the original letter and attachment from Thelma Magno dated and postmarked September 28, 2002.

9) On October 3, 2002, the Agency filed a Motion for Default and Alternative Motion for Limitation of Issues at Hearing. The Agency's motion stated, in pertinent part:

> "On August 22, 2002, the Agency issued a Notice of Hearing ('Notice'). The Notice set forth in bold font that Respondent's Answer was due 20 days from the date of service. OAR 839-050-0330 controls service of Agency hearing documents. Service of the charging document in this case was complete upon mailing under OAR 839-050-0330(1)(b). Attached as Exhibit A and incorporated by reference herein is a copy of the certified mail return receipt requested card showing the correct address of Respondent. In addition, the document from Respondent received by the Hearings Unit on October 1, 2002, lists the same address for Respondent. Therefore, service was effective on August 22, 2002, making the Respondent's Answer due no later than September 11, 2002.
>
> "Although there is no Agency rule requiring that Respondent be allowed a 10-day grace period before the Agency will seek a default, the Agency Case Presenter sent a 10-day letter to Respondent on September 16, 2002, a copy is attached as Exhibit B and incorporated by reference herein. Respondent did not file an Answer. However, Respondent reportedly faxed a document to the Agency on September 27, 2002, at 7:02 p.m. Faxed filings are not allowed in this forum unless specifically provided for by the Administrative Law Judge. OAR 839-050-0040(2). The Case Presenter has not received any correspondence

from Respondent. The Hearings Unit did not receive a hard copy until October 1, 2002. A copy of the envelope that is date stamped is attached as Exhibit C and incorporated by reference herein. This was over two weeks after the Answer was due. OAR 839-050-0050 allows the Administrative Law Judge to disregard any document that is filed late.

"OAR 839-050-0110(1) requires that corporations be represented by either counsel or an authorized representative *at all stages of the contested case proceeding*. The Notice of Hearing further clarifies this requirement by specifically stating that this requirement includes the filing of an Answer. The document received from Respondent on October 1, 2002, is signed by the President of the corporation. There is no indication that Ms. Magno is an attorney or authorized representative. This is particularly clear from the last sentence of the document." [Citations omitted]

10) On October 9, 2002, the ALJ granted the Agency's motion and issued a Notice of Default noting that the Formal Charges issued on August 22, 2002, that Respondent was required to file an answer within 20 days and failed to do so, and that it was in default under OAR 839-050-0330(1)(a). Respondent was advised it had ten days from the date the Notice of Default issued to request relief from default through counsel or an authorized representative as provided in the contested case hearing rules.

11) On October 22, 2002, the Hearings Unit received a letter from Thelma Magno that was sent by facsimile transmission at 5:11 p.m. on October 21, 2002, after BOLI business hours.[2] The letter stated that "Magno-Humphries, Inc. requests a relief from default due to my absence at the time of the prescribed deadline. At the time of my return, I did not have time to act on this." The letter included a lengthy answer that concluded as follows: "1. Because of her history of absences, there was no indication that her absences as early as August were due to a serious health condition. 2. Complainant was terminated due to her absences, not a condition that was not yet diagnosed." The letter did not include a statement authorizing Magno to appear on Respondent's behalf.

12) On October 25, 2002, the ALJ issued an order denying Respondent relief from default

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[2] The Notice of Default included a footnote pertaining to the request for relief from default deadline that stated "OAR 839-050-0040(3) provides that when the last day of the designated period falls on a 'Saturday, Sunday or holiday, the period shall run until 5 p.m. of the next day that is not a Saturday, Sunday or holiday.' In this case, the 10 day period ends on Saturday, October 19, 2002, thus, Respondent has until 5 p.m. on the following Monday, October 21, 2002, to submit its request for relief from default."

noting that its request for relief was not timely filed, was not filed by counsel or an authorized representative, and, in any event, failed to show good cause for Respondent's failure to timely file an answer.

13) On January 9, 2003, the Hearings Unit received a Notice of Representation of Counsel filed by attorney Terrence Kay on Respondent's behalf.

14) On February 10, 2003, the Agency submitted a case summary.

15) On February 10, 2003, Respondent, through counsel, moved the forum to set aside the notice of default and the order denying relief from default and alternatively moved for relief from default. Additionally, Respondent moved to continue the hearing to allow "reasonable" time for discovery and hearing preparation. At counsel's request, the ALJ convened a pre-hearing conference by telephone to address Respondent's motions. During the pre-hearing conference and for reasons set forth in the Ruling Upon Motions section of this order, the ALJ denied the motions and informed counsel that Respondent would not be allowed to participate in the hearing, pursuant to OAR 839-050-0330(3).

16) On February 11, 2003, the Agency filed an addendum to its case summary with the Hearings Unit which included a copy of a letter to Kay from Domas stating that a "courtesy" copy of the Agency's case summary was enclosed.

17) At the start of hearing on February 11, 2003, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Complainant of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) During the hearing, the Agency requested that the forum issue a protective order for three exhibits (submitted during the hearing) that were part of Complainant's medical records. Case presenter Domas stated she provided a copy of the exhibits to attorney Kay prior to the hearing and to no other persons. After discussion about the extent to which the documents may be protected after their release to a non-participant, Domas offered to research and provide the forum with information pertinent to the issue.

19) On February 18, 2003, the ALJ issued a Protective Order that exempted Complainant's medical records from public disclosure and set forth conditions governing their classification, acquisition, and use.

20) The ALJ issued a proposed order on January 14, 2004, 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 exceptions on January 26, 2004. Respondent's filing is discussed in the Opinion section of this Final Order.

RULING UPON MOTIONS

Respondent's motions to set aside the forum's default notice and ruling denying relief from default and to postpone were filed the day before the hearing and over three months after the ALJ issued an order denying Respondent relief from default. In its motions, Respondent focused on six points that are addressed as follows:

1. Respondent timely filed an answer on September 28, 2002.

Respondent asserts it "filed a letter by an authorized officer with an Answer on September 28, 2002, which was not subject to challenge as a 'default' even if the Answer was open to a motion seeking further specifically [*sic*] or detail as to form." As the procedural findings herein recite, the answer was due on September 11, not September 28, 2001. Although the Agency was not required to do so, it advised Respondent that it would not seek a default order if Respondent filed its answer within 10 days from the date of the Agency's letter which was September 16, 2001. Respondent did not file an answer on or before September 26, 2001. Instead, on October 1, 2001, the Hearings Unit received a letter from Thelma Magno dated and postmarked September 28, 2001, that addressed Respondent's failure to timely answer the charges by stating: "I apologize for the delay of this reply (I have a serious business to run)." In her letter, Magno did not state that she was authorized to represent Respondent and she did not offer further explanation for the delayed response. Notably, Magno did not serve the Agency with a copy of its correspondence. The Agency moved for default based on Respondent's failure to timely file an answer as provided in the contested case hearing rules. The forum found and affirms the finding that Respondent did not timely file an answer. Since the corporation is obliged to timely file an answer through counsel or an authorized representative, pursuant to OAR 839-050-0110, and did not do so in this case, the forum need not determine whether Magno's September 28 letter constituted an answer as contemplated under OAR 839-050-0130(1).

2. The Notice of Default was unlawful because Respondent appeared by filing an answer through an authorized representative before the Agency's Motion for Default was filed and was issued in violation of ORS 183.415(6).

As previously discussed, Magno's September 28th letter was not timely filed, was not filed through counsel or an authorized representative, and, in any event, was not served on the Agency. The Agency, therefore, properly moved for default and the forum properly issued a Notice of Default.

Respondent, citing ORS 183.415(6), argues:

> "At the time of the Motion for Default Magno had requested a hearing in its September 28, 2002, submission, but that hearing was not provided, and the Case Presenter did not present, as required, a 'prima facie case,' let alone a sufficient basis for default. Even if the ALJ had discretion to consider the Motion without a hearing, the Motion was decided without waiting for a response from Magno within the time frame of the rule on motions, and it was an abuse of discretion (if there was authority to decide the Motion) to issue a 'Notice' which the ALJ intended to treat [as] an Order of Default."

Respondent misconstrues the statute. ORS 183.415(6) provides that:

> "An order adverse to a party may be issued upon default only upon prima facie case made on the record of the agency. When an order is effective only if a request for hearing is not made by the party, the record may be made at the time of issuance of the order, and if the order is based only on material included in the application or other submissions of the party, and such material shall constitute the evidentiary record of the proceeding if hearing is not requested."

In this case, Respondent was not required to request a hearing. Instead, Respondent was served with a charging document, notified of the time and place scheduled for hearing, and duly advised of its rights and responsibilities as required under ORS 183.413. Respondent *was* required, however, to submit an appropriate answer within a specified period and did not do so. Moreover, even after Respondent was given notice and opportunity to show good cause for its failure to timely file an answer,[3] it failed to comply with the Notice of Default requiring it to reply within ten days of the notice and to include notice of representation by counsel or by authorized representative. Contrary to Respondent's assertion, there is no requirement that the Agency present a prima facie case on the record before the forum issues a notice of default. The Agency must, however, establish a prima facie case on the record prior to the issuance of a final order adverse to Respondent based on its default status. The Agency presented a prima facie case at the scheduled hearing prior to the issuance of the Final Order in this matter and that is all that is required under the statute.

3. Respondent timely filed a request for relief from default and included another

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[3] OAR 839-050-0340(1)(b) provides that "[r]elief from default may be granted where good cause is established within ten days after * * * [a] notice of default has been issued." 839-050-0340(4) provides that "[a] request for relief from default made after a notice of default has been issued * * * shall be addressed to and ruled upon by the administrative law judge."

answer satisfying the Notice of Default.

Contrary to Respondent's assertion, Respondent did not timely file a request for relief from default or a letter authorizing its president to appear on its behalf in accordance with OAR 839-050-0110(3).[4] Therefore, even if the forum concluded that Magno's second submission constituted an answer in accordance with the rules, it was not submitted by counsel or accompanied by a letter authorizing Magno to respond on Respondent's behalf. In the absence of timely notice of representation on the part of Respondent, the forum correctly disregarded the "answer."

4. Failure to grant Respondent relief from default constitutes discrimination based on Respondent's president's "protected minority class."

Respondent asserts that the ALJ's refusal to accept Thelma Magno's document "requesting relief [which included an] Answer and explanation" is a denial of "equal protection and constitute[s] discrimination against a protected minority class for Mr. Magno's business."[5] According to Respondent's counsel, Thelma Magno is "a Philippine-American U.S. Citizen" and he requests the forum to "take judicial notice of the Hearing Unit's and Agency's entire history of filings by respondents and give Magno a reasonable opportunity to review those records if this Motion is not otherwise granted." Respondent further proposes that the Agency would not refuse "such a document signed by Phil Knight as President for Nike, for President Dave Frohnmayer for the University of Oregon, or any number of other officers of companies or directors of public bodies[.]" Respondent is simply wrong. OAR 839-050-0110 spells out the requirements for appearing as an authorized representative on behalf of a corporation: "Before a person may appear as an authorized representative of a * * * corporation * * * that is a party to a contested case proceeding, the person *must file a letter authorizing the person to appear on behalf of the party*." The purpose of the rule is to ensure that the corporation *intends* a named representative represent the corporation's legal interests in the contested case proceeding. It is not enough that a corporate president respond unilaterally to a charging document. Without a written statement qualifying the corporate president or some other officer or corporate employee as an authorized representative, the forum will not otherwise make a presumption. That is true regardless of a responding officer's prominence in the community.

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[4] *See* Findings of Fact – Procedural 11 and 12.

[5] There is no way to discern from the record whether or not counsel's reference to "Mr. Magno" is intended or is a typographical error.

5. Alternatively, Respondent should be allowed to "re-open" the record.

Respondent argues that a full and fair adjudication cannot occur in this case without Respondent's evidence in the record and for that reason the ALJ *must* reopen the record for its consideration. OAR 839-050-0410 addresses the circumstance under which the record shall be reopened and provides:

> "Upon the administrative law judge's own motion or upon the motion of a participant, the administrative law judge shall reopen the record where he or she determines additional evidence is necessary to fully and fairly adjudicate the case. In making this determination, the administrative law judge shall consider whether the evidence suggested for consideration could have been gathered prior to the hearing."

Contrary to Respondent's assertion, the rule does not require the record be reopened to receive evidence from a party in default. In fact, the ALJ is barred from permitting a party in default "to participate *in any manner* in the subsequent hearing, including, but not limited to, *presentation of witnesses or evidence on the party's own behalf*, examination of Agency witnesses, objection to evidence presented by the Agency, making of motions or argument, and filing exceptions to the Proposed Order." OAR 839-050-0330(3). Additionally, under the default rules and in accordance with ORS 183.415(6), the Agency was required only to make a prima facie case in support of its allegations. The Agency did so when it appeared at the scheduled hearing in this matter.

As to Respondent's due process argument, the forum finds Respondent had ample notice and opportunity to avoid default, but through either neglect or inattention failed to take the necessary steps that would have prevented its exclusion from participation in the contested case hearing. As a previous commissioner observed:

> "A contested case hearing involving unlawful practices in connection with ORS chapter 659 does not occur in a vacuum. It is preceded by administrative complaint, investigation, administrative determination, and usually conciliation. Respondents should be well aware, following an administrative determination finding substantial evidence of a violation, and certainly following a failure of conciliation, that a hearing is a distinct possibility. * * * A party's neglect of or inattention concerning process such as was received by Respondents is difficult to justify. I cannot find that it was justified here."

In the Matter of 60 Minute Tune, 9 BOLI 191, 202 (1991), *aff'd without opinion, Nida v. Bureau of Labor and Industries*, 119 Or App 508 (1993). As in *60 Minute Tune,* the forum finds no justification for Respondent's failure to attend to the same procedural requirements all other participants

are obliged to meet. Relief from default was properly denied in this case and this order affirms that ruling.

6. The hearing must be postponed for good cause.

For all of the reasons stated above, Respondent's motion to postpone the hearing to allow its participation was properly denied.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Magno-Humphries, Inc. was a corporation doing business in Tigard, Oregon, engaged in formulating over-the-counter pharmaceuticals that are shipped and distributed elsewhere in the state, and was an employer utilizing the personal services of 25 or more persons.

2) At all times material herein, Thelma Magno was Respondent's president.

3) Respondent employed Complainant as a shipping clerk from October 23, 1996, until October 19, 2001. Complainant worked the morning shift from 8 a.m. until 4:30 p.m., Monday through Friday, five days per week.

4) At all times material herein, Kim Messenger was Respondent's shipping manager and Complainant's immediate supervisor. Catherine Meneses was Respondent's human resources director and Pat Bohnert was Respondent's operations director.

5) Sometime in August 2001, Complainant began to experience stomach pains. Complainant was absent from work due to an excused illness on September 4 and 5, 2001, and was on an approved vacation September 6 and 7, 2001. On or about September 12 or 13, 2001, Complainant experienced stomach pain that included vomiting, so she went to the emergency room for treatment. She was absent from work four days. Upon her return to work, Complainant gave Messenger a "Clinician's Report of Disability" from Kaiser Permanente that was signed by Calvert J. Shipley, MD, on September 13, 2001. The medical note authorized Complainant time loss from "9/11/01 through 9/14/01." Complainant's "diagnosis (impression)" was "acute illness." Messenger did not question Complainant about her illness or her doctor's release. On September 25 and 26, 2001, Complainant was again absent from work. She called Messenger and told him she was ill. He did not question those absences or ask for medical verification.

6) In September, Complainant complied with Respondent's call-in policy by telephoning Respondent each day she missed work because of illness and she gave Respondent a doctor's note for all absences of three or more days.

7) On September 27, 2001, Messenger, Meneses, and Bohnert called Complainant into a conference room to discuss her attendance. They told her that she was a valuable employee and

that Respondent did not want to lose her, but she needed to have better attendance. Bohnert asked Complainant if there was anything Respondent could do to help and Complainant told them she was undergoing medical testing and that she would provide Respondent with the test results when available. During the meeting, Messenger gave Complainant an "Employee Warning Notice," dated September 26, 2001, which was denoted as a "1st Written Warning." The type of violation noted was "Attendance" and Messenger wrote that Complainant had "excessive absences within a 90 day period (pg. 40)." During the meeting, Complainant signed the warning, but does not recall anyone telling her she would be fired if she continued to miss work.

8) On Respondent's behalf, Messenger, Bohnert, and Meneses submitted a position statement to the Agency, which stated, in pertinent part regarding the September 27, 2001, meeting:

> "The terminated employee met with her Manager (Kim Messenger), the Director of Operations (Pat Bohnert) as well as the Director of Human Resources (Catherine Meneses). The employee's absences were unpredictable. What was stated was that she had numerous absences, both unexcused and also absences covered by a doctor's note.
>
> "*Our employee manual, which the employee received and has acknowledged receipt of, defines excessive absenteeism and the results of which, being disciplinary action leading to termination.*
>
> "The focus of the meeting and final warning was to tell the terminated employee that her absences were detrimental to the operation of the Shipping/Distribution Department. When she was present at her job, she was very productive, an asset to the team. Because her work was valuable, she was missed when she was not there. In addition, because the department was so small every body counted and even one person missing for extended periods of time created a hardship for the department and the company. The Director of Operations also asked Bonnie "Is there anything we can do to help?" Bonnie stated she was working with her doctor and she realized her attendance was important. She was told that if she continued to have excessive absences she would be terminated. This was the reason for the meeting and the final warning.
>
> "The manager could no longer count on her to be there. Because her absences were unpredictable [*sic*]. The meeting concluded with the terminated employee acknowledging her attendance responsibilities, as well as her part of a crucial department in the day-to-day operations of Magno.
>
> "The employee knew why she was given a final warning, and

what needed to be done to stay employed.

"At no time during her absences did she mention a specific medical condition.

"At no time during the meeting, did the employee request time off for Oregon Family Leave.

"The respondent recognizes that employees of the company are not authorized to diagnose an employee, nor was there a condition specifically defined by Bonnie or her doctor. Therefore, it is inappropriate for the employer to solicit such a request, since neither the employee nor the physician had a specific medical reason for her absences.

"We were not given official notice that problem constituted ongoing or intermittent leave.

"*Our employee manual also states several types of unpaid leaves, all of which were not formally requested by the employee.*" (Emphasis in original)

9) After she was warned about her attendance, Complainant continued to experience severe stomach pains and vomiting. On October 2, 2001, she underwent an "upper G.I." procedure and was off work due to continued stomach pain from October 2 through 5, 2001. During that time she went to the emergency room and was placed on intravenous ("IV") fluids because she was dehydrated.

10) When she returned to work the following Monday, October 8, 2001, Complainant gave Messenger a note from Kaiser Permanente that had "IV" written on it and authorized her to be off work for medical reasons from October 3 through 5, 2001. She told Messenger and Bohnert that her doctor believed she had "gastritis," that "it had to do with her esophagus and her reflux," and that she would need further tests. Neither Messenger nor Bohnert asked for additional information and Complainant's absence from October 2 through 5, 2001, was excused. Respondent documented the "excused" absence on its "Pre-Approved Absence Form," which was "approved" and signed by the human resource director on October 8, 2001. On that same date, Complainant gave Messenger and Bohnert a copy of a "Kaiser Permanente Appointment Reminder" showing that she was scheduled to see "Dr. Griffin" at 10 a.m. on October 25, 2001.

11) In an "Emergency Dept. Report" dictated by "Mullen, John, T." on October 5, 2001, it states, in pertinent part:

"CHIEF COMPLAINT: Abdominal pain. Patient is complaining of continued abdominal pain over the last two months. Seen and evaluated by primary physician. Started on Protinix and ranitidine without improvement. Patient recently had GI study positive for gastroesophageal reflux disease and patient would probably improve with ranitidine as prescribed. Patient though complaining of an upper abdominal pain over the

last two to three days. No improvement with all present medications.

"* * * Patient to continue Zoloft and ranitidine as prescribed. Patient while in the emergency department received IV Inapsine and Benadryl with total resolution of discomfort. Patient informed has gastroesophageal reflux disease by GI study and will need to take ranitidine with addition of Maalox or Mylanta if needed. Patient also to stop any alcohol, smoking, caffeine, aspirin, Motrin. Patient states and understands these instructions. Will comply. Patient not improved next week to follow up with primary care physician for a re-evaluation and possible GI referral. Has continued constant abdominal pain.

"DIAGNOSIS: Abdominal pain, improved, gastritis.

"PLAN: As above."

The signature on the emergency room report appears as "K. Griffin, MD" and a handwritten note next to it says: "IV means 'intravenous.'"

12) Before her next scheduled medical appointment, Complainant experienced another bout of stomach pain and was absent from work from October 15 through 18, 2001. She called in daily throughout that week in accordance with Respondent's policies.

13) Complainant returned to work on October 19, 2001, where Bohnert met her in Respondent's parking lot before she entered the workplace. Complainant handed Bohnert a Kaiser Permanente "Clinician's Report of Disability" that was signed by Kristin Griffin, MD, on October 16, 2001. The medical report authorized Complainant time loss from "10/14/01 through 10/18/01." The physician's "diagnosis (impression)" was "gastritis" and the treatment plan called for "rest [and] prescribed medication." Bohnert told her: "This is not going to do it – you are terminated." Bohnert told Complainant that she was terminated because she missed too much work. Complainant did not perform any work for Respondent on October 19, 2001.

14) After Bohnert told her she was terminated, Complainant was "shocked and hurt" and cried in her car the entire drive home. She arrived home upset and in tears. She enjoyed her job and could not understand why she was terminated after five years of employment with Respondent. Since she was fired, she has had difficulty sleeping because she cannot stop thinking about her termination. She also has had difficulty socializing with friends and family which she attributes to her termination. She gets "scared" and either returns home or does not go at all on beach trips or other outings that she enjoyed before she was terminated. She has had some depression in the past, but it became worse after she was terminated. Her primary care physician referred her to Jeanne Ewen, a licensed clinical social

worker at Kaiser Mental Health. At the Agency's request, Ewen addressed Complainant's treatment for depression in a letter dated February 6, 2003 that stated, in pertinent part:

> "Ms. Hopperstad has been in treatment with me since June 3, 2002. Ms. Hopperstad presented with depressive symptoms, including panic attacks, following being fired from her job. Ms. Hopperstad told me that she had been ill and had physical problems that prevented her from going to work, and that she had been fired for being off sick. This was very distressing for her and affected her self-esteem to the extent that she was not able to socialize and had great difficulty thinking about applying and interviewing for other jobs. In addition to this she seemed to lose her self confidence and was no longer able to drive out of town, be away from home overnight, or do the things that she normally did to enjoy herself. Being fired from her job has been a major stressor in her life and her usual coping skills seemed to stop working for her at that time. She continues to struggle with these issues."

During her testimony, Complainant was visibly upset when she related her shock at being terminated following her absence due to illness.

15) Respondent documented Complainant's termination in an "Employee Warning Notice" dated October 18, 2001. The document describes the "Disciplinary Action" as "Termination" and the "Type of Violation" as "Attendance." In the space designated "Employer Statement" it says: "Continues to miss work." The document also indicates that it is Complainant's second written warning. The document shows the notice was issued by "K.M." and Kim Messenger's signature, which is dated October 17, 2001, appears to be on the line designated as "Signature of Supervisor Who Issued Warning." The employee signature line is blank. Complainant did not see or receive the termination document and was not at work on the dates appearing in the document.

16) On October 25, 2001, Complainant underwent a medical procedure that involved placing a scope "down to [her] stomach." She continues to take prescribed medication for her stomach disorder.

17) While she was employed, Respondent paid Complainant's health insurance coverage. After she was terminated, Complainant continued her health insurance benefits by purchasing COBRA coverage through Respondent. According to a statement entitled "COBRA Coverage Analysis" that Respondent mailed to Complainant in January 2003, she paid $2,585.31 for her coverage between October 30, 2001, and December 26, 2002, and still owed $595.82 as of the hearing date.

18) Complainant was earning $8.75 per hour when she was terminated. On January 24, 2003, Complainant began packing boxes of Honey Stix and tea for shipment for Stash Tea and has earned $395 since her start date.

19) The testimony of Complainant, her mother, Barbara Hopperstad, and the Agency investigator appearing herein was credible. Moreover, it was corroborated by documents Respondent prepared during Complainant's employment and during the Agency investigation.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a corporation and an Oregon employer that utilized the personal services of 25 or more persons in Oregon for each working day during both 2000 and 2001.

2) Complainant was employed by Respondent more than 25 hours per week from October 1996 through October 18, 2001.

3) Beginning in September 2001, Complainant began to suffer from a stomach ailment that required her absence from work for more than three days on three separate occasions and which required ongoing treatment by a physician, including prescribed medication.

4) Complainant complied with Respondent's daily call-in policy and timely presented a physician's note after each of her absences due to illness.

5) Respondent was aware that Complainant had been diagnosed with gastritis, involving her esophagus and reflux, and had sufficient information about Complainant's medical condition to put Respondent on inquiry notice.

6) Respondent did not question Complainant's physician's notes or request that Complainant provide additional information or medical verification regarding her medical condition.

7) Respondent's management personnel signed a termination notice on October 17, 2001, that ended Complainant's employment effective October 18, 2001, while she was still absent due to her ongoing medical condition. The basis for Complainant's termination was her continued absences following the September 27, 2001, written warning about previous absenteeism. All of Complainant's absences after September 27 were due to her ongoing medical condition.

8) Complainant's final rate of pay was $8.75 per hour. She was regularly scheduled to work 40 hours per week, from Monday through Friday. From October 19, 2001, until January 24, 2003, Complainant lost wages totaling $22,400 ($8.75 per hour x 40 hours per week x 64 weeks).

9) Complainant suffered financial distress, shock, hurt, loss of self esteem, an inability to engage in activities that she routinely engaged in prior to her termination, and depression because of

her termination based on Respondent's denial of OFLA leave.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was a covered employer as defined in *former* ORS 659.472(1). *See also former* ORS 659.470(1).

2) The actions, inaction, statements and motivations of Thelma Magno, Respondent's president, Kim Messenger, Respondent's Shipping Manager; Catherine Meneses, Respondent's human resources director, and Pat Bohnert, Respondent's operations manager, properly are imputed to Respondent.

3) *Former* ORS 659.374(1) provides that "[a[ll employees of a covered employer are eligible to take leave for one of the purposes specified in [*former*] ORS 659.476(1)(b) to (d)" except in circumstances not applicable here. Complainant was an eligible employee.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. *Former* ORS 659.492(2); *former* ORS 659.010 to 659.110; ORS 659A.780; ORS 659A.850(2) and ORS 659A.850(4).

5) Complainant had a stomach ailment that rendered her incapable of performing any of her job functions for periods exceeding three days and for which she sought and received medical care that involved ongoing treatment from her physician, constituting a serious health condition as defined in *former* and *current* OAR 839-009-0210(14)(d).

6) Complainant was entitled to 12 weeks of OFLA leave, pursuant to *former* ORS 659.478(1). By firing Complainant during the time she was incapacitated from work due to an OFLA qualifying medical condition, and by using Complainant's previous OFLA qualifying absences from work as the reason for firing her, Respondent denied Complainant the 12 weeks of leave to which she was entitled, thereby violating *former* ORS 659.478 and committing an unlawful employment practice. *Former* ORS 659.492(1).

7) By terminating Complainant because she used OFLA qualified leave, Respondent violated *former* and *current* OAR 839-009-0320(2).

OPINION

DEFAULT

Respondent Magno-Humphries, Inc. was found in default under OAR 839-050-0330 for failing to timely file an answer within the time specified in the Formal Charges. In a default situation, the Agency is required to present a prima facie case on the record to support the allegations in its charging document and to establish damages. ORS 183.415(6). In this case, the Agency met that burden by submitting credible witness testimony and documentary evidence to

support its allegations. *See In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 124, 136 (1997).

PRIMA FACIE CASE

The Agency alleged Respondent had notice that Complainant was suffering from a medical condition that qualified her for leave under the Oregon Family Medical Leave Act ("OFLA") and failed to grant her the medical leave to which she was entitled. The Agency also alleged Respondent terminated Complainant because she was absent from work due to an OFLA qualifying medical condition in violation of *former* and *current* OAR 839-009-0320(2).

A. Unlawful Denial of OFLA Leave – Former ORS 659.492

To establish a prima facie case, the Agency must show that: 1) Respondent was a covered employer as defined in *former* ORS 659.470(1) and *former* ORS 659.472; 2) Complainant was an eligible employee, *i.e.*, she was employed by a covered employer at least 180 calendar days immediately preceding the date her medical leave began; 3) Complainant had a "serious health condition" as defined in *former* and *current* OAR 839-009-0210(14)(d); 4) Complainant used or would have used OFLA leave to recover from or seek treatment for her serious health condition; and 5) Respondent did not allow Complainant to utilize the full amount of OFLA leave to which Complainant was entitled as specified in *former* ORS 659.478. *In the Matter of Centennial School District*, 18 BOLI 176, 192-93 (1999). The Agency established all of the elements with documents and witness testimony.

1. Respondent was a covered employer and Complainant was an eligible employee.

Former ORS 659.470(1) and *former* ORS 659.472 define "covered employers" as those "who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar work weeks 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." Complainant credibly testified that Respondent employed over 100 workers while she was in Respondent's employ. Also, Agency investigator Martindale credibly testified that Respondent confirmed it was subject to both FMLA and OFLA provisions.[6] The forum therefore finds the Agency made a prima facie showing that Respondent was a "covered employer."

Evidence also shows that Complainant was an eligible employee under *former* ORS 659.474. She worked the requisite number of days preceding her leave and Respondent did not dispute Complainant's eligibility during the Agency's investigation. Moreover, Martindale credibly tes-

[6] The FMLA covers employers with 50 or more employees.

tified that Respondent's human resource manager confirmed that Respondent was a covered employer *and* that Complainant was eligible for leave under OFLA. Consequently, the forum finds the Agency has established the first two elements of its claim.

2. Complainant had a serious health condition.

Under *former* and *current* OAR 839-009-0210(14)(d), a serious health condition is "an illness, injury, impairment or physical or mental condition of an employee * * * that:

> "involves a period of incapacity. Incapacity is the inability to perform at least one essential job function * * * for more than three consecutive calendar days and any subsequent required treatment or recovery period relating to the same condition. This incapacity must involve:
>
> "(A) Two or more treatments by a health care provider; or
>
> "(B) One treatment plus a regimen of continuing care."

On its face, the rule sets forth three objective requirements that must be met before Complainant may be deemed to have had a "serious health condition."

One, she must have had a period of incapacity during which she was unable to perform at least one essential job function. In this case, evidence shows Complainant suffered from ongoing stomach problems in September and October 2001 which rendered her unable to perform the essential functions of her job on three separate occasions. On each occasion, Complainant's physicians authorized her time loss for medical reasons. Complainant credibly testified and Respondent acknowledged during the Agency's investigation that she had given Respondent a physician's note following each of her absences, that she had complied with Respondent's call-in policy during her absences, and that Respondent had excused at least two of the three absences.[7] Moreover, credible evidence shows Respondent did not request additional information, despite its ability to do so under *former* and *current* OAR 839-009-0250(1)(b) which provides that an employer may request additional information to determine that leave taken or requested "qualifies for designation as OFLA leave." Based on those facts, the forum finds that Complainant was incapacitated from performing any of her job functions on three separate occasions in September and October 2001.

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[7] *Former* and *current* OAR 839-009-0250(3) provides that "[w]hen 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. * * * The employer may require written notice by the employee within three days of the employee's return to work." In this case, evidence shows Complainant complied with Respondent's call-in policy and gave Respondent medical verification of her absences on the day she returned to work following each illness.

Two, her period of incapacity must have exceeded three consecutive calendar days. Evidence shows Complainant was absent from work for medical reasons during the periods covering September 11-14, October 2-5, and October 15-18, all of which exceeded three consecutive calendar days. In each case, Complainant's physicians authorized Complainant's time loss from work. Respondent timely received all three authorizations for absence and excused all but the last absence.

Three, she must have received two or more treatments by a health care provider *or* received one treatment that included a regimen of continuing care within the period of incapacity. Here, evidence established that Complainant saw a physician for her stomach problems on or about September 13, 2001, and the physician's note stated that the "diagnosis (impression)" was "acute illness." Thereafter, she had an "upper GI study" on October 2, tested positive for "gastroesophageal reflux disease," and was placed on a regimen of medication and lifestyle changes after seeing a physician on October 5 - all while she was absent from work due to illness. Shortly thereafter, Complainant's physician scheduled her for additional testing regarding her stomach illness on October 25, 2001. On or about October 16, during another period of absence due to the same illness, Complainant again saw her physician who documented a treatment plan that included "rest and prescribed medication." Those facts are sufficient to support a finding that Complainant received more than one treatment by a physician that included a regimen of continuing care within each period of incapacity.

Based on these unrefuted facts, the forum concludes that Complainant's stomach condition met the objective criteria set forth in the rule and qualified as a serious health condition under OFLA as a matter of law.

3. Complainant used or would have used leave time to recover from or seek treatment of an OFLA qualified condition.

Under *former* and *current* OAR 839-009-0250(1), an employee need not invoke OFLA by name in order to put an employer on notice that OFLA may have relevance to an employee's absence from work.[8] Furthermore, once an em-

[8] The Agency rule is analogous to the federal regulation promulgated to carry out the provisions of the federal Family and Medical Leave Act ("FMLA") which provides that "the employee need not expressly assert rights under the FMLA or even mention the FMLA * * * The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may re-

ployee provides enough information to put the employer on notice that the employee may be in need of OFLA leave, the employer may request additional information, including medical verification, "to determine that a requested leave qualifies for designation as OFLA leave * * *." *See former* and *current* OAR 839-009-0250(1)(b) and OAR 839-009-0260. The Ninth Circuit has interpreted the analogous federal regulation as squarely placing the onus on "the employer, having been notified of the reason for an employee's absence, for being aware that the absence may qualify for FMLA protection." *See Bachelder v. America West Airlines, Inc.*, 259 F3d 1112 (9th Cir. 2001) (holding that "it is the employer's responsibility, not the employee's, to determine whether a leave request is likely to be covered by the [FMLA] * * * Employees need only notify their employers that they will be absent under circumstances which indicate that the FMLA might apply.); *see also, Bailey v. Southwest Gas Company*, 275 F3d 1181 (9th Cir. 2002) (determining that "[i]f the employer lacks sufficient information to determine whether an employee's leave (including leave taken in the form of a reduced schedule) qualifies under the FMLA, the employer should inquire further in order to ascertain whether the FMLA applies.").[9] In this case, Complainant was absent from work for more than three days on three separate occasions, with notes from her physicians, written during each absence, indicating that she was unable to work for medical reasons. That was sufficient reason to compel Respondent to either count the absences as OFLA leave or to follow the procedures set forth in the rules to determine if Complainant's absences were OFLA qualified, *i.e.*, have Complainant provide additional information, have its company health care provider contact Complainant's health care provider to supplement and complete certification information, as permitted under the rules, or require that Complainant seek a second opinion at Respondent's expense.[10]

In light of the above, the forum concludes that Complainant's efforts to communicate her condition to Respondent constitute sufficient compliance with the OFLA notice requirements and that she used leave time to seek treatment for an OFLA qualifying health condition.

4. <u>Respondent did not allow Complainant to utilize the amount of OFLA leave to</u>

quest medical certification to support the need for such leave." 29 CFR 825.302(c).

[9] The Ninth Circuit holdings are pertinent because federal cases interpreting the FMLA are instructive in interpreting the "same or similar" OFLA provisions.

[10] *See former* and *current* OAR 839-009-0250 and OAR 839-009-0260.

which Complainant was entitled.

Under the OFLA, eligible employees are entitled to take up to 12 weeks of leave each year and are guaranteed reinstatement to their employment position, if it still exists, after they have exercised their leave right. *See former* ORS 659.478; 659.484 and *current* ORS 659A.162; 659A.171. The forum has already determined that Complainant was an eligible employee and was absent from work under circumstances that put Respondent on notice that Complainant was a candidate for OFLA leave. Despite those circumstances, Respondent did not seek additional information from her to make that determination, but instead, summarily terminated Complainant while she was still on OFLA qualified leave. The written termination notice was signed on October 17, 2001, two days before Complainant returned to work and was told she had been fired. At that time, Respondent knew that each period of absence was related to Complainant's ongoing stomach problems, that she was seeking treatment and undergoing tests, and that another test was scheduled for October 25, 2001. There is no evidence that Complainant had exhausted 12 weeks of OFLA leave at the time she was terminated. Therefore, by summarily terminating her employment while she was out on OFLA qualified leave, Respondent denied Complainant leave to which she was entitled.

Under the OFLA, it is an unlawful employment practice for an employer to deny an eligible employee leave to recover from or seek treatment for a serious health condition. *Former* ORS 659.492 and *current* ORS 659A.193. The forum concludes that the Agency established a prima facie case that Respondent committed an unlawful employment practice by denying Complainant the right to seek treatment for or to recover from her serious medical condition, in violation of former ORS 659.492.

B. Retaliation – Former and Current OAR 839-009-0320(3)

Under OAR 839-009-0320(3), "[i]t is an unlawful employment practice for an employer to retaliate or in any way discriminate against any person with respect to hiring, tenure or any other term or condition of employment because the person has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act." *Former* and c*urrent* OAR 839-009-0320(3).

To establish a prima facie case of retaliation, the Agency must show that: 1) Complainant invoked a protected right under the OFLA; 2) Respondent made an employment decision that adversely affected Complainant; and 3) there is a causal connection between the Complainant's protected OFLA activity and Respondent's adverse action. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 26-27 (2000).

1. Complainant invoked a protected right under the OFLA.

As previously discussed, the circumstances under which Complainant was absent from work in October for two periods exceeding three days put Respondent on notice that Complainant may need OFLA leave. It was Respondent's obligation, not Complainant's, to either designate the leave as OFLA qualifying or to follow the procedure set forth in the rules to confirm whether or not Complainant was entitled to OFLA leave. By timely providing Respondent with a medical release each time she was absent for more than three days and calling in each day while she was out in accordance with Respondent's policies, the forum finds Complainant "invoked" her right to OFLA leave.

2. Respondent's adverse employment decision

This element is undisputed. Evidence shows Respondent acknowledged during the Agency investigation that it terminated Complainant because she continued to miss work after she was given a "final" warning about her absenteeism on September 27, 2001. The specific absences for which Complainant was terminated occurred October 2-5 and October 15-18, 2001 while Complainant was seeking treatment for or recovering from an OFLA qualified medical condition.

3. Causal connection

Evidence shows Respondent, via its management personnel, acknowledged it knew Complainant's absences in October 2001 were related to her stomach ailment. In fact, one manager stated to the Civil Rights Investigator that Complainant had advised management as early as October 8, 2001, that her physician thought she had "gastritis" and that it had affected her esophagus. Despite its knowledge of those facts and Complainant's complete compliance with Respondent's sick leave policies during both periods of absence in October, Respondent summarily terminated Complainant on October 17, 2001, *because of* those absences. The causal connection is established directly by Respondent's acknowledgement that it terminated Complainant because of those absences which Respondent knew or should have known were OFLA qualified absences.

DAMAGES

Back Pay and Benefits Lost

It is well established in this forum that the purpose of back pay awards in employment discrimination 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 practices. *In the Matter of H. R. Satterfield*, 22 BOLI 198, 210 (2001). Benefits lost include, but are not limited to, out of pocket expenses for health insurance premiums the complainant incurs as a result of the respondent's unlawful employment practices. In this case, the effect of terminating Complainant during

and because of her OFLA qualified leave was to deny Complainant leave to which she was entitled as a matter of law. Because of the manner in which she was unlawfully denied OFLA leave, she suffered an unnecessary wage loss and loss of medical benefits for an extended period.

The forum has accepted Complainant's testimony that she was earning $8.75 per hour when she was denied her leave and that she found subsequent employment at Stash Tea on January 24, 2003. Back pay awards generally cease when a complainant obtains replacement employment for a similar duration with similar hours and hourly wage rate as when employed by the respondent. *Id.* at 210-11. Absent evidence that Complainant's hours and earnings at Stash Tea are *not* comparable to the hours she worked and hourly wages she earned during her employment with Respondent, the forum has calculated Complainant's lost wages from October 19, 2001, to January 24, 2003, the date she obtained replacement employment. The forum calculates that Complainant lost $22,400 in wages ($8.75 per hour x 40 hours per week x 64 weeks).

Documentary evidence shows Complainant continued her health insurance after she was terminated through COBRA continuation coverage which required that she pay out of pocket for extended health benefits. The "COBRA Coverage Analysis" she received in the mail from Respondent shows she paid a total of $2,585.31 from October 30, 2001, through December 26, 2002, with a $595.82 balance owing. The forum finds that the sums Complainant expended on insurance premiums would have been available for Complainant's use but for Respondent's denial of OFLA leave and that an award of $2,585.31, in addition to the back pay award of $22,400, is justified to compensate her fully for the effects of Respondent's unlawful employment practice, *i.e.*, the statutory violation found herein. *See former* ORS 659.010(2)(a) and *current* ORS 649A.859(4).

Mental Suffering

The Agency seeks mental suffering damages in the amount of $18,000 on Complainant's behalf. In determining a mental suffering award, the commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. *In the Matter of Barrett Business Services, Inc.*, 22 BOLI 77, 96 (2001). The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id.* at 96.

Based on Complainant's credible testimony, the forum finds she suffered significant emotional distress as a result of Respondent's unlawful employment practices. Complainant complied with Respondent's sick leave rules by calling in each day she was ab-

sent due to illness and by giving her employer a medical release after each absence exceeding three days. Despite her diligence and Respondent's assurances that she was a "valuable" employee, Complainant lost a job she had enjoyed and held for five years. As a result, she became so anxious and depressed that her physician referred her to a mental health specialist, Ewen, who determined that Complainant's self-esteem was affected to the extent that "she was not able to socialize and had great difficulty thinking about applying and interviewing for other jobs." Additionally, Ewen stated that Complainant "seemed to lose her self confidence and was no longer able to drive out of town, be away from home overnight, or do the things that she normally did to enjoy herself. * * * Being fired from her job has been a major stressor in [Complainant's] life and her usual coping skills seemed to stop working for her at that time." According to Ewen, Complainant continued to struggle with those issues as of February 6, 2003. Moreover, during her testimony at the hearing, Complainant was still visibly upset and confused about why she lost her job. Complainant also suffered mental distress as a result of losing her income.

The forum recognizes that Complainant acknowledged that she suffered from a lesser degree of depression prior to Respondent's denial of OFLA leave. However, the forum is not compensating her for emotional distress that is not attributable to Respondent's unlawful employment practices. Evidence shows that after she was denied leave, Complainant's emotional health and financial resources declined significantly and the forum finds that $18,000 will compensate her for the suffering caused by Respondent's unlawful employment practice in violation of *former* ORS 659.492(1) and *current* ORS 659A.183.

RESPONDENT'S EXCEPTIONS

As noted elsewhere herein, after Respondent was found in default, it lost its opportunity "to participate *in any manner* in the * * * hearing, including, but not limited to * * * filing exceptions to the Proposed Order." OAR 839-050-0330(3). Consequently, even though Respondent's exceptions are included in the record, the forum is barred from giving them consideration in this Final Order.

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 659.492 and *current* ORS 659A.183, the Commissioner of the Bureau of Labor and Industries hereby orders **Magno Humphries, 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 Bonnie Hopperstad in the amount of:

a) TWENTY TWO THOUSAND FOUR HUNDRED DOLLARS ($22,400), less appropriate lawful deductions, representing wages Complainant lost from October 19, 2001, to January 23, 2003, as a result of Respondent's unlawful employment practice; plus

b) Interest at the legal rate on the sum of $22,400 from October 19, 2001, until paid; plus

c) EIGHTEEN THOUSAND DOLLARS ($18,000), 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 $18,000 from the date of the final order until paid; plus

e) TWO THOUSAND FIVE HUNDRED EIGHTY FIVE DOLLARS AND THIRTY ONE CENTS ($2,585.31), representing benefits lost as a result of Respondent's unlawful employment practice.

f) Interest at the legal rate on the sum of $2,585.31 from the October 30, 2001, until paid.

Cease and desist from discriminating against any employee in tenure of employment based upon the employee having invoked or utilized Oregon Family Leave Act provisions.

In the Matter of

MILLENNIUM INTERNET, INC.

Case No. 95-03

Final Order of Commissioner Dan Gardner

Issued March 22, 2004

SYNOPSIS

Respondent employed Claimant as a technical writer and failed to pay Claimant his earned wages for all straight time hours worked and did not pay Claimant overtime for hours worked over 40 in a given workweek. The forum awarded Claimant $1,831.50 in unpaid, due and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay $5,280 in penalty wages. ORS 652.140(2), *former* 652.150, *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 Indus-

tries for the State of Oregon. The hearing was held on February 24, 2004, at the Oregon State Employment Department, located at 545 SW 2nd Street, Corvallis, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Frederick B. Marsico, the wage claimant ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent did not appear at the hearing and was found in default.

The Agency called Claimant and Jenelle Neuffer, Wage and Hour Division compliance specialist, as its only witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-16, A-18, and A-19 (submitted prior to 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 August 6, 2001, Claimant filed a wage claim with the Agency. He alleged that Respondent 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 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 January 24, 2003, the Agency served Order of Determination No. 01-3568 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of $1,831.50 in unpaid straight time and overtime wages and $5,280 in 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 February 24, 2003, Respondent filed an answer and request for hearing. Respondent's answer admitted that Respondent had been Claimant's employer from May 15, 2001 through July 12, 2001, and alleged that Claimant had been paid all earned wages.

6) On January 16, 2004, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as February 24, 2004 at 9:00 a.m.

at the Oregon Employment Department, 5545 SW 2nd Street, Corvallis, 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.

7) On February 24, 2004, at 9 a.m., Respondent did not appear for the hearing and had not earlier notified the Hearings Unit that it would not be present at the hearing. The ALJ went on the record and announced that he would wait until 9:30 a.m., pursuant to OAR 839-050-0330, to commence the hearing and that Respondent would be in default if it did not make an appearance by that time. Respondent did not appear by 9:30 a.m. and the ALJ declared Respondent to be in default and commenced the hearing.

8) 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.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Millennium Internet, Inc. was a Washington corporation that engaged or utilized the personal services of one or more employees in the state of Oregon.

2) In late May 2001, Benter Oriko, Respondent's corporate president, hired Claimant to work as a technical writer on a contract Respondent was performing for the Oregon Department of Education at the Department's office in Salem, Oregon.

3) Oriko and Claimant originally agreed that Claimant would be paid $25 per hour. Subsequently, Oriko and Claimant agreed that Claimant would be paid $22 per hour, with statutory deductions taken from his wages.

4) Claimant began work for Respondent on May 30, 2001. Throughout his employment with Respondent, his workweek was Monday through Friday.

5) Claimant's last day of work with Respondent was July 13, 2001. During his employment with Respondent, he worked for the following number of hours by workweek:

a) May 30-31: 16 hours

b) June 4-8: 43.5 hours

c) June 11-15: 44.5 hours

d) June 18-22: 41.5 hours

e) June 25-29: 41.5 hours

f) July 2-6: 34 hours

g) July 9-13: 42.5 hours

6) In all, Claimant worked 250 straight time hours and 13.5 overtime hours while employed by Respondent.

7) Oriko was aware of all the hours that Claimant worked.

8) Claimant was entitled to be paid $33 per hour ($22 x 1.5) for his overtime hours.

9) Claimant earned a total of $5,945.50 while employed by Respondent (250 hours x $22 = $5,500; 13.5 hours x $33 = $445.50; $5,500 + $445.50 = $5,945.50).

10) Respondent paid Claimant a total of $4,114 in wages in three paychecks issued on June 5, June 20, and July 5, 2001. These checks were intended to pay Claimant for work he performed during the respective pay periods of May 16-31, June 1-15, and June 16-30, 2001.

11) Respondent paid Claimant nothing for the work he performed after June 30, 2001.

12) There is no evidence in the record as to whether Claimant's separation from Respondent's employment was voluntary or involuntary.

13) Claimant asked Oriko to pay him all wages due and owing on several occasions after he left Respondent's employment, but Respondent did not and has not paid Claimant any more wages.

14) Penalty wages, computed pursuant to *former* ORS 652.150 and *former* OAR 839-001-0470, equal $5,280 ($22 per hour x 8 hours x 30 days = $5,280).

15) Claimant and Neuffer were both credible witnesses and the forum has credited all of their testimony.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Millennium Internet, Inc. was a Washington corporation that engaged or utilized the personal services of one or more employees in the state of Oregon.

2) Respondent employed Claimant as a technical writer in Oregon from May 30 through July 13, 2001.

3) Respondent and Claimant agreed that Claimant would be paid $22 per hour.

4) Claimant worked a total of 250 straight time hours and 13.5 overtime hours while employed by Respondent, earning $5,945.50. Claimant has only been paid $4,114 and is owed $1,831.50 in unpaid, due and owing wages.

5) Penalty wages equal $5,280.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Millennium Internet, Inc. 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, Respondent employed Claimant.

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, ORS 653.261.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and

unpaid by July 20, 2001, five days after he left Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes Claimant $1,831.50 in unpaid, due and owing wages. ORS 653.261, OAR 839-020-0030.

4) Respondent's failure to pay Claimant all wages due and owing was willful and Respondent is liable for $5,280 in penalty wages to Claimant. *Former* ORS 652.150; *former* OAR 839-001-0470.

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 his earned, unpaid, due and payable wages, and the 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) Respondent employed Claimant; 2) Respondent agreed to pay Claimant $22 per hour; 3) 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 Scott Miller,* 23 BOLI 243, 258 (2002).

RESPONDENT EMPLOYED CLAIMANT

The first element of the Agency's prima facie case is undisputed, as Respondent admitted in its answer that it employed Claimant.

RESPONDENT AGREED TO PAY CLAIMANT $22 PER HOUR

Respondent admitted in its answer that it agreed to pay Claimant $22 per hour, satisfying the second element of the Agency's prima facie case.

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

In its answer, Respondent asserted that Claimant had been paid all wages due and owing. Respondent did not provide copies of any records to back up that assertion. In contrast, Claimant credibly testified that he worked 66.5 hours in July 2001 and that Respondent paid him nothing for that work. Based on this credible testimony, the forum concludes that Claimant performed work for which he was not properly compensated.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by the claimant. 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 claimant, the forum may rely on credible testimony by the claimant to show the amount and extent of the claimant's work. *In the Matter of G & G Gutters, Inc.,* 23 BOLI 135, 145 (2002). In this case, Claimant credibly testified that he worked 250 straight time and 13.5 overtime hours for Respondent. Based on Claimant's agreed wage of $22 per hour, he earned $5,945.50 in straight time and overtime wages. His check stubs show that he was only paid $4,114, leaving $1,831.50 in unpaid, due and owing wages.

RESPONDENT MUST PAY PENALTY WAGES TO CLAIMANT

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).

Claimant credibly testified to his wage agreement with Respondent and that Respondent's president, Benter Oriko, Blair was aware of the amount and extent of the work he performed. There is no evidence to show that Respondent acted other than intentionally and as a free agent in underpaying him.

Based on the foregoing, the forum concludes that Respondent acted willfully and awards $5,280 in penalty wages to Claimant.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and penalty wages owed as a result of its violation of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Millennium Internet, 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 Frederick B. Marsico in the amount of SEVEN THOUSAND ONE HUNDRED ELEVEN DOLLARS AND FIFTY CENTS ($7,111.50), less appropriate lawful deductions, representing $1,831.50 in gross, earned, unpaid, due, and payable wages and

$5,280 in penalty wages, plus interest at the legal rate on the sum of $1,831.50 from August 1, 2001, until paid and interest at the legal rate on the sum of $5,280 from September 1, 2001, until paid.

In the Matter of

LARSEN GOLF CONSTRUCTION, INC.

Case No. 36-03

Final Order of Commissioner Dan Gardner

Issued May 24, 2004

SYNOPSIS

Respondent employed two wage claimants at an agreed wage and did not pay them all wages earned and due. The first claimant was awarded $2,581.60 and the second $1,759.50 in unpaid wages. Respondent's failure to pay the wages was willful, and the first claimant was awarded $6,386 in penalty wages and the second $4,320. The second claimant's unpaid wages included overtime wages, and he was awarded an additional $4,320 in civil penalties. ORS 652.140(1) & (2), ORS 652.150, ORS 653.055(1)(b); OAR 839-010-0470.

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 ("BOLI") for the State of Oregon. The hearing was held on April 27, 2004, at BOLI's Salem office located at 3865 Wolverine NE, E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Respondent did not appear at hearing and was held in default.

The Agency called the following witnesses: Douglas Failing and Juan Guerrero Gomez, wage claimants.

The forum received into evidence:

a) Administrative exhibits X-1 through X-21 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-32 (submitted prior to 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 26, 2002, Claimant Failing filed a wage claim with the Agency. He alleged that Re-

spondent had employed him and failed to pay wages earned and due to him.

2) On November 14, 2002, Claimant Failing assigned to the Commissioner of Labor and Industries, in trust for himself, all wages due from Respondent.

3) On April 8, 2002, Claimant Gomez filed a wage claim with the Agency. He alleged that Respondent had employed him and failed to pay wages earned and due to him.

4) On April 5, 2002, Claimant Gomez assigned to the Commissioner of Labor and Industries, in trust for himself, all wages due from Respondent.

5) Both claimants brought their wage claims within the statute of limitations.

6) On September 9, 2002, the Agency served Order of Determination No. 02-1191 on Respondent based upon the wage claim filed by Claimants Failing and Gomez and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of $4,255.60[1] in unpaid wages, plus interest; $10,720.80[2] in penalty wages, plus interest; and $4,334.40 in civil penalties due to claimant Gomez pursuant to ORS 653.055, 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.

7) On September 20, 2002, Respondent, through Scott Larsen, its corporate president and designated authorized representative, filed an answer and request for hearing.

8) On March 25, 2004, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimants Failing and Gomez stating the time and place of the hearing as April 27, 2004, at 9:30 a.m., in 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.

9) On April 7, 2004, the Agency moved that the hearing be rescheduled to start at 1:00 p.m. on April 27, 2004. Respondent filed no objections and the motion was granted.

10) On April 16, 2004, the Agency filed a motion for partial summary judgment on the following issues:

a) That Respondent owed claimants Failing and Gomez

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[1] The Agency alleged $2,581.60 was due to Failing and $1,674 was due to Gomez.

[2] The Agency alleged $6,386.40 was due to Failing and $4,334.40 was due to Gomez.

$3,507.20 in unpaid wages, plus interest;

b) That Respondent owes claimants Failing and Gomez $10,720.80 in penalty wages, plus interest.

11) On April 23, 2004, the Administrative Law Judge issued an interim order granting the Agency's motion for partial summary judgment that read as follows:

"**INTRODUCTION**

"This action arises from an Order of Determination issued by the Agency on June 24, 2002, seeking (a) unpaid wages in the amount of $2,581.60 as assignee of wage claimant Douglas Failing ('Failing'), along with $6,386.40 as penalty wages pursuant to ORS 652.150; (b) unpaid wages in the amount of $1,674.00 as assignee of wage claimant Juan Guerrero Gomez ('Gomez'), along with $4,334.40 as penalty wages pursuant to ORS 652.150; (c) a civil penalty of $4,334.40 for Gomez pursuant to ORS 653.055; and (d) interest at the legal rate per annum on these sums until paid. Respondent filed an answer and request for hearing on September 20, 2002, in which Respondent made a number of admissions, but denied owing the total amounts sought by the Agency.

"On April 16, 2004, the Agency filed a motion for partial summary judgment, contending that the admissions contained in Respondent's answer entitled the Agency to partial summary judgment for the sum of $3,570.20 in unpaid wages and $10,720.80 in penalty wages, together with interest on those sums on the legal rate until paid. The Agency's motion did not address the civil penalty sought pursuant to ORS 653.055(1)(b).

"**SUMMARY JUDGMENT STANDARD**

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. *OAR 839-050-0150(4)(B).* The standard for determining if a genuine issue of material fact exists is as follows:

' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].'

"*In the Matter of Cox and Frey Enterprises, Inc*., 21 BOLI 175, 178 (2000).

"UNPAID WAGES

"**A. Claimant Gomez**

"In the Order of Determination, the Agency alleged Gomez worked at the agreed rate of $18 per hour for Respondent, that Gomez worked 158 straight time hours and one hour of overtime between February 24 and March 25, 2002, that Gomez earned a total of $2,871, and that Gomez has only been paid $1,197. In its answer, Respondent admitted that Gomez was employed at the agreed rate of $18 per hour during the time period alleged. Respondent also affirmatively alleged that 'Juan Gomez worked a total of 160 hrs, 8.5 hours of which was worked over 40 hrs in a given week.' One and one-half times $18 per hour is $27 per hour, Gomez's overtime rate. ORS 633.261; OAR 839-020-0030.

"Based on Respondent's admission, the forum calculates that Gomez earned a total of $2,956.50 (151.5 hours x $18 per hour = $2,727; 8.5 hours x $27 = $229.50; $2,727 + $229.50 = $2,956.50). Respondent's answer did not specifically admit or deny that Gomez had been paid $1,197, but did acknowledge that '$1,197.00' had been paid to the claimants. Based on Respondent's failure to deny that the $1,197 had been paid to Gomez as alleged in the Agency's Order of Determination, the forum concludes that Respondent paid Gomez $1,197, leaving $1,759.50 in unpaid wages to which Gomez is entitled.[3]

"**B. Claimant Failing.**

"In its Order of Determination, the Agency alleged that Failing worked for Respondent at the rate of $4,613.17 per month[4] and $26.61 per hour[5] and earned $2,581.60, that Respondent has not paid Failing any wages, and that Respondent owes Failing $2,581.60 in unpaid wages. In its answer, Respondent admitted that Failing was employed at the rate of $4,613.17 per month during the time period alleged.

"In its answer, Respondent admitted that there was 'a balance due and owing of $3,507.20' in 'unpaid wages' to the 'claimants.' The forum has already calculated that Respondent has admitted owing $1,759.50 in unpaid wages to

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[3] When the Agency proves a wage claimant is owed wages exceeding those sought in the Agency's Order of Determination, the commissioner has the authority to award the higher amount of unpaid wages. *In the Matter of Francisco Cisneros,* 21 BOLI 190, 213 (2001), *aff'd without opinion, Cisneros v. Bureau of Labor and Industries,* 187 Or App 114, 66 P. 3d 1030 (2003).

[4] The Agency alleged this amount in Exhibit A to the Order of Determination, which shows the total unpaid wages allegedly due to Failing.

[5] The Agency alleged this amount in Exhibit B to the Order of Determination, which shows the total penalty wages allegedly due to Failing.

Gomez. Since there are only two wage claimants, Respondent's admission that it owes '$3,507.20' creates an admission, by inference, that Respondent owes Failing the sum of $1,747.70 in unpaid wages.

"**C. Distribution of Summary Judgment Award for Unpaid Wages**

"Based on Respondent's admissions, there is no genuine issue of material fact that $3,507.20 in unpaid wages are due to Gomez and Failing, and that $1,759.50 of that total is owed to Gomez and $1,747.70 owed to Failing. The Agency's motion for partial summary judgment for unpaid wages due to Gomez and Failing in the amount of $3,507.20 is **GRANTED**. The forum awards $1,759.50 to Gomez and $1,747.70 to Failing. Failing's entitlement to the remaining $833.90 unpaid wages in dispute ($2,581.60 - $1,747.70 = $833.90) must be established at hearing.

"**PENALTY WAGES**

"In its Order of Determination, the Agency alleged that Gomez is entitled to $4,334.40 in penalty wages and Failing entitled to $6,386.40 in penalty wages based on Respondent's alleged willful failure to pay their wages. In its answer, Respondent denied that its failure to pay claimants their unpaid wages was willful, alleging that it unsuccessfully tried to pay Gomez and Failing their wages. Respondent alleged it was unable to Failing because he disappeared from the job and would not come to Respondent's office to pick up his check. Respondent alleged that Gomez's paycheck was initially withheld because he did not turn in keys and equipment, and that Respondent tried to pay Gomez his check by mail '[a]fter further investigation' but Respondent's 'check was returned with insufficient address.'

"Under ORS 652.150, 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. *In the Matter of Usra Vargas*, 22 BOLI 212, 222 (2001). ORS 652.150(2) further provides that the penalty may not exceed 100 percent of the employee's unpaid wages unless the employer fails to pay the full amount of the employee's unpaid wages 'within 12 days after written notice of such nonpayment is sent to the employer by or on behalf of the employee.'

"In this case, Respondent received written notice that Gomez and Failing were due unpaid wages sometime be-

tween June 24 and September 20, 2002.[6] The Order of Determination directed Respondent to pay the Commissioner the amount of the wage claims. Respondent admitted in its answer that $3,507.20 in unpaid wages was due and owing to Gomez and Failing, but did not enclose a check with its answer and there is no evidence that it has subsequently paid any of those wages.[7] Respondent's admission that it owes $3,507.20 in unpaid wages to Gomez and Failing establishes Respondent's knowledge that it knew that amount of wages was due to Gomez and Failing, but did not pay those wages. Respondent's defense that it attempted to pay Gomez and Failing their unpaid wages fails because it could have satisfied the undisputed amount of the wage claims by merely following the instructions in the Order of Determination and sending a check for that amount to the Commissioner. Based on Respondent's admission that it owes $3,507.20 in unpaid wages, the forum concludes that Respondent acted voluntarily and as a free agent in failing to pay those wages. *See In the Matter of Westland Resources, Inc.,* 23 BOLI 276, 280 (2002). Respondent's failure to pay claimants' wages was willful and Gomez and Failing are entitled to penalty wages. The Agency's motion that it be granted partial summary judgment on the issue of Respondent's liability for penalty wages for Gomez and Failing is **GRANTED.**

"**AMOUNT OF PENALTY WAGES**

"Respondent failed to pay all unpaid wages to Gomez and Failing within 12 days after the Agency sent written notice of nonpayment of those wages to Respondent in its Order of Determination. Consequently, Gomez and Failing are entitled to 30 days of penalty wages, the maximum allowed by ORS 652.150. In this case, penalty wages for Gomez are calculated by multiplying his hourly rate of pay times eight (8) hours for each day the wages are unpaid, then multiplying that sum by 30 days. ORS 652.150, OAR 839-001-0470. *See In the Matter of Stephanie Nichols,* 24 BOLI 107, 122 (2002). Using this formula, Gomez is entitled to $4,320 in penalty wages ($18 per hour x 8 hours x 30 days = $4,320). The Agency's motion for an award of penalty wages to Gomez is **GRANTED**, and

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[6] The Order of Determination was issued on June 24, 2002, and Respondent's answer is dated September 20, 2002.

[7] *See* ORS 652.160, which requires that "[i]n case of dispute over wages, the employer must pay, without condition, and within the time set by ORS 652.140, all wages conceded by the employer to be due * * *."

Gomez is awarded $4,320 in penalty wages.

"Failing's circumstances are different. In the Order of Determination, the Agency alleged two separate pay rates for Failing -- $4,613.17 per month and $26.61 per hour, and did not explain the basis for those two different rates. In its Order of Determination, the Agency did not allege how many hours Failing worked and Respondent did not agree to a number in its answer, but admitted that Failing was paid $4,613.17 per month. The Agency provided no evidence in support of its motion to indicate whether Failing was paid on a salary or hourly basis or the number of hours that Failing worked. If Failing was paid on an hourly basis, penalty wages are calculated by multiplying the hourly rate of pay times eight hours, then multiplying that sum by 30 days. If he was paid on a salary basis, the forum must first determine his hourly rate by 'dividing the total wages earned during the wage claim period (the period for which wages are owed and upon which the wage claim is based) by the total number of hours worked during the wage claim period.' OAR 839-001-0470(d). Without evidence showing how many hours Failing worked, or whether he worked on a salary or hourly basis, the forum is unable to calculate the penalty wages due to Failing. The Agency's motion for a specific monetary award of penalty wages for Failing is **DENIED**. Failing's specific entitlement to penalty wages must be established at hearing.

"**SUMMARY**

"The Agency is granted partial summary judgment as to the following matters:

"(1) Claimant Gomez is awarded $1,759.50 in unpaid, due, and owing wages, plus interest at the legal rate from May 1, 2002, until paid.

"(2) Claimant Failing is awarded $1,747.70 in unpaid, due, and owing wages from March 1, 2002, until paid.[8]

"(3) Respondent is liable for 30 days of penalty wages to Gomez and Failing.

"(4) Claimant Gomez is awarded $4,320 in penalty wages, plus interest at the legal rate from June 1, 2002, until paid.

"The hearing will commence as scheduled for the purpose of establishing the total amount earned by Failing, the amount of penalty wages without which Failing is entitled, and to determine whether Gomez should be awarded civil penal-

[8] At hearing, the ALJ amended his Interim Order to read: "Claimant Failing is awarded $1,747.70 in unpaid, due, and owing wages, **plus interest at the legal rate** from March 1, 2002, until paid." (*change in bold*)

ties pursuant to ORS 653.055(1)(b)."[9]

This ruling is **AFFIRMED**.

12) At the start of the hearing, Respondent had not appeared or notified the forum that it would not be appearing at the hearing. The ALJ waited 30 minutes past the time set for hearing before declaring Respondent in default and commencing the hearing.

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

14) On May 11, 2004, the ALJ issued a proposed order and notified the participant they were entitled to file exceptions to the proposed order. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent was an Oregon corporation that engaged the personal services of one or more employees in Oregon.

2) Respondent employed Claimant Failing from February 1 through February 13, 2002, at the salary of $4,613.67 per month. Respondent paid Failing on the first of each month. Failing's salary was based on a 40 hour workweek and converts to an hourly rate of $26.61 per hour ($4,613.67 x 12 months = $55,364.04÷ 52 weeks = $1,064.58 ÷ 40 hours = $26.61 per hour).

3) Claimant Failing worked 97 hours between February 2 and February 13, 2002, earning $2,581.60. Respondent has not paid him for any of those hours.

4) Claimant Failing quit Respondent's employment on February 13, 2002.

5) The Agency mailed written notice to Respondent on March 29, 2002, demanding that Respondent pay Claimant Failing $6,813.67 in unpaid wages.

6) Penalty wages are computed as follows for Claimant Failing: $26.61 per hour x 8 hours = $212.88 x 30 days = $6,386.[10]

7) Respondent employed Claimant Gomez from February 24 through March 25, 2002, at the wage rate of $18 per hour. Claimant Gomez worked 151.5 straight time

hours and 8.5 overtime hours in that time period, earning

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[9] At hearing, the ALJ amended his Interim Order to read: "The hearing will commence as scheduled for the purpose of establishing the total amount earned by Failing, the amount of penalty wages **to** which Failing is entitled, and to determine whether Gomez should be awarded civil penalties pursuant to ORS 653.055(1)(b)." (*change in bold*)

[10] Pursuant to Agency policy, civil penalty wages are rounded to the nearest dollar. *In the Matter of Staff, Inc.,* 16 BOLI 97, 119 (1997).

$2,956.50. Respondent paid Gomez $1,197 for his hours worked from February 24 through March 9, 2002 and did not pay Gomez anything for the work he performed after March 9, 2002.

8) Respondent fired Claimant Gomez on March 26, 2002.

9) Respondent still owes Claimant Gomez $1,759.50 in earned and unpaid wages.

10) Respondent created a check stub for Claimant Gomez for the period "03/11/2002 – 03/24/2002" on which was printed that Gomez had worked 77 regular hours and 8.5 overtime hours.

11) The Agency mailed written notice to Respondent on April 9, 2002, demanding that Respondent pay Claimant Gomez $1,737 in unpaid wages.

12) Penalty wages are computed as follows for Claimant Gomez: $18 per hour x 8 hours = $144 x 30 days = $4,320.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon employer that engaged the personal services of one or more employees.

2) Claimant Failing was employed by Respondent between February 1, and February 13, 2002, when he voluntarily quit Respondent's employment.

3) Claimant Gomez was employed by Respondent between February 24 and March 25, 2002, when he was fired.

4) Claimant Failing was employed at the salary of $4,613.67 per month.

5) Claimant Gomez was employed at the agreed wage of $18 per hour.

6) Claimant Failing earned $2,581.60 in the wage claim period and has not been paid anything for his work.

7) Claimant Gomez earned $2,956.50 in the wage claim period and has only been paid $1,197 for work performed between February 24 and March 9, 2002. Respondent still owes Gomez $1,759.50 in unpaid, due and owing wages, including 8.5 hours of overtime earned after March 9, 2002.

8) Written notice of nonpayment of unpaid wages due to Claimants Failing and Gomez were sent to Respondent on behalf of Failing and Gomez on March 29 and April 9, 2002, respectively.

9) Penalty wages are computed as follows for Claimant Failing: $26.61 per hour x 8 hours = $212.88 x 30 days = $6,386.

10) Penalty wages are computed as follows for Claimant Gomez: $18 per hour x 8 hours = $144 x 30 days = $4,320.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants Failing and Gomez were employees 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, Respondent employed Claimants.

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, ORS 653.040, ORS 653.256, ORS 653.261.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant Failing all wages earned and unpaid by February 20, 2002, five days after he voluntarily left his employment, excluding Saturdays, Sundays and holidays. Respondent owes Claimant Failing $2,581.60 in unpaid, due and owing wages. Respondent violated ORS 652.140(1) by failing to pay Claimant Gomez all wages earned and unpaid by March 27, 2002, the first business day after discharging him. Respondent owes Claimant Gomez $1,759.50 in unpaid, due and owing wages.

4) Respondent is liable for $6,386 in penalty wages to Claimant Failing. Respondent is liable for $4,320 in penalty wages to Claimant Gomez. ORS 652.150.

5) Respondent is liable for $4,320 in civil penalties to Claimant Gomez. ORS 653.055(1)(b).

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

OPINION

CLAIMANT GOMEZ

The facts regarding Claimant Gomez's wage claim are undisputed. Respondent's liability for his unpaid wages and penalty wages and the specific amount of those wages was resolved in the Administrative Law Judge's interim order granting the Agency's motion for partial summary judgment. The only remaining issue is Respondent's liability for civil penalties under ORS 653.055.

Where a Respondent pays an employee "less than the wages to which the employee is entitled under ORS 653.010 to 653.261," the forum may award civil penalties to the employee. ORS 653.055; *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001); *In the Matter of TCS Global Corp.,* 25 BOLI 1, 15 (2003). *See also In the Matter of William Presley,* 25 BOLI 56, 73 (2003), *appeal pending*. Here, the unpaid wages are an undisputed 8.5 hours of unpaid overtime wages that Claimant Gomez earned during the wage claim period. The statutory requirement to pay overtime is contained in ORS 653.261 and OAR 839-020-0030, the Agency rule interpreting the statute. Therefore, Respondent's failure to pay overtime wages to Gomez subjects Respondent to civil penalties in addition to the penalty wages awarded pursuant to ORS

652.150. Civil penalties are computed in the same manner as penalty wages under ORS 652.150, so Gomez is entitled to $4,320 in civil penalties.[11]

CLAIMANT FAILING

When a Respondent defaults, the Agency must establish a prima facie case supporting the allegations of the charging document in order to prevail. *In the Matter of Venus Vincent,* 24 BOLI 155, 163 (2003). When an employer produces no records of hours or dates worked by the wage claimant, the commissioner may rely on evidence presented by the Agency, including credible testimony by the claimant, to show the amount and extent of work performed by the claimant. *In the Matter of Stan Lynch,* 23 BOLI 34, 44 (2002).

It was undisputed that Respondent employed Claimant Failing during the wage claim period at the salary of $4,613.67 per month, that Respondent owes Failing at least $1,747.70 in unpaid wages, and that Respondent paid Failing nothing for the work he performed during the wage claim period. Claimant Failing credibly testified that his salary was based on a 40 hour workweek and that he worked a total of 97 hours during the wage claim period. He supported his testimony with a calendar on which he had contemporaneously noted the dates and hours he worked during the wage claim period. Agency calculations established that Failing's salary converts to an hourly rate of $26.61 per hour and that Failing earned $2,581.60 during the wage claim period.

Based on Respondent's admissions, Failing's credible testimony, and the Agency's calculations, the forum concludes that Failing earned $2,581.60 and was not paid anything, entitling him to an award of $2,581.60 in unpaid, due and owing wages.

Respondent's liability for penalty wages to Failing was established in the ALJ's interim order granting partial summary judgment to the Agency. The actual amount of penalty wages Respondent owes to Failing is computed by reducing Failing's monthly salary of $4,613.67 to an hourly rate of $26.61.[12] $26.61 multiplied by 8 hours equals $212.88, and $212.88 multiplied by 30 days equals $6,386, the amount of penalty wages to which Failing is entitled.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages, penalty wages, and civil penalties Respondent owes as a result of its violations of ORS 652.140(1), ORS 652.140(2), and ORS 653.055(1)(b), the Commissioner of the Bureau of Labor and Industries hereby orders **Larsen Golf Construction, Inc.** to deliver to

[11] *See* Finding of Fact 12 – The Merits, *supra*.

[12] *See* Finding of Fact 2 – The Merits, *supra.*

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 Douglas Failing in the amount of EIGHT THOUSAND NINE HUNDRED SIXTY SEVEN DOLLARS and SIXTY CENTS ($8,967.60), less appropriate lawful deductions, representing $2,581.60 in gross earned, unpaid, due and payable wages and $6,386 in penalty wages, plus interest at the legal rate on the sum of $2,581.60 from March 1, 2002, until paid, and interest at the legal rate on the sum of $6,386 from April 1, 2002, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Juan Guerrero Gomez in the amount of TEN THOUSAND THREE HUNDRED NINETY NINE DOLLARS and FIFTY CENTS ($10,399.50), less appropriate lawful deductions, representing $1,759.50 in gross earned, unpaid, due and payable wages, 4,320 in penalty wages, and $4,320 as a civil penalty, plus interest at the legal rate on the sum of $1,759.50 from May 1, 2002, until paid, and interest at the legal rate on the sum of $8,640 from June 1, 2002, until paid.

In the Matter of

SOUTHERN OREGON SUBWAY, INC.

Case Nos. 21-03 and 22-03

Final Order of Commissioner Dan Gardner

Issued May 24, 2004

SYNOPSIS

Where the forum found that Respondent reduced Complainant's work hours by half, reduced her pay from a salary to an hourly rate, and hired another manager to replace her after she was absent from work due to a health condition covered under the Oregon Family Leave Act ("OFLA"), the forum concluded that Respondent failed to restore Complainant to her former management position, in violation of *former* ORS 659.484. The forum further found that Respondent demoted and ultimately terminated Complainant after she returned from OFLA leave because she invoked her right to be restored to the position she held when she began her OFLA leave, in violation of *former* and *current* OAR 839-009-0270. The forum ordered Respondent to pay Complainant $28,590.29 in back wages and $25,000 for mental suffering incurred as a result of Respondent's unlawful practices. *Former* ORS 659.484; *former* and *current* OAR 839-009-0270; *for-*

mer and *current* OAR 839-009-0320.

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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 September 24-26, 2003, at the Oregon Employment Department, Room 3, 119 N. Oakdale, Medford, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Renee K. Dangelo ("Complainant") was present throughout the hearing and was not represented by counsel. P. David Ingalls, Attorney at Law, represented Southern Oregon Subway, Inc. ("Respondent"). Ada Rodgers was present throughout the hearing as Respondent's corporate representative.

In addition to Complainant, the Agency called as witnesses: Barbara Turner, former BOLI Senior Civil Rights Investigator; Josh Bergrud, Complainant's friend; Judy Dangelo, Complainant's mother; Julie Milstead, former Respondent employee; and Shandell Morgan (telephonic), former Respondent employee.

Respondent called as witnesses: Renee K. Dangelo, Complainant; Paul Richard ("Dick") Hackstedde, Respondent CEO and majority shareholder; Jeff Hoxsey, Respondent Operations Manager; Ada Rodgers, Respondent Operations Director; and Blanca Meza (telephonic), former Respondent employee.

The forum received as evidence:

a) Administrative exhibits X-1 through X-34 (generated prior to hearing) and X-35 through X-38 (submitted after hearing);

b) Agency exhibits A-1 through A-28 (submitted prior to hearing) and A-29 and A-30 (submitted during hearing);

c) Respondent exhibits R-1, R-11, R-16, R-18, R-24, R-25 (submitted prior to hearing) and R-27 through R-32 (submitted during 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 August 10, 2001, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of the unlawful employment practices of Respondent (denied reinstatement and demoted). On March 1, 2002, Complainant filed a second complaint with the CRD alleging she was the victim of the unlawful em-

ployment practices of Respondent (terminated). After investigation and review, the CRD found substantial evidence of unlawful employment practices on the part of Respondent as to both complaints.

2) On May 19, 2003, the Agency submitted formal charges to the forum alleging that Respondent failed to restore Complainant to the position she held prior to using provisions of the Oregon Family Leave Act ("OFLA") and demoted her from her previous management position to an hourly status, in violation of *former* ORS 659.484, *former* and *current* OAR 839-009-0270. The Agency further alleged that Respondent terminated Complainant because she used OFLA leave, in violation of *former* ORS 659.484; *former* and *current* OAR 839-009-0270; *former* and *current* OAR 839-009-0320. The Agency also requested a hearing.

3) On May 22, 2003, the forum served formal charges on Respondent together with the following: a) a Notice of Hearing setting forth August 5, 2003, in Medford, Oregon, as the date 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 June 6, 2003, Respondent, through counsel, timely filed an answer to the formal charges, denying the allegations of unlawful employment practices and alleging that "[a]ny actions taken by respondent with respect to complainant were taken for bona fide business reasons and were not motivated by any OFLA leave taken by complainant."

5) On June 6, 2003, Respondent moved for a postponement of the hearing based upon Respondent's counsel's previously planned vacation. The Agency declined to take a position on Respondent's request and the forum thereafter denied the request based upon Respondent's failure to show good cause for postponement.

6) On June 12, 2003, the Agency moved for a protective order in response to Respondent's discovery request regarding Complainant's medical and psychological records and also requested that the ALJ conduct an *in camera* inspection of the records before releasing the documents to Respondent.

7) On June 16, 2003, Respondent's counsel submitted an affidavit in support of Respondent's request for a postponement. The ALJ reconsidered her ruling and granted the postponement based on Respondent's demonstration of good cause. The hearing was reset for September 23, 2003.

8) On June 19, 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; 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 the case summaries by September 12, 2003, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On June 19, 2003, the ALJ issued a protective order addressing the classification, acquisition, and use of medical and psychological records produced through discovery during the course of the hearing.

10) On July 29, 2003, the ALJ released to Respondent unredacted copies of all medical records submitted by the Agency for the ALJ's *in camera* review on July 23, 2003.

11) On August 28, 2003, the Agency requested an extension of time to file case summaries. Respondent had no objection and the ALJ extended the filing time to September 16, 2003.

12) On August 29, 2003, the Agency filed a motion for a discovery order seeking certain 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.

13) On September 17, 2003, the forum granted the Agency's motion for discovery order and ordered Respondent to provide the documents sought by the Agency. The forum's order was served on the participants by facsimile transmission and regular mail.

14) Respondent and the Agency timely filed case summaries on September 17 and 18, 2003, respectively.

15) On September 18, 2003, the Agency requested cross-examination of the "preparers" of two of Respondent's exhibits.

16) On September 19, 2003, Respondent moved for sanctions against the Agency based on Respondent's perception that the Agency had not timely provided Respondent with its case summary. On the same date, the ALJ conducted a pre-hearing conference with Respondent's counsel and the Agency case presenter to address Respondent's motion and to clarify and rule on the Agency's request for cross-examination. During the conference, the ALJ granted the Agency's request to cross-exam certain persons and Respondent's subsequent request to produce those persons as witnesses in Respondent's case-in-chief. At the conclusion of the conference, the ALJ found the facts regarding the case summary receipt dates did not warrant sanctions against the Agency and

denied Respondent's motion. The ALJ further found that due to the imminence of the hearing and the delay Respondent's counsel experienced in receiving the Agency's case summary, counsel's case preparation was impeded. After the pre-hearing conference, the ALJ issued an interim order resetting the hearing date to September 24, 2003, at 1:00 p.m., "to afford Respondent equal preparation time." The ALJ served the participants with the interim order by facsimile transmission and regular mail.

17) On September 22, 2003, the Agency filed, by facsimile transmission and regular mail, an addendum to its case summary.

18) 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.

19) At the start of hearing, the Agency and Respondent stipulated to the following facts:

a) At times material herein, Respondent was a covered employer under the Oregon Family Leave Act;

b) At times material herein, Complainant was an eligible employee under the Oregon Family Leave Act;

c) At times material herein, Complainant suffered a serious health condition and was entitled to use provisions of the Oregon Family Leave Act.

During the hearing, Respondent withdrew exhibits pertaining to Complainant's medical records.

20) At the conclusion of the hearing, the ALJ ordered the participants to submit written closing arguments to the forum and to each other no later than 5 p.m. on October 14, 2003, and any rebuttal arguments no later than 5 p.m. on October 20, 2003.

21) The Agency and Respondent timely submitted written closing arguments and rebuttal. The hearing record closed on October 20, 2003.

22) The ALJ issued a proposed order on April 15, 2004, 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 an exception on April 22, 2004. Respondent's exception is discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Southern Oregon Subway, Inc. was a corporation doing business in Oregon, engaged in the food service business and employed 25 or more persons in Oregon for each working day during each of 20 or more calendar workweeks in 2001.

2) At times material herein, Ada Rodgers was Respondent's Operations Director and Complainant's supervisor; Dick

Hackstedde was Respondent's Chief Financial Officer, Chief Executive Officer, and majority shareholder; and Jeff Hoxsey was Respondent's Operations Manager.

3) Rodgers hired Complainant as a part time sandwich maker in Respondent's South Grants Pass ("SGP") store (store #11089) in or around February 2000. Complainant started at the minimum wage rate and worked approximately 20 hours per week. She received several pay increases and earned up to $7.00 per hour as an hourly employee. She was told to wear a uniform that included a purple shirt. Respondent's managers wore striped shirts to distinguish them from the line staff. In her initial interview with Rodgers, Complainant requested Sundays off to attend church and Respondent accommodated her request.

4) On or about February 1, 2001, Rodgers promoted Complainant to the manager's position at the SGP store. When she became the manager, Complainant's pay rate changed from an hourly rate to a weekly salary of $350. In May 2001, she received a salary increase to $400 per week. Her work schedule was 7 a.m. to 3 p.m. or later if an employee failed to show up for work. Complainant generally worked 40-45 hours per week.

5) Complainant's management duties included opening and closing the store, hiring and firing employees, banking the revenues taken in each day, preparing daily paperwork, attending management meetings, overseeing daily operations, and assisting the sandwich makers with their prep work and bread baking. Rodgers told Complainant to wear a striped shirt as part of her uniform while she was manager.

6) Respondent's "Employee Handbook" states that employees must be in full uniform every time they work and describes specific uniform requirements in detail. The handbook also states: "Your Supervisor will give you the details of the uniform colors worn in your store and will explain how uniforms are allocated."

7) Complainant was happy to be promoted to the managerial position because it meant more pay and she liked the hours she worked. Her management training was "on-the-job." Rodgers approved the weekly schedules, but Complainant was able to adjust the schedule without Rodgers's approval and she was responsible for ensuring that the scheduled was covered. Rodgers advised her not to discipline employees in front of others and told her that if an employee was not performing well to remove the employee from the schedule or cut back on the employee's hours. When she was not scheduled to work, an assistant manager managed the store and if not the assistant manager, then whoever had the most seniority was in charge. While she was manager, Complainant hired three people: Jesse McBain, Shandell Morgan, and "Paul" (Naylor or Sapien).

8) Between May 26 and June 18, 2001, Complainant was absent from work to undergo and recover from an appendectomy. Complainant's medical condition was an OFLA covered condition and Complainant was eligible for OFLA leave.

9) Respondent employee Blanca Meza was promoted to a managerial position in September 2000 and thereafter regularly moved from store to store covering for employees who were out on sick leave. In May 2001, she went from Respondent's "Delta Waters" store to fill in as manager of the SGP store while Complainant was out on OFLA covered leave. Respondent's payroll records show that Meza's last day at the SGP store was June 14, 2001, and on that last day she noted on her time card: "good luck beverly."

10) Respondent employee Beverly Bergen was the manager of the North Grants Pass ("NGP") store (store # 5992) when Respondent asked her to work in the SGP store. Respondent's payroll records show that Bergen began working regularly as a manager at the SGP store on June 14, 2001. The records also show that Bergen worked at the SGP store during the first two weeks that Complainant was out on OFLA covered leave – Bergen worked 6.15 hours on May 26, 9.14 hours on May 27, 6.07 hours on May 28, 3.24 hours on May 29, 8.81 hours on June 3 and .40 hours on June 4, 2001.

11) After Bergen left to manage the SGP store, Amanda Wood managed the NGP store beginning June 13, 2001, and continued as manager until April 23, 2002.

12) While she was on medical leave, Complainant called the store and Rodgers several times. Complainant's friend, Josh, took her in to the store two times per week "to see how things were going" when she was no longer bedridden. On one visit, she spoke with McBain, who told her that Bergen was the new manager and that he believed Complainant "was not coming back." She gave little credence to his statement until he later called her and told her he had quit his job because he did not like the change in management. She was surprised at that point and thought he must be telling the truth if he quit his job as a result. McBain does not appear on Respondent's payroll records after June 3, 2001.

13) At some point, Complainant submitted an employment application to Keith Brown Building Materials ("Keith Brown") that was dated June 11, 2001. The application shows Complainant applied for a "courtesy clerk" position and was seeking "full-time" employment. She stated on the application that she was available for employment on June 12, 2001. In response to the question: "Do you have any commitments or agreements with another employer which might affect your employment here?" she checked the "No" box. She disclosed her employment with Respondent and stated that she was "still em-

ployed" in the section designated "reason for leaving." In the section requiring "three references, not relatives or former employers," Complainant listed "Ada Rodgers Subway District Manager" and listed Rodgers's cell phone number. On the application's last page, Complainant signed an affidavit certifying, among other things, that "the information contained in this application is true and complete" and dated it "June 11, 2001."

14) Complainant's cell phone records show phone calls made from Complainant's cell phone to Rodgers's cell phone number on May 16, May 28, June 11, and June 21, 2001.

15) On June 14, 2001, Complainant's doctor released her to work effective June 18. The work release stated in pertinent part: "Renee Dangelo is now released for full work on 6/18/01. Restrictions: No heavy lifting over > 20 lbs x 2 wks from 6/18 – 7/2/01. Full release 7/3/01."

16) Complainant brought her medical release to the SGP store on or about June 16, 2003, and talked to Bergen about returning to work. Bergen told Complainant there were no available hours for her. Sometime thereafter, Complainant reached Rodgers by telephone to discuss her return to work. Rodgers told Complainant that Bergen had told her Complainant's medical release limited her work hours to 20 per week. Complainant told Rodgers that the medical release restricted her from heavy lifting and that her work hours were not limited. Rodgers indicated she was relying on Bergen's rendition of the medical release and would pay Complainant $10 per hour for 20 hours per week. Complainant later called Rodgers to protest the lack of hours and told Rodgers she thought that she should return to her management position. Rodgers responded by informing Complainant that her position had been filled.

17) On June 18, 2001, Complainant downloaded information pertaining to the OFLA provisions from the BOLI Website. Sometime thereafter, she gave the information to Rodgers and Hoxsey.

18) Sometime after her conversation with Rodgers, Complainant was placed on the weekly work schedule beginning June 21, 2001. Complainant was scheduled to work 18 hours during the week ending June 26, 2001, but worked only about 12 hours because Bergen asked her to wait until the store "got busy" before she started each scheduled shift. On her first day back at work, Complainant was given two purple shirts to wear instead of the striped manager's shirt and that was an indicator to her that she was a line staff person again rather than a manager.

19) On or about June 27, 2001, Complainant questioned Bergen about why she was scheduled to work fewer than 20 hours during the week ending July 3, 2001. Bergen told Complainant that she had faxed Complainant's

medical release to Rodgers and that Rodgers agreed the release limited her work hours to 20 per week. Later in the evening while at work, Complainant found her medical release and made an extra copy for herself. The copy of Complainant's medical release received as an exhibit in the record shows it was faxed from the SGP store on June 18, 2001, at 2:51 p.m. While at the store's copy machine, Complainant retrieved a copy of the company newsletter, titled "Good Day Subway," from a nearby trash can. The newsletter was not dated, but the "news" items included a blurb stating: "Welcome back Renee' (Hope you are better after your surgery)" and another item stating: "Beverly has moved from North GP store to the South GP. Mandy has taken over the North store." The last three sentences of the newsletter state: "DO YOU HAVE ANY NEWS ABOUT YOUR STORE? LET'S HEAR FROM YOU. FAX YOUR INFORMATION TO THE OFFICE IN CARE OF JANE OR BLONCA."

20) On June 28, 2001, Bergen told Complainant by telephone that she was giving her a written warning for being uncooperative and unhelpful to her coworkers in the workplace. Later, Bergen gave Complainant a written "Employee Warning" that claimed she had committed "violations" on June 21 and June 24, 2003, the first two days Complainant was scheduled back to work, that amounted to "substandard work" and "insubordination," and that Complainant was "uncooperative." Bergen noted on the warning that the violations were Complainant's "first." Under "Employer's Remarks" Bergen wrote: "baked off to [sic] much white & wheat, and didn't do special breads, when asked question walks away, doesn't help other employees, or saids [sic] I don't know." Under "Corrective Action to Be Taken" Bergen wrote: "smile, change attitude about work and help other employees." Bergen signed the warning on the "Manager's Signature" line. The date on the warning is "6-26-01" with the number "8" written over the 6 in the number 26. Complainant did not sign the warning, but wrote a response, dated June 28, 2001, that stated:

> "Beverly.
>
> "When you can give me the name of someone or specific time and date I was ever unwilling to help any employee(s) as well as a specific time and date of my substandard work, insubordination, and uncooperativeness, I will sign this write up. As far as the bread goes, Crystal baked all the bread Sunday from the time she had come to work.
>
> "Renee Dangelo"

21) During the week ending July 3, 2001, Complainant worked approximately 15 hours. On two of the four days she was scheduled to work, she was scheduled to work only three hours.

22) Complainant asked Rodgers for one or two days off between July 4 and July 8 to at-

tend a previously scheduled July 4 celebration with her family on the coast. Rodgers told her that since business was slow she should go ahead and take the whole time off. Complainant was on vacation from July 4 through July 8, 2001.

23) On July 9, 2001, Complainant returned from her vacation and went in to pick up her paycheck. Bergen asked her to sign a typewritten statement dated June 20, 2001, that states: "Renee Dangello [sic] has been advised that she will no longer be on salary effective as of June 20, 2001. She will be on Hourly wage at 8.89 Per Hour." Complainant refused to sign the statement and Bergen refused to give Complainant her paycheck. Complainant copied the statement and took it to the Bureau of Labor and Industries ("BOLI"). A BOLI representative gave her a printout of a Wage and Hour statute pertaining to regular paydays to give to her manager. When she returned to work, Bergen was not there so she gave it to Bergen the following Monday, July 13, 2001, and Bergen gave Complainant her paycheck. Complainant did not request any time off after July 9, 2001. At some point, Complainant placed a note on her copy of the typewritten statement that says: "July 9, 2001 Monday I went to Subway to pick up my paycheck, which I should have received on Friday, July 6. Beverly said she was told not to give it to me unless I signed this paper agreeing to accept $8.89 per hour. I refused to sign it and she kept my check." Complainant also placed a note on a copy of the printout the BOLI representative gave her that states: "July 9, 01[,] Monday[,] When Beverly refused to give me my paycheck, I drove to Medford to the Bureau of Labor and Industries to talk to someone. The lady there told me by law Subway can't do that. She gave me this printout and told me to show it to the manager at Subway. The manager had already left by the time I got back to Grants Pass. I went back on Friday, July 13, 01, and showed Beverly this printout and she gave me my check."

24) After July 3, 2001, Complainant worked 4.22 hours on July 13, 2.36 hours on July 23, and 1.79 hours on July 24, 2001. On or about July 20, 2001, Complainant accepted employment with Keith Brown as a stock clerk. She understood that Keith Brown would work around her scheduled hours at Respondent. Complainant worked 6.75 hours at Keith Brown while still employed at Respondent's.

25) On or about July 23, 2001, Bergen presented Complainant with the same typewritten statement that she asked Complainant to sign on July 9, 2001. Complainant once again refused to sign it. Complainant made another copy of the statement which included a handwritten note at the bottom that says: "Monday 7-9-01 Renee came in to get her check[.] [A]sked her to sign this, she said no. So, I am for her, she has been told & read this & took a copy." The notation is signed:

"Manager Beverly." At the top of the page, Complainant wrote: "copied 7-23-01 2nd time she told me to sign this." At some point, Complainant also attached a note referencing Bergen's handwritten note, stating: "This note was written on the agreement letter the second time Beverly told me to sign it in order to get my paycheck. It's very difficult to read and understand Beverly's note. (In my opinion, before you can manage any type of business, you should be capable of at least constructing a complete and proper sentence.)"

26) On or about July 24, 2001, Bergen terminated Complainant.

27) During the Agency investigation into Complainant's civil rights complaints, Hoxsey told the Agency investigator that Respondent had previously failed to document employee breaks and that the managers told all employees they were required to take breaks and document them. He also told the investigator that Bergen had told him Complainant was refusing to sign the break sheets. Bergen told the investigator that everyone, including Bergen, was required to sign the break sheets. She also told the investigator that she had asked Complainant three or four times to sign the sheets but Complainant refused and Hoxsey had told her to terminate anyone who refused to sign the break sheets. Bergen told the investigator that a "woman from the Bureau of Labor and Industries" told her that "she found that people were getting their breaks but said [Respondent] could be fined for not documenting them." The "break sheet" is actually a sign-up sheet designed to track an employee's "time out" and "time in" while on a break. It includes columns for the employee's name and the day and month of the break.

28) On April 15, 2002, the Agency investigator received an undated letter from Hackstedde explaining why Complainant was terminated. Hackstedde stated that:

> "[Complainant's] employment relationship ended with [Respondent] for her refusal to comply with our policies and procedures. Specifically, she refused to comply with our policy on rest/break periods for employees as required by State Statute."

29) In a letter dated June 21, 2001, Agency Wage and Hour Division Compliance Specialist Lesley R. Laing advised Respondent, through Hackstedde and Hoxsey, of the following:

> "At this time you must notify all of your location managers in writing that they must ensure that *every* employee *receives and takes* a rest period of at least 10 minutes duration for adults (15 minutes for minors under the age of 18) *as close to the middle of each four (4) hour period* (or major portion thereof) of work as possible. During such rest periods the employee must be relieved

from *all* duties. The enclosed table will show the number of rest periods and meal periods required for varying lengths of shifts. Please send a copy of your notice to managers to this office, together with a list of the managers, and their locations, so notified.

"Please find enclosed an 'Investigator's Report and Employer Compliance Agreement,' form WH-60B. It shows violations found in the course of this investigation. Please sign the report and pledge of future compliance.

"This investigation will be closed upon proof that you have notified managers of rest period requirements and your signed acknowledgement of violations found and pledge of future compliance. Please ensure these items arrive in this office by **July 5, 2001**. However, please be advised that if *any* complaints are received in the future that employees in any of your locations are not receiving required rest periods, an investigation may ensue. Your history regarding this issue is on the record and may be considered as aggravating factors in any decision to impose civil penalties."

Based on that letter, Hackstedde notified his managers in writing on July 3, 2001, of the break requirements discussed in Laing's letter as follows:

"To all Managers

"Every employee receives and takes a rest period of at least 10 minute duration for everyone 18 and older. And 15 minutes for minors under the age of 18. During such rest periods the employee must be relieved from all duties. The new list shows the number of rest periods and meal periods required for varying lengths of shifts.

"Failure to comply with the above policy will result in disciplinary action up to and including termination of employment.

"Please notify Dick, Jeff or Ada if you do not understand this policy. Please sign if you have full understanding of the above policy."

The letter included a table showing the number of breaks required for varying shifts and space for up to 16 signatures. The first copy of the letter that Respondent submitted as an exhibit showed 12 signatures and dates ranging from July 6 to July 18, 2001. All of the names show up as hourly employees in Respondent's payroll records. The second copy Respondent submitted during the hearing also had 12 signatures but they are not dated. The names on that list include managers Blanca Meza, Beverly Bergen, and Amanda Wood. Complainant's name does not appear on either copy. Complainant was not aware of the wage and hour investigation and did not know about the letter pertaining to break requirements until the civil rights

investigation ensued. No one spoke to Complainant about breaks. Julie Milstead, who worked in the SGP store with Complainant, was an hourly employee and her name does not appear on either copy. Milstead worked for Respondent from 1996 until 2003 and was not asked to sign the letter pertaining to break requirements that was directed to "all managers." Milstead recalled documenting her breaks on break sheets three or four times. Milstead was not a manager.

30) None of Respondent's employees took OFLA leave between January 1, 2000, and December 31, 2001.

31) After Complainant was terminated, she went to work for Keith Brown full time until she left in November 2001 due to a seasonal lay-off. She received unemployment benefits thereafter and continued to apply for work. She accepted all employment she was offered and earned $17,809.71 total from her different employment between June 20 and September 24, 2003, including those hours she worked after she returned to work for Respondent. Each interim job paid at or around minimum wage and did not offer 40-45 hour work weeks. At the time of hearing, Complainant had not found a job that was similar in hours and pay to the managerial position she held at Respondent's SGP store.

32) When she lost her managerial position at Respondent, Complainant was upset and suffered financial hardship. She had purchased various items based on her earnings as a manager and still owes $400 on a car loan she owed to her grandmother and $2,800 in back rent owed to her mother.

33) Complainant liked her job, particularly the income, and was "devastated" and "depressed" after she realized she was no longer a manager. She "moped" over the loss of hours and did not go out as much as she had in the past, but she continued to believe that "things would work out." A usually outgoing person, Complainant stayed home and slept after she was terminated rather than go out with her friends. She felt "depressed" for approximately six months following the change in her employment status. At the time of hearing, she continued to suffer some frustration and anxiety related to her lack of financial resources.

34) Complainant's overall demeanor during the hearing was sincere. She answered questions in a forthright manner, her rendition of key facts was believable and relatively consistent with her prior statements to the Agency investigator, and her testimony was supported by other credible evidence. Consequently, the forum finds her testimony on the key issues trustworthy. However, Respondent aptly points out particular problems in the record that are addressed in the opinion section of this order. Overall, Complainant was more believable than Respondent's witnesses and the forum has credited her testi-

mony where it was corroborated or not refuted by other credible evidence.

35) Ada Rodgers was present throughout the hearing as Respondent's designated corporate representative and heard all of the testimony before she testified. After carefully observing her demeanor, the forum concluded that much of her testimony was influenced by or in reaction to what she heard rather than a straightforward recitation of what she knew or had observed. Additionally, her testimony was internally inconsistent, contradicted by other credible evidence, or simply not believable. For instance, she testified that "no one ever showed her" Complainant's medical release and that she relied solely on Bergen's representation that Complainant's work hours were medically restricted to 20 hours per week. Contrarily, she later testified that employee medical releases are routinely faxed from the stores to Respondent's corporate office and "put in a pile" on her desk for her perusal. Complainant's medical release indicates it was faxed from the SGP store on June 18, 2001, to an unidentified destination that, in the absence of evidence to the contrary, the forum infers was Respondent's corporate office. During her interview with the Agency investigator, closer in time to the events at issue, Rodgers stated that the first time she heard from Complainant after she called to say she was having surgery was when she brought in her medical release. She also stated that she thought the medical release restricted Complainant's hours and could not recall when she learned *she* was in error. In further contrast, Rodgers insisted at hearing that she did not hear from Complainant after she left on medical leave, that her mother, not Complainant, called to say she was having surgery, and that the only time she spoke with Complainant was when Complainant asked for time off for the July 4 holiday. Not only does her testimony conflict with her earlier statements to the Agency investigator, it is further impaired by Complainant's cell phone records which show Complainant called Rodgers at least three times before she returned from her OFLA leave and one call lasted a full seven minutes. Overall, Rodgers's testimony was not reliable and the forum only credited it when it was corroborated by credible evidence.

36) Neither Jeff Hoxsey nor Dick Hackstedde had first hand knowledge of key facts. Hackstedde stated he did not spend much time in any of his stores and Hoxsey acknowledged that he was busy opening four new stores and had little time to spend in the SGP store during the relevant time period. What little they knew about Complainant's return to work or her termination was second or third hand from Rodgers whose information purportedly came from Bergen, who did not testify in this case.

Additionally, Hoxsey's testimony that Bergen was never the

manager at the SGP store and that there was in fact no manager at the SGP store during the period Complainant was on OFLA leave, was contrary to every other witness's testimony, the documentary evidence, and his own prior statement to the Agency investigator. His testimony was self serving and unreliable and the forum credited it only where it was corroborated by credible evidence.

Also, Hackstedde first testified that Respondent's written break policy precipitated the implementation of a "break form" that employees were expected to sign when they began and ended their breaks, and that Rodgers and Hoxsey told him Complainant refused to sign the break "forms." He later insisted the break "policy" and break "form" were one and the same document when he realized Respondent's position at hearing was that Complainant was terminated because she refused to sign the break policy. However, his original position statement to the Agency during its investigation is consistent with his initial testimony that Complainant was terminated because "she refused to comply with our policy on rest/break periods for employees as required by State Statute." The forum finds the abrupt shift in his account of one of the key issues particularly suspect and has credited his testimony only where it was corroborated by credible evidence.

37) Blanca Meza's telephonic testimony was not wholly credible. Her testimony that she covered for those employees who were out on sick leave, including Complainant, and that she left the SGP store about a week before Complainant returned from her OFLA leave was believable and consistent with Respondent's payroll records. However, her statement that Bergen became manager of the SGP store in mid-July 2001 was contradicted by Respondent's payroll records that show Bergen was intermittently managing the store as early as May 26, 2001, and on a regular full time basis as of June 14, 2001. Moreover, her testimony that she was not aware of the SGP store's management status and that Rodgers never gave her any information about the manager situation is suspicious in light of the note she wrote on her time card on June 14, 2001, which was directed to Bergen and stated: "good luck, beverly." Since Respondent's payroll records show Bergen made the change to the SGP store on that date, it is more likely than not that Meza knew who the SGP store manager was at the time she left the SGP store in June 2001. On the other hand, Meza's statement that Bergen was still managing the SGP store as late as July 2003 when Meza voluntarily left Respondent's employ was unrefuted and the forum accepts it as fact. The forum credited Meza's testimony only where it was corroborated by credible evidence in the record.

38) Judy Dangelo was a credible witness despite her family relationship with Complainant.

Her testimony was direct and responsive and not exaggerated in any way. Her recollection of events was clear, reasonably free of bias and not impeached. The forum credits her testimony in its entirety.

39) Despite his natural bias as Complainant's close friend, Josh Bergrud was a credible witness. He was honest about his lack of personal knowledge concerning certain key events and did not exaggerate those he observed. His testimony that Complainant appeared happy with her management position, that he drove her to the SGP store twice each week to check on things before she returned to work after her OFLA leave, and that "Jesse" had told Complainant that Respondent hired Bergen as the "new" manager and was going to quit "because he didn't get along with her" was completely credible and not impeached in any way. The forum credits his testimony in its entirety.

40) Julie Milstead's testimony was reasonably straightforward despite her nervous giggles. She readily acknowledged that she left her employment after Rodgers wrongly accused her of stealing money, but demonstrated no particular bias against Respondent by her demeanor or testimony. Her statement that she could not remember ever seeing a break policy and was not asked to sign one was credible and not refuted. The forum credits her testimony in its entirety.

41) Barbara Turner was a credible witness. She had a clear recollection of her interviews with Respondent employees and testified in a direct manner about her interviews with Bergen, Rodgers, Hoxsey, and Complainant. Turner confirmed that Bergen and Rodgers stated during the interview that they "thought" Complainant's medical release restricted her to only 20 hours per week. Bergen and Hoxsey also stated to Turner that a 20 pound lifting restriction would not prevent Complainant from performing her management duties. Additionally, Bergen told Turner that she continued to perform the management duties because Complainant did not "resume" her duties. Turner testified that her interview summaries accurately summarized the substance of her discussions with Complainant and Respondent's managers. The forum credits her testimony in its entirety.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent employed 25 or more persons in Oregon for each working day during each of 20 or more calendar workweeks in the year preceding Complainant's OFLA leave.

2) Respondent employed Complainant as a sandwich maker in February 2000 and promoted her to manager of the SGP store on February 1, 2001.

3) Complainant worked more than an average of 25 hours per week during the 180 days preceding her OFLA leave.

4) On or about May 26, 2001, Complainant had an appendectomy that required her absence from work for more than three days and included ongoing treatment by a physician.

5) When she began her OFLA leave, Complainant was a manager receiving a weekly salary of $400 and working 40 to 45 hours per week.

6) Before Complainant began her OFLA leave, she received a pay raise and had never received a written "employee warning" about her work performance.

7) While Complainant was on OFLA leave, Respondent filled Complainant's management position with another employee, Beverly Bergen, who had previously managed Respondent's NGP store. Respondent filled the NGP manager's position with another employee, Amanda Wood.

8) On June 16, 2001, Complainant presented Bergen with a doctor's note that released her to work on June 18, 2001, with a 20 pound lifting restriction that was effective until July 3, 2001, at which time Complainant would be released for full duty. Bergen told Complainant that she had no hours for her.

9) After complaining to Ada Rodgers, Respondent's Operations Director, Complainant was placed on the schedule for fewer than 20 hours per week.

10) After her first two days back on the job, Complainant was given her first written "employee warning" that claimed she performed substandard work and was insubordinate and uncooperative by failing to bake enough bread or help other employees.

11) Complainant's pay rate was changed from a salary to $8.89 per hour after she returned from OFLA leave.

12) When Complainant refused to sign a document acknowledging the change in her pay schedule, Bergen refused to give Complainant her paycheck. After Complainant went to the Medford BOLI office and returned with information pertaining to wage and hour rules, Bergen gave Complainant her paycheck. Later, Bergen again asked Complainant to sign the statement acknowledging the change in her pay status and Complainant refused.

13) Respondent did not ask Complainant to sign a break policy memorandum that was directed to "all managers."

14) Bergen terminated Complainant on July 24, 2001, which was the last day Complainant worked.

15) After she was terminated, Complainant diligently looked for work and found alternative interim employment. She earned $17,809.71 between June 18, 2001 (the date Complainant was entitled to be restored to the same or substantially equivalent hours that she worked when she began her OFLA leave), and September 24, 2003 (the hearing date).

16) From June 18, 2001, until the hearing date, Complainant lost wages totaling $28,590.29 ($400 per week x 116 weeks - $17,809.71).

17) Complainant was upset and suffered financial distress, felt depressed, and was unable to engage in activities that she routinely engaged in before she was denied restoration to the position she held when she began her OFLA leave.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was a covered employer as defined in *former* ORS 659.472(1). *See also former* ORS 659.470(1).

2) The actions, inaction, statements and motivations of Richard Hackstedde, Respondent's CEO and majority shareholder; Ada Rodgers, Respondent's Operations Director; and Jeff Hoxsey, Respondent's Operations Manager, properly are imputed to Respondent.

3) *Former* ORS 659.374(1) provides that "[a]ll employees of a covered employer are eligible to take leave for one of the purposes specified in [*former*] ORS 659.476(1)(b) to (d)" except in circumstances not applicable here. Complainant was an eligible employee.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. *Former* ORS 659.492(2); *former* ORS 659.010 to 659.110; ORS 659A.780; ORS 659A.850(2) and ORS 659A.850(4).

5) Complainant required medical treatment for a period of time that constituted a serious health condition as defined in *former* and *current* OAR 839-009-0210(14)(d).

6) Complainant was entitled to be restored to the management position she held when her leave commenced on May 26, 2001, pursuant to *former* ORS 659.484. Complainant's management position still existed when she returned to work on June 18, 2001, but was filled by another employee who continued to fill the position after Complainant returned from OFLA leave. Respondent refused to return Complainant to the management position she held when her leave commenced, thereby violating *former* ORS 659.478 and committing an unlawful employment practice. *Former* ORS 659.492(1).

7) Respondent terminated Complainant in July 2001 because she invoked a protected right under the OFLA provisions, in violation of *former* and *current* OAR 839-009-0320(3).

OPINION

The Agency alleges in this case that Respondent failed to restore Complainant to her former management position upon her return from an OFLA qualified leave, demoted her upon her return, and subsequently terminated her be-

cause she invoked or utilized OFLA provisions. Respondent denies the allegations and asserts that Complainant voluntarily worked less hours, declined to perform her management duties, and was terminated because she refused to sign a policy related to breaks and meal periods.

RESTORATION TO PREVIOUS EMPLOYMENT POSITION – *FORMER* ORS 659.484

To establish a prima facie case that Respondent committed an unlawful employment practice by failing to restore Complainant to the position she held at the time her OFLA leave began, the Agency must prove: (1) Respondent was a covered employer as defined in former ORS 659.470(1) and former ORS 659.472; (2) Complainant was an "eligible employee" for OFLA leave, *i.e.*, she was employed by a covered employer and worked for the employer an average of at least 25 hours per week for the 180 calendar days immediately preceding the date on which her OFLA began [former ORS 659.474; former OAR 839-009-0210(2)(b)]; (3) Complainant took OFLA leave to seek treatment for or recover from a serious health condition; and (4) Complainant attempted to return to work after taking OFLA leave and was denied or refused restoration to the position she held when the OFLA leave commenced. The participants stipulated to the first three elements and the remaining issue is whether Complainant attempted to return to work following her OFLA leave and was denied or refused restoration to the management position she held when the OFLA leave began.

Under the OFLA, eligible employees are entitled to take up to 12 weeks of leave each year and are guaranteed restoration to their employment position, if it still exists, after they have exercised their leave right. See *former* ORS 659.478; 659.484 and *current* ORS 659A.162; 659A.171. However, employees are not entitled to "[a]ny 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." *Id*. The Oregon Court of Appeals views the issue this way:

> "[T]he determination whether an employer has violated the reinstatement right of an employee under the [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 the [OFLA]."

Entrada Lodge, Inc. v. Bureau of Labor and Industries, 184 Or App 315, 56 P3d 444, 446 (2002). In this case, there is no dispute that Complainant held a management position with all of the associated duties and benefits when she began her OFLA leave in May 2001. The participants also agree that Complainant's pre-OFLA leave management position entailed a 40 hour or more work week at a $400 per week salary. Evidence shows and Respondent does not dispute that upon her return from OFLA leave Complainant was scheduled for less than 20 hours per week, did not perform the management duties she performed before her OFLA commenced, and was paid $8.89 per hour, in contrast to the hours, responsibilities, and salary she enjoyed as a manager.

An employer's failure to restore an employee to the employee's pre-OFLA position creates a rebuttable presumption that the employer unlawfully refused to restore the employee to that position. *In the Matter of TJX Companies, Inc.*, 19 BOLI 97, 113 (1999). If the position still exists and the employee would not have otherwise been bumped or displaced if the employee had not taken leave, the employer rebuts the presumption "by proving that the employee asked not to be [restored] to his or her former position. *Cf*. OAR 839-009-0270(8) ('If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under OFLA cease.')" *Id*. at 113.

In this case, Respondent's argument that Complainant did not want to be restored to her position is overcome by a preponderance of credible evidence to the contrary. Credible evidence establishes that Complainant was happy with her job, occasionally checked in on the store when she became mobile after her surgery, and immediately presented her medical release to Respondent upon receiving the go ahead to return to work. In contrast, Respondent acknowledges it had already established Bergen as the new manager of the SGP store and replaced Bergen with Amanda "Mandy" Wood at the NGP store. Respondent suggests that Bergen took over the management duties because Complainant was unwilling to work the hours required to perform her responsibilities as manager. There is simply no evidence of any kind that supports Respondent's attempt to explain the change in management that occurred *prior to* Complainant's return from OFLA leave. Moreover, Respondent agrees that its alternative explanation for Complainant's reduced work hours is reliant upon Bergen and Rodgers's stubborn, but disingenuous, contention that Complainant's medical release dictated the reduction in her work hours. Neither explanation is corroborated by any evidence in the record.

Credible evidence establishes that when Complainant returned from her leave, Bergen denied her any work hours and she was placed on the schedule for 20

hours or less per week only after complaining to Rodgers. Complainant acknowledges that she requested certain days off for the July 4 holiday, but contrary to Respondent's contention, there is no evidence that Complainant ever requested additional time off or to work fewer hours or that she turned down any hours she was scheduled to work.

Respondent argues that Complainant's employment application to Keith Brown, dated one week before she returned from her OFLA leave, establishes Complainant's intent to abdicate her managerial position and belies her testimony that she later accepted the Keith Brown job because she was not receiving sufficient work hours from Respondent following her return from OFLA leave. Respondent's argument is unpersuasive for two reasons. First, Respondent did not know about the application until the discovery process prior to hearing and therefore could not have relied on that information when it assigned Bergen the SGP store management position. Second, there is sufficient evidence to negate Respondent's theory that Complainant intended to leave Respondent's employ before she was medically released for work. Complainant credibly testified, and her testimony was consistent with her prior statement to the Agency investigator, that while she was still on OFLA leave McBain told her that Bergen had replaced her permanently as manager. While she was at first skeptical, she believed his account when he later told her he had quit his job because of the change in management. Respondent's records confirm that McBain was no longer on the payroll after June 3, 2001. It is not a stretch to infer that Complainant reacted to the information by attempting to find replacement employment as quickly as possible in order to ensure a continued income to pay her bills.

The inference is further reinforced by Complainant's actions after the date of the application. Rather than give up on her position with Respondent, which would be consistent with Respondent's assertion that Complainant planned to leave her position, Complainant repeatedly took active steps to try to be fully reinstated to her management position. For instance, when her doctor released her to work, she immediately presented her medical release to Bergen who told her there were no hours available for her to work. Evidence shows that about that time, Complainant downloaded information pertaining to OFLA provisions from the BOLI Website and sometime thereafter gave the information to Rodgers and Hoxsey. After she complained, she was put on the schedule for the following week, but only for 18 hours. Unrefuted evidence shows that in her discussions with Bergen and Rodgers, and despite her requests that they re-examine her medical release, she was repeatedly told her medical release limited the hours she could work to 20 per week.

Finally, Complainant was available for and worked all of the hours she was given, even after she accepted employment with Keith Brown, which suggests that Complainant's motivation to apply elsewhere was for a reason other than a desire to relinquish her management position and take on an entry level stock clerk job with another employer. The forum therefore finds that the Keith Brown employment application does not undercut the premises of Complainant's liability and damage claims or her credibility as Respondent contends.

Respondent failed to rebut the presumption that it unlawfully refused to restore Complainant to her management position by proving that Complainant voluntarily restricted her availability or refused to work the required hours. Instead, a preponderance of credible evidence establishes that the employment advantages Complainant enjoyed on her return to work following her OFLA leave fell far short of those she would have enjoyed had she not taken OFLA leave. The forum therefore concludes that Respondent failed to restore Complainant to her employment position as required by *former* ORS 659.484 and *current* ORS 659A.171.

RETALIATION – *FORMER* AND *CURRENT* OAR 839-009-0320(3)

Under OAR 839-009-0320(3), "[i]t is an unlawful employment practice for an employer to retaliate or in any way discriminate against any person with respect to hiring, tenure or any other term or condition of employment because the person has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act." *Former* and *current* OAR 839-009-0320(3).

To establish a prima facie case of retaliation under the rule, the Agency must show that: 1) Complainant invoked a protected right under the OFLA; 2) Respondent made an employment decision that adversely affected Complainant; and 3) there is a causal connection between the Complainant's protected OFLA activity and Respondent's adverse action. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 26-27 (2000).

A. Complainant invoked a protected right under the OFLA.

There is no dispute that Complainant was absent from work due to an OFLA qualifying medical condition or that upon her return to work she provided Respondent with a physician's certificate fully releasing her to work, except for a 20 pound lifting restriction that terminated two weeks from the date of the release. At hearing, Respondent acknowledged that Complainant's management position did not require her to lift over 20 pounds. By reporting to work after her OFLA leave ended and providing a proper medical release that permitted her to resume her employment, Complainant "invoked" a protected right under the OFLA provisions, *i.e.*, her entitle-

ment to be restored to the employment position she held when her leave commenced.

B. Respondent's adverse employment decision

There is no dispute that Complainant's terms and conditions of employment significantly changed after she returned from OFLA leave. Respondent reduced Complainant's hours by half and changed her pay method, effectively demoting her from her management position, and acknowledged that it terminated her employment slightly more than one month after she returned from OFLA leave.

C. Causal connection

A causal connection between Complainant's protected activity and Respondent's adverse employment decision may be shown by either direct or circumstantial evidence. In this case, there is no direct evidence that Respondent terminated Complainant because she invoked her right to be restored to the position she held when she commenced her OFLA leave. However, a prima facie case of retaliation is established if there is circumstantial evidence raising an inference of retaliation. In this case, the Agency established that Respondent terminated Complainant little more than a month after she returned to work following her OFLA leave. While the temporal relationship alone may not be sufficient to establish a causal connection, it raises an inference of retaliation, particularly where the Agency establishes that Respondent engaged in a pattern of retaliatory conduct immediately upon Complainant's return to work that continued until Complainant was terminated. Credible evidence shows the retaliatory conduct began when Complainant returned to work with a medical release and Bergen told her there were no hours for her to work. After she complained to Rodgers, Complainant was scheduled to work 18 hours for the week beginning June 20, 2001. Thereafter, despite Complainant's repeated requests that Bergen and Rodgers re-examine her medical release, her work hours were limited to fewer than 20 per week until July 3, 2001, when her only physical limitation – a 20-pound lifting restriction - was lifted. Instead of increasing her work hours after the lifting restriction was lifted, evidence shows Complainant's hours were reduced even further and her pay was summarily changed from salary to hourly. Additionally, on her first day back on the job she was told to don the purple uniform that distinguished her from management personnel and Complainant determined that Bergen had indeed assumed the managerial functions she had performed prior to taking OFLA leave, including preparing the weekly schedules. Finally, within one week of her return, Complainant was given her first "employee warning." As manager of the SGP store, Bergen admonished Complainant for "substandard work" purportedly performed on her first and second day back on the job. Those facts coupled with the tem-

poral proximity give rise to an inference sufficient to establish a causal nexus between Complainant's protected activity, *i.e.*, invoking her right to be restored to the position she held when she began her OFLA leave, and Respondent's adverse employment decision, *i.e.*, terminating Complainant shortly after she returned from OFLA leave.

In its answer, Respondent contended that it terminated Complainant solely because she "refused to sign and acknowledge Respondent's break policy." To support its contention, Respondent produced evidence that shows the Wage and Hour Division ("WHD") investigated Respondent's break practices and required it to notify its managers of break requirements and to provide the WHD with proof the managers were so notified. Respondent also demonstrated that it provided the WHD with the required proof. Despite that evidence and for reasons stated below, the forum finds that Respondent's purported "business" reason for terminating Complainant is not believable.

First, Complainant credibly testified that she was not asked to sign the break policy and that she had not seen the written policy until sometime during the civil rights investigation. Her testimony was bolstered by Milstead's credible testimony that she also had not been made aware of the written break policy, but had seen a "break sheet" and documented her breaks three or four times during her employment. Additionally, Respondent asserts the policy was in effect July 3, 2001, and was discussed at a meeting on July 6, when Complainant was on an approved vacation. Evidence also shows that when she returned from her vacation, the only paper she was asked to sign was the one changing her salary status to hourly. Notably, Bergen memorialized Complainant's refusal to sign the pay status change, but made no mention that Complainant refused to sign the break policy which apparently had been signed by others on July 6 and 8, 2001.[1] The forum infers that Complainant was not asked to sign the break policy on that occasion because Bergen otherwise would have noted that refusal, given its purported importance. In fact, there is no documentation that shows Complainant was ever asked or refused to sign a policy that ultimately was the basis for her termination. In light of Respondent's penchant for documenting Complainant's other purported transgressions after she returned from her OFLA leave, the forum is not persuaded that Respondent unsuccessfully attempted to obtain Complainant's signature on its break policy.

Second, even if the forum believed that Respondent asked Complainant to sign the break policy and terminated her because she refused to do so, evidence shows that at least one employee, who had not invoked a right under

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[1] *See* Finding of Fact – The Merits 25.

the OFLA provisions, was not required to sign the break policy. That evidence creates a permissible inference that Respondent treated Complainant differently than her counterpart because she engaged in a protected activity and not because of a legitimate, non-discriminatory motive.

Finally, evidence shows Complainant's work was particularly scrutinized beginning the day she returned to work and resulted in an "employee warning" that had no substance. When Complainant asked for details supporting Respondent's complaints, Respondent could not or would not provide them. Instead, she was terminated shortly thereafter for a reason unrelated to the written warning, but equally suspect.

Based on a preponderance of the credible evidence, the forum finds that Respondent engaged in a pattern of retaliatory conduct against Complainant by reducing her work hours, changing her employment status from a salaried manager to an hourly line staff employee, subjecting her to greater scrutiny, and terminating her within one month upon her return from OFLA leave. The forum further finds that Respondent was not truthful about its reason for terminating Complainant and concludes therefore that its stated reason for terminating Complainant is pretext for discrimination based on Complainant's exercise of her rights under the OFLA provisions, in violation of *former* OAR 839-009-0320(3).

DAMAGES

A. Back Pay

It is well established in this forum that the purpose of back pay awards in employment discrimination is to compensate a complainant for the loss of wages the complainant would have received but for the respondent's unlawful employment practices. *In the Matter of H. R. Satterfield*, 22 BOLI 198, 210 (2001). In its pleading, the Agency seeks $35,000 based on the amount Complainant would have earned had she been restored to her managerial position when she returned from her OFLA leave, less interim earnings. Respondent argues that Complainant's Keith Brown job application was submitted while she was still employed and therefore negates any finding of back pay because it establishes Complainant's intent to leave her employment. The forum has resolved that issue elsewhere herein by determining that Complainant in no way manifested an intention to give up her managerial position for a lower paying stock clerk position, but rather made every reasonable effort to return to her former full time employment with Respondent to no avail. The forum concludes therefore that had Complainant not taken OFLA leave in May 2001, she would have continued working 40 to 45 hours earning at least $400 per week as Respondent's manager for the duration of her employment. The forum's calculations of Complainant's lost wages include a deduction for interim

earnings and other evidence in the record does not refute that amount. The forum therefore finds Respondent liable for Complainant's wage loss between June 18, 2001 and the date of hearing in the amount of $28,590.29.

B. Expenses

The Agency asks this forum to compensate Complainant in the amount of $3,200 for debts she incurred "but for Respondent's failure to reinstate her to her manager's position and then wrongfully terminating her altogether." This forum has consistently held that "economic loss to a complainant that is directly attributable to an unlawful practice may be recovered from respondents as a means to eliminate the effects of any unlawful practice found. * * * This includes actual expenses." *In the Matter of Strategic Investments of Oregon, Inc.*, 8 BOLI 227, 250 (1990). In this particular case, the forum knows of no recovery theory that permits it to find Respondent liable for the debts Complainant happened to incur while employed with Respondent. The forum has found that the change in Complainant's employment status caused Complainant financial hardship by making it difficult for Complainant to timely pay some of her bills, including her car loan and rent. However, Respondent's actions did not cause Complainant to incur those expenses. The forum finds therefore that Complainant's debts are not compensable "out of pocket expenses" as typically contemplated by this forum.

C. Mental Suffering

The Agency seeks $25,000 to compensate Complainant for the mental suffering she experienced due to Respondent's unlawful discrimination. The forum has concluded that Respondent failed to restore Complainant to the managerial position she held when her OFLA leave began, subjected her to discriminatory working conditions, and subsequently terminated her from her employment because she was absent due to OFLA leave. Complainant is therefore entitled to compensation for the mental suffering she experienced as a result of Respondent's unlawful practices.

In determining a mental suffering award, the commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. *In the Matter of Barrett Business Services*, 22 BOLI 77, 96 (2001). The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id*. at 96.

In this case, Complainant's testimony that she was angry, upset, and tearful when she realized her hours were reduced and that she was no longer part of management was believable. Although credible witness testimony confirmed that she felt

"depressed" due to Respondent's unlawful actions, it was short lived and did not inhibit her ability to look for and secure employment for various periods during and after her employment with Respondent. Her concern about the financial effects of the change in her employment was longer term and evidence shows that none of the interim jobs she held compared to her pre-OFLA leave management position.

This forum has consistently held that financial insecurity and anxiety caused by a respondent's unlawful practices is compensable. *See, e.g.*, *In the Matter of Entrada Lodge, Inc.*, 24 BOLI 125, 155 (2003), *amended final order on remand*. In the *Entrada Lodge* case, the forum awarded the complainant $15,000 in mental suffering damages based on facts that showed she was suffering a heightened stress level for a short duration "which manifested itself in the form of Complainant being very worried and scared, and crying frequently" because she was not scheduled for any hours during the first two and one half weeks after she "attempted to return to work, further exacerbating her family's financial distress." In that case, the complainant was able to obtain equivalent employment within a short period. In contrast, Complainant mitigated her damages by seeking and accepting available interim employment, but did not find work equivalent to the same hours or pay as her previous management position. The forum finds that as of the hearing date, Complainant continued to suffer financial insecurity from Respondent's failure to restore her to her pre-OFLA leave employment and that $25,000 is an appropriate award for Complainant's mental suffering as a result of Respondent's unlawful practices found herein.

RESPONDENT'S EXCEPTION

Respondent correctly points out that the proposed order incorrectly "assesses interest on the entire amount of lost wages from the commencement of the period in which wages were lost" and that the "result of this order would be to over compensate complainant by awarding her interest on wages before the right to receive wages accrued." The Order below has been corrected to reflect the date that interest properly accrues.

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 659.478(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Southern Oregon Subway, 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 trust for Complainant Renee Deangelo** in the amount of:

(1) TWENTY EIGHT THOUSAND FIVE HUNDRED NINETY DOLLARS AND TWENTY NINE CENTS ($28,590.29), less appropriate lawful deductions, representing wages Complainant lost from June 18, 2001, until September 24, 2003, as a result of Respondent's unlawful employment practices; plus

(2) Interest at the legal rate on the sum of $28,590.29 from September 24, 2003, until paid; plus

(3) TWENTY FIVE THOUSAND DOLLARS ($25,000), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practices; plus

(4) Interest at the legal rate on the sum of $25,000 from the date of the final order until paid.

(5) Cease and desist from discriminating against any employee in tenure of employment based upon the employee having invoked or utilized Oregon Family Leave Act provisions.

In the Matter of

SOUTHERN OREGON SUBWAY, INC.

Case Nos. 21-03 and 22-03

Amended Final Order of Commissioner Dan Gardner

Issued June 10, 2004

ED.: The final order in this case was initially issued on May 24, 2004, and published at 25 BOLI 218. The commissioner later determined that there had been a typographical error in the Final Order. On June 10, 2004, the commissioner issued an amended order identical to the original order except that the date in Finding of Fact 16 – The Merits, was corrected. The editors have decided to only publish the amended Finding of Fact rather than reprinting the Final Order in its entirety. The final order should be cited: 25 BOLI 218, as amended, 25 BOLI 245 (2004). Persons wishing a complete copy of the amended final order should contact the Hearings Unit of the Bureau of Labor and Industries.

The amended Finding of Fact – The Merits is:

"(16) Complainant brought her medical release to the SGP store on or about June 16, 2001, and talked to Bergen about returning to work. Bergen told Complainant there were no available hours for her. Sometime

thereafter, Complainant reached Rodgers by telephone to discuss her return to work. Rodgers told Complainant that Bergen had told her Complainant's medical release limited her work hours to 20 per week. Complainant told Rodgers that the medical release restricted her from heavy lifting and that her work hours were not limited. Rodgers indicated she was relying on Bergen's rendition of the medical release and would pay Complainant $10 per hour for 20 hours per week. Complainant later called Rodgers to protest the lack of hours and told Rodgers she thought that she should return to her management position. Rodgers responded by informing Complainant that her position had been filled."

In the Matter of

MARTIN BROTHERS CONTAINER AND TIMBER PRODUCTS CORPORATION,

Case No. 23-80

Final Order of Commissioner Mary Wendy Roberts

Issued March 24, 1981[1]

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[1] This Final Order was recently discovered. The original Final Order was issued on March 24, 1981, and has not been previously published in this reporter. This order is being published for purposes of completeness of agency orders. ED: September 2004.

The above-entitled case came on regularly for hearing before Jon Wu, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held in the Medford Service Bureau, 821 North Columbus, Medford, Oregon on May 15, 1980.

The Bureau of Labor and Industries was represented by Michael Tedesco, Assistant Attorney General. Respondent, The Martin Brothers Container and Timber Products Corporation, was represented by Carl M. Brophy, Attorney at Law. Complainant, Janet Robinson, was present and testified.

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

CONCLUSIONS OF LAW

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the subject matter and the persons herein.

The motion for dismissal was properly granted.

ORDER

NOW, THEREFORE, the Specific Charges and the Complaint against the Respondent herein are dismissed with prejudice according to the provisions of ORS 659.060 (3).

In the Matter of
GARY L. BUYSERIE, dba Buyserie Farms,

Case No. 20-93
Final Order of Commissioner Mary Wendy Roberts
Issued December 24, 1992[1]

The above-entitled case came on for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 14, 1992, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street N.E., Bldg E-1, Salem, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Gary L. Buyserie (Respondent) was represented by Vance Day, Attorney at Law. Mr. Buyserie was present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): Bill Pick, a Compliance Specialist with the Agency; Ronald Smith, Deputy Sheriff, Polk County Sheriff's Office.

Respondent called the following witnesses (in alphabetical order): Bill Pick, a Produce Manager, Lincoln City Thriftway; and Gary Buyserie, Respondent.

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

FINDINGS OF FACT - PROCEDURAL

1) On February 6, 1992, the Agency issued to Respondent a Final Order of Determination (Default), because Respondent failed to make a written request for a hearing or to request a trial in a court of law within twenty days after service of an Order of Determination, number 91-159.

2) On July 13, 1992, Respondent filed a motion with the Court of Appeals to present additional evidence on the issue of whether he received actual notice of the Order of Determination. Following responsive briefs and replies, on November 10, 1992, the court granted Respondent's motion to present additional evidence before the Bureau of Labor and Industries. The court denied Respondent's motion to appoint a special master to take evidence and make findings of fact.

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[1] This Final Order was recently discovered. The original Final Order was issued on December 24, 1992, and has not been previously published in this reporter. This order is being published for purposes of completeness of agency orders. ED: September 2004.

3) On November 30, 1992, the Agency requested a hearing from the Hearings Unit. A hearing was set for December 10, 1992. By agreement of the participants and the Hearings Referee, the hearing was reset for December 14, 1992.

4) At the start of the hearing, Respondent's attorney said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

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

6) On December 16, 1992, the Hearings Unit of the Bureau of Labor and Industries sent by fax a copy of the Proposed Findings of Fact in this matter to Respondent's attorney, Vance Day. In addition, the Hearings Unit mailed copies of the Proposed Findings to all persons listed on the Certificate of Mailing, including Respondent. Exceptions to the Proposed Findings had to be received by the Hearings Unit no later than Tuesday, December 22, 1992. On December 22, 1992, the last day for the filing of exceptions, the Hearings Unit received two copies of a fax cover sheet purporting to be the first of five pages containing Respondent's exceptions. On December 23, 1992, Mr. Kelly Hagan, the Agency's Legal Policy Advisor, advised the office of Respondent's counsel that the exceptions due the day before had not been received. A set of exceptions dated December 22, 1992, were received thereafter in the Commissioner's Office within an hour of Mr. Hagan's contact. While Respondent's exceptions are subject to being disregarded as untimely, OAR 839-30-040 (1), the forum finds that Respondent's failure to file exceptions on the 22nd was the product of a technical error or malfunction and that the interests of justice are best served in this case by the acceptance and consideration of Respondent's exceptions. Respondent's exceptions are addressed in the Opinion section of this of this Final Order.

FINDINGS OF FACT - THE MERITS

1) On December 19, 1991, the Polk County Sheriff's prepared a service jacket for civil service of a cover letter, an Order of Determination No. 91-159, and a responsive pleading notice for In the Wage Claim Matter of Oregon Bureau of Labor and Industries as Assignee of Lenin R. Mosier, Wage Claimant vs. Gary L. Buyserie, dba Buyserie Farms, Employer. The civil clerk marked on the service jacket that Gary L. Buyserie, dba Buyserie Farms, was to be served personally at 4810 S. Pacific Hwy W, Rickreall.

2) On December 19, 1991, Deputy Ronald Smith of the Polk County Sheriff's office picked up the civil service jacket containing the documents for Respondent. As part of their other duties, Polk County Sheriff's Deputies served

documents in civil cases. Respondent's residence was in Deputy Smith's assigned area. At 9:03 a.m., December 20, 1991, Deputy Smith arrived at Respondent's property, where there are two houses. Respondent's house is at 4820 S. Pacific Highway, Rickreall. Respondent's house is adjacent to and up a hill from the second house at 4810 S. Pacific Highway, where Respondent's sister lives. Deputy Smith knew from serving process on Respondent before that he lived in the house up the hill.

3) Deputy Smith encountered a man he recognized as Respondent coming out of the residence at 4820. Deputy Smith asked the man to identify himself, and Respondent identified himself as Gary L. Buyserie. At 9:05 a.m., December 20, 1991, Deputy Smith served Respondent with the documents in the civil service jacket. Deputy Smith recognized Respondent because he had served process on Respondent in the past. Respondent was upset, and complained to Deputy Smith about getting wage claims from the Bureau of Labor and Industries. Deputy Smith noted on the service jacket that service was made on Respondent at 9:05, December 20, 1991, and made entries in his notebook of the same information.

4) Thereafter on December 20, 1991, Respondent and his wife drove to Lincoln City, which is roughly 45 to 50 miles from Rickreall. In the late morning, somewhere between 9:00 a.m. and noon, they stopped at Frey Thriftway in Lincoln City, where they sold Christmas trees and wreaths to Mat Alt, the produce manager. Later, Respondent and his wife went shopping at some discount stores in Lincoln City. At around 5:00 p.m., Respondent went to Waldport to deliver more trees.

5) The testimony of Deputy Smith was credible. The Forum carefully observed the demeanor of each witness, and evaluated the testimony for its internal consistency, whether or not it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible. Deputy Smith's memory, as well as that of other witnesses, suffered due to the length of time that had passed between the events at issue and the day of hearing. At hearing, he did not recognize Respondent. However, his testimony was bolstered and corroborated by the civil service jacket and his notebook entries made in December 20, 1991, and by his affidavit made on April 22, 1992, when his memory was fresher, The Forum is satisfied that no bias or conflict of interest tainted his testimony.

6) Respondent's testimony was not wholly credible. During the hearing, he was often agitated and flustered. His memory of events was selective, and some of his answers were evasive. His financial interest in the case is obvious. Concerning the critical events of the morning of Decem-

ber 20, 1991, his testimony differed from his affidavit. For example, he testified that he stopped for 15 to 30 minutes at Dallas Automotive to have the charging system checked on his truck; however, in his affidavit concerning the same events, there is no reference to such a stop. During his testimony, he made no mention of a stop at a cooperative store, yet in his affidavit he claimed that he stopped at a coop to purchase supplies. Later in his testimony he suggested that Dallas Automotive and the coop were the same thing. In his affidavit, he makes no mention of a stop at Waldport on December 20; yet, he testified at hearing that he delivered trees thereat around 5:00 p.m. Such inconsistencies made Respondent's testimony unreliable. For example, for December 20, 1991, there are three invoices, all different, for his one delivery of trees to Frey Thriftway (cf. A-6, A-7, R-2). And despite his testimony that the invoices in his book were not in chronological order, and that they were written in the book in random locations, the Forum notes that all of the dated invoices for 1991, beginning with receipt number 7674, are in chronological order except for the invoice for December 20, 1991. That invoice is located before all other ones for 1991. Accordingly, Respondent's testimony was not believed whenever it was contradicted by credible evidence. At times, his testimony was not believed even when it was uncontroverted,

7) Mat Alt's testimony was credible with one important exception. He testified that on several occasions Respondent came to the Thriftway store in the "late morning" to deliver trees. He testified that the same was true of Respondent's December 20 delivery. When Respondent's attorney attempted to clarify that, he asked, "When you say 'late morning,' is that seven to nine, nine to twelve, can you give us -- " Mr. Alt cut in and answered, "nine to twelve." He testified that he did not know exactly what time Respondent came to the store. After reviewing his affidavit, he testified that Respondent came in to the store at 9:30 a.m. Later, he again testified that Respondent came to the store in "late morning, between nine and twelve." Mr. Alt testified that he had never talked to Respondent about making an affidavit in this case. However, Mr. Alt told Bill Pick, a Compliance Specialist with the Agency, that Respondent contacted him (Mr. Alt) in January or February 1992 about making an affidavit. Given his repeated testimony at hearing that he could not be specific about the time Respondent arrived on December 20 except that it was "late morning," and the fact that no contemporaneous document shows the time of Respondent's arrival at the Thriftway store, and the disputed issue of whether Respondent contacted Mr. Alt about making an affidavit, and the exceptional exactness of his affidavit statement that Respondent arrived at 9:30, the Forum finds Mr. Alt's testimony that Respondent

arrived at 9:30 unreliable and not credible.

ULTIMATE FINDING OF FACT

On December 20, 1991, Deputy Smith personally reserved Respondent with Order of Determination No. 91-159, In the Wage Claim Matter of Oregon Bureau of Labor and Industries as assignee of Kevin R. Mosier, Wage Claimant v. Gary L. Buyserie, dba Buyserie Farms, Employer, dated December 17, 1991. Respondent had actual notice of Order of Determination No. 91-159.

OPINION

The findings of facts in this case were made based upon the preponderance of credible evidence on the whole record. *Oregon State Correctional Institute v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, 747-48 (1989), *rev den* 308 Or 660, 784 P2d 1101 (1989). The credibility of the witnesses' testimony was determinative. The Forum applied the test for credibility adopted in *In the Matter of Glenn Walters Nursery, Inc. et al,* 11 BOLI 32, 43 (1992), which was based on *Lewis and Clark College v. Bureau of Labor,* 43 Or App 245, 256, 602 P2d 1161 (1979) (Richardson, J., concurring in part and dissenting in part). *See* Finding of Fact number 5. The Forum also applied the principle that a witness false in one part of the testimony of the witness is to be distrusted in others. *In the Matter of Lee's Café,* 8 BOLI 1, 18 (1989) (quoting from ORS 10.095 (3)).

Deputy Smith's testimony was credible. It was supported by his reliable records and affidavit. *See* Finding of Fact number 5. Respondent's testimony was not entirely credible. For the reasons stated in Finding of Fact number 6, the Forum was persuaded that his testimony was unreliable. The most helpful bit of evidence to Respondent was Mat Alt's testimony, based upon his affidavit, that Respondent visited Mr. Alt's store at 9:30 a.m. on December 20. Besides that statement, Alt's testimony at hearing was only that Respondent came to the store sometime between 9:00 a.m. and noon. For the reasons given in Finding of Fact number 7, the Forum did not believe Alt's testimony that Respondent arrived at 9:30 a.m.

Respondent testified about a farm worker named Chester Johnson, who Respondent said looked like him and was around Respondent's farm on December 20. Respondent speculated that Deputy Smith served the Order of Determination on Johnson. This testimony was utterly unconvincing and speculative, especially given Deputy Smith's credible testimony that Respondent became upset when he was served, and complained about wage claims he'd received from the Bureau of Labor and Industries.

The Forum believes that Respondent delivered trees and wreaths in Lincoln City, and later shopped there, as he testified, However, the Forum believes those activities occurred later than

Respondent claimed. The preponderance of credible evidence shows that Respondent was served with Order of Determination No. 91-159 by Deputy Smith, and thus had actual notice of that order, on December 20, 1991.

In his exceptions, Respondent challenged the Hearings Referee's credibility findings. The Commissioner has previously held that,

> "[a] hearing referee's credibility findings are accorded substantial deference by this Forum. Absent convincing reasons for rejecting such findings, they are not disturbed."

In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 117 (1989). Respondent's exceptions do not provide a convincing basis for rejecting the referee's findings in the matter. Deputy Smith could not recall at the time of hearing the words exchanged with Respondent when served, a fact which Respondent's exceptions attempt to recast into a recantation of the statements made in his affidavit of April 22, 1992. (Exhibit R-1) The forum remains convinced of the reliability of Deputy Smith's earlier recollections, particularly in light of his previous service on and resulting familiarity with Respondent and the records made pursuant to routine procedure corroborating that recollection.

Respondent's exceptions regarding inconsistencies in the documentation surrounding the service address do not convince the forum that more than insignificant notational errors are involved. The evidence at hearing was persuasive that Deputy Smith went to Respondent's residence and that the person served was leaving Respondent's residence.

The last exception of consequence concerns Respondent's "alibi" witness, Mr. Alt's affidavit regarding the 9:30 am arrival time for Respondent was unreliable, and that his testimony at hearing that the arrival time was "late morning," or sometime in the range of "9 and 12" was his best recollection. *See* Finding of Fact #7. Unlike the affidavit of Deputy Smith, there is no documentation supporting Mr. Alt's earlier statement and there is conflicting evidence regarding the role of Respondent in its formulation. In combination, these factors convince the forum that Mr. Alt's evidence is not inconsistent with Deputy Smith's credible assertion that he personally served Respondent at the time indicated by his records and testimony.

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In the Matter of

NEAL M. and CHERYL A. NIDA, dba 60 Minute Tune.

Case No. 23-90

Final Order of Commissioner Mary Wendy Roberts

Issued May 14, 1990[1]

The above-entitled case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on February 27, 1990, in Room 311, State Office Building, 1400 S. W. 5th Avenue, Portland, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Neal M. Nida and Cheryl dba 60 Minute Tune (Respondents; references to "Respondent" in the singular are to Neal M. Nida), after being duly notified of the time and place of this hearing and of the obligation to file an Answer within twenty (20) days of the issuance of the Specific Charges, failed to file an Answer as required. The Hearings Referee previously found the Respondents in default, and ruled that Respondents were thereby precluded from presenting evidence or argument at the hearing. Deborah Sather, Attorney at Law, as counsel for Respondents, and Respondent Neal M. Nida were present throughout the hearing, and was not represented by counsel.

The Agency called as witnesses the following: the Complainant; Joseph Tam, an Investigative Supervisor with the Agency; and Ahmad Muhammad, a Senior Investigator with the Agency.

The Respondents through counsel filed a Motion and Memorandum at hearing, and also suggested that the agency and/or the Referee question with a witness who was present.

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

FINDINGS OF FACT - PROCEDURAL

1) On December 22, 1988, the Complainant filed a verified complaint with the Civil Rights Division (CRD) of the Agency alleging that

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[1] This original Final Order was recently discovered and was not previously printed in the BOLIOs. The commissioner's Amended Final Order in this case is printed at 9 BOLIO 191 (1991). ED: September 2004.

he was the victim of the unlawful employment practice of the Respondents.

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

3) Joseph Tam, an investigative supervisor for the Agency approved the Administrative Determination prepared by the investigator, Ahmad Muhammad, and subsequently initiated conciliation efforts between the Complainant and the Respondents on May 9, 1989. On May 17, 1989, Tam concluded that conciliation had failed and referred the case to the case to the Agency's Quality Assurance Unit for further action. The Respondents' representative during investigation and conciliation was Neal Nida.

4) On December 29, 1989, the Agency prepared and served on the Respondents Specific Charges herein, alleging that Respondent Neal M. Nida had discharged the Complainant from his employment as a technician/mechanic on December 6, 1988 for opposing unsafe practices and working conditions in violation of ORS 654.062 (5) (a).

5) With the Specific Charges, the Forum served on the Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183. 413; c) a complete copy of the Agency's Administrative Rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) A copy of those Charges, together with items a) through d) of Procedural Finding 5) above, were sent by U.S. Post Office certified mail, postage prepaid, as Article Number P 467 959 900, to the last known address (supplied by the Agency) of the following pursuant to OAR 839-30-030 (1):

Neal a. (sic) Nida and Cheryl A. Nida

60 Minute Tune

13203 S.W. Canyon Rd.

Beaverton, Oregon 97005

7) Both the Notice of Contested Case Rights and Procedures (item b) in Procedural Finding #5) and the Bureau of Labor and Industries Contested Case Hearings Rules (item d) in Procedural Finding #5), at OAR 839-30-060(1), provide that an Answer must be filed within 20 days of the issuance of the Charging Document.

8) A U.S. Post Office Domestic Return Receipt, Certified Mail, PS Form 3811, Apr 1989, Article Number P 467 959 900 was received by the Hearings Unit showing delivery to the following addressee on the date indicated per the signature listed:

Neal A and Cheryl A Nida

60 Minute Tune 13203 SW Canyon Rd

Beaverton, OR 97005

12-30-89

9) On January 25, 1990, the Form sent a letter entitled "Notice of Intent to Default" by first - class mail with postage prepaid to the following:

Neil A. (sic) and Cheryl A. Nida

60 Minute Tune

13203 S.W. Canyon Rd.

Beaverton, Oregon 97005

The purpose of the letter was to assure that no late-delivered, but otherwise timely, Answer to the Specific Charges existed.

10) On January 25, 1990, the Form received a letter, with enclosures, signed "Neal M. Nida, Owner" and reciting that the letter was to request relief from default.

11) Pursuant of OAR 839-30-071, on January 29, 1990 the Agency timely filed a Summary of the Case.

12) On February 7, 1990, the Forum issued its formal Notice of Default, noting that Specific Charges were issued on December 29, 1989 and that respondents were required to file an Answer within twenty (20) days and had failed to do so and were in default under OAR 839-300185.

13) Also on February 7, the Form issued its Ruling On Request For Relief From Default. Noting that Respondent Neal Nida's letter listed alternate reasons for his failure to answer, the Hearings Referee found that none of the reasons advanced constituted good cause under the Forum's rules, and denied Respondents' Request For Relief From Default.

14) On February 26, 1990, the Hearings Referee received a telephone call from Deborah Sather, Attorney at Law, as counsel for Respondents. Counsel stated her intention to attend the hearing of February 27 and to request that the Hearings Referee reconsider his denial of relief from default.

15) At the commencement of the hearing, counsel for Respondents submitted a Motion for Reconsideration of the February 7 ruling, supported by the Affidavit of Respondent Neal Nida and other attachments. Counsel also submitted a document entitled "Respondent's Hearing Memorandum on Judicial Notice and Collateral Estoppel."

16) The Hearings Referee summarily denied the Motion, there being no provision in the Forum's rules for reconsideration of Rulings, and no provision allowing the participation at hearing of charged parties in default.

17) Pursuant to ORS 183.415(7), the Hearings Referee recited the issues to be addressed, the matters to be proved and the procedures governing the conduct of the hearing. (Statement of the Hearings Referee)

18) At the close of the hearing on February 27, the Hearings Referee allowed the Agency ten days in which to respond to Respondent's submissions in order to assist the Commissioner in evaluating the Hearings Referee's rulings denying relief from default. On March 9, 1990, the Agency's letter memorandum was received by the Forum and the record was closed herein.

19) At the close of the hearing, after the Agency had rested, counsel for Respondents suggested that the Agency and/or the Hearings Referee interrogate Theresa Kanisio (phonetic), described as an independent witness, who was present. The Hearings Referee refused this and all other offers of proof as being inconsistent with the Respondents' default status. The Hearings Referee reiterated that Respondents had been found in default and were thereby precluded from presenting evidence or defenses, including offers of proof, and declared the hearing adjourned. 20) The Proposed Order which included an Exceptions Notice, was issued on April 10, 1990. Exceptions, if any were to be filed by April 20, 1990. No Exceptions were received.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, the Respondents Neal M. and Cheryl A. Nida did business as 60 Minute Tune, repairing motor vehicles in Beaverton, Oregon, utilizing the personal service of one or more employes and controlling the means by which such service was performed in said State. Respondents were the franchisees of National 60 Minute Tune, Inc., a Washington corporation.

2) The Complainant worked for Respondents as a tune-up technician from May, 1988 until his termination on December 6, 1988. He started at $6.50 an hour and was earning $6.75 an hour by December 6, 1988.

3) The Complainant first worked in a 60 Minute Tune shop in Vancouver, Washington beginning in January, 1987. He began working at Respondents' 60 Minute Tune as a tuneup technician on May 1, 1988. He had taken automotive vocational courses in high school and in junior college, and had worked in other tuneup shops. (Testimony of the Complainant)

4) In the junior college automotive course, which he completed, he received instruction from representatives of the federal Occupational Safety and Health Administration (OSHA). The instruction included information on reporting health and safety hazards in the workplace to OSHA without fear of employer retaliation. He was taught safety habits as part of the automotive technology course. (Testimony of the Complainant)

5) Safety subjects at community college included the use of eye protection with grinders, keeping shop floors clean, safe use of jacks and jackstands, locating first

aid kits and keeping them stocked, locating fire extinguishers and keeping them charged, fire hazards of gasoline engines, and other things that were "just common sense." (Testimony of the Complainant)

6) The Forum officially notes that at times material the Accident Prevention Division (APD) of the State of Oregon Department of Insurance and Finance was the State of Oregon representative of federal OSHA, and that calls and complaints regarding workplace health and safety issues were accepted and acted upon by APD.

7) At all times material, the Complainant lived in Vancouver, Washington, and commuted a minimum of 15 Miles one way to the Beaverton job site during peak morning traffic hours by automobile. (Testimony of the Complainant, Official Notice)

8) The Complainant had difficulty arriving at Respondents' Beaverton shop on a regular basis by 8:00 AM because of the unpredictability of his commute.

9) The subject of the Complainant's late arrival was discussed between the Complainant and Respondent with the result that the Complainant was allowed to arrive at 8:30 AM.

10) The other shop employees were allowed to arrive at work later, at times as late as 9:00 or 10:00 AM, depending on the amount of work scheduled. Respondent expected the Complainant there because of his knowledge, training and experience.

11) By September, 1988, the time of one of the Complainant's discussions with Respondent of the Complainant's attendance, the Complainant had been working both as manager and lead technician from 8:00 or 8:30 AM to 7:30 or 8:00 PM, without breaks for lunch, six days per week, Monday through Saturday. As a result, the Complainant began getting Wednesdays off on a fairly regular basis.

12) While discussing the Complainant's arrival difficulties and shop operations, Respondent would ask the Complainant about ways to improve the safety of the shop and what other shops did about certain situations. The Complainant told Respondent that there was oil on the wooden floor of the grease pits which become a "slippery mess" when combined with rainwater blown in under the shop door. The Complainant, among others, had slipped on it.

13) Respondent installed metal skidplates to catch the oil. The Complainant considered these ineffective and suggested grates which would allow the oil to pass through. Grates were not installed during his employment.

14) Another condition considered unsafe by the Complainant involved a metal bar at the stairway between the pits. Employees, including the Complainant, periodically struck their heads on the bar when entering or leaving the pit. The Complainant

suggested foam padding the bar in a manner similar to a roll bar on a racing car. No padding was installed during his employment.

15) The shop was considered cold by the employees when the shop doors were open. It was uncomfortable doing bare handed mechanical work under those conditions.

16) The four shop employees met on December 1, 1988, to discuss a solution for the heat problem. One employee was quitting, one had just started working, and two had children to support. The Complainant was chosen by the other employees to call "OSHA" (APD) "because I had the least to lose."

17) The Complainant called APD about whether there were regulations or rules regarding the shop temperature. He was told that there were not. In response to the APD representative's questions, the Complainant identified the business and its location. The APD representative then asked the Complainant questions about other safety and health aspects of Respondents' shop, such as fire extinguishers, first aid certification, and first aid kits. All of the employees were present when the Complainant made the phone call. They were watching for Respondent, who was out of the shop at the time.

18) The Complainant responded that the one fire extinguisher was empty. The APD spokesman said there was not much they could do about the fire extinguisher except to initiate a letter to Respondents and advise them that APD was concerned about it. The Complainant also told the ADP representative that there was a first aid kit, and that he knew some first aid but was not certified.

19) The Complainant's birthday was on December 2. He had previously mentioned to Respondent that he wanted to take a day off for his birthday. He had taken his birthday as a paid holiday at another 60 Minute Tune shop, had knowledge that both company run shops and other independently owned franchise shops gave employee birthdays as paid holidays, and understood this to be "company policy." He wanted to take Saturday, December 3. Respondent did not approve.

20) Other employees had been allowed a Saturday off for such things as concerts. The Complainant had a regular day off on Wednesday, November 30, 1988. The Complainant did not work on Saturday, December 3, 1988.

21) On Monday, December 5, 1988, the Complainant was late arriving at work due to a truck accident blocking Interstate 5, part of his regular commuting route. Respondent mentioned the late arrival to the Complainant on December 5, cautioning him that there might be disciplinary action if he were late again. Respondent also mentioned that the Complainant had not come in on

Saturday, December 3, but he seemed the most concerned about the Complainant being late on December 5.

22) The discussion of December 5 then turned into a "shop improvement meeting." Including operational matters, as it had on other occasions when the Complainant's attendance was discussed. Respondent did not mention OSHA on December 5.

23) On December 6, the Complainant arrived at work on time. At that time, Respondent was on the telephone in his office and the Complainant went in back to change clothes. In about five minutes, Respondent came in and asked if the Complainant was the one who called "OSHA." The Complainant said that he was. Respondent said "you're fired; pack your tools," or words to that effect. He then proceeded to curse at the Complainant, threaten him with bodily harm, and with calling the police if the Complainant didn't leave. Respondent did not mention the Complainant's attendance on December 6. 1988.

24) During the Agency investigation of the Complainant's allegations, Muhammad interviewed Respondent. Respondent told him that the Complainant was late on December 6, 1989. He further stated that he was concerned about whether the Complainant would lie about calling OSHA about the fire extinguisher. He said he asked if the Complainant had called OSHA and the Complainant responded that he had. Respondent then discharged the Complainant. Respondent told the investigator that he considered the Complainant a trouble maker.

25) The Complainant sought work following his discharge. Among the places he applied were other 60 Minute Tune shops, C-Tran Bus in Vancouver, the City of Vancouver, and several privately owned auto shops in Vancouver. He filled out applications listing Respondents' shop as his last employer, and stating that he had been discharged.

26) At the time of his discharge, the Complainant was working at least 40 hours per week on a five day week basis.

27) Following his discharge by Respondent, the Complainant was employed between January 25 and February 28, 1989, at Gresham AMC Jeep-Eagle where he earned $800.00, between April 3 and June 5, 1989 at Fisher Auto where he earned $1,500.00, between July 15 and October 12, 1989 at Gunderson's, where he earned $5.50 per hour for 60 calendar days and $6.55 per hour for the next 30 calendar days. After October 12, 1989, his hourly wage, $7.30, exceeded his rate of pay at the time of discharge. He left the Jeep-Eagle and Fisher Auto jobs due to no-fault lay-offs.

28) Prior to Respondent discharging him, the Complainant had never been fired before. It made him feel "pretty bad." Having to list the fact of his discharge on subsequent job applications was embarrassing and made him

anxious and apprehensive, as he didn't know what Respondent would say if contacted. He was told at Fisher that Respondent gave him a negative recommendation. He had to borrow money to keep his bills paid. He began having problems with his girlfriend because of his lack of employment and eventually "broke up" with her.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondents were doing business as 60 Minute Tune and were persons having one or more employees in Oregon. Respondent Neal M. Nida supervised the daily operation of the shop.

2) The Complainant was employed by Respondents from May 1, 1988 to December 6, 1988. He worked as a tuneup technician and was earning $6.75 an hour for a five day 40 hour week.

3) During his employment, the Complainant had called Respondent's attention to safety concerns, some of which were not corrected.

4) On December 1, 1988, on his own behalf and as representative of his co-workers, the Complainant called APD to inquire about shop temperature regulations, identified the employer and location, and answered questions about the business regarding health and safety subjects.

5) On December 6, 1988, Respondent told the Complainant that he was fired.

6) The Respondent discharged the Complainant for requesting information from and furnishing information to an agent of the Accident Prevention Division of the State of Oregon.

7) The Complainant suffered emotional upset, embarrassment, and financial distress as a result of the discharge.

8) The Complainant lost wages amounting to $6,527.00 as a result of the discharge. At the time of his discharge, the Complainant was earning at least $270.00 per week (8 hours X 5 days X $6.75). Thereafter he made a diligent search for replacement employment. Had he continued working for Respondents, he would have earned at least $11,745.00 between December 8, 1988 and October 12, 1989, a period of 44 weeks. Following his discharge by Respondent the Complainant's earnings were:

a) January 25 to February 28, 1989, at Gresham Jeep-Eagle, $800.00;

b) April 3 to June 5, 1989, at Fisher Auto, $1,500.00;

c) July 15 to October 12, 1989 at Gunderson's $2918.00 (8 1/2 weeks (60 calendar days) at $5.50 per hour X 40 = $1,870.00: 4 weeks (30 calendar days) at 46.55 per hour X 40 = $1,048.00; $18,870.00 + $1,048.00 = $2,918.00)

($11,745.00 - $800.00 - $1,500 - $2918.00 = $6,527.00)

(Calculations of the Hearings Referee)

CONCLUSIONS OF LAW

1) At all times material herein, Respondents were employers subject to the provisions of ORS 659.010 to 659.110, and ORS 659.400 to 659.435.

2) ORS 654.062 (5) (b) provides, in pertinent part:

> "any employe * * * who believes that the employe has been barred or discharged from employment or otherwise discriminated against in compensation, or in terms, conditions or privileges of employment, by any person in violation of this subsection may * * * file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659.040. Upon receipt of such complaint the commissioner shall process the complaint and case under the procedures, policies and remedies established by ORS 659.010 to 659.110 and the policies established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age under ORS 659.030(1)(f)."

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

3) OAR 839-06-40 provides:

> "In addition to protecting employes or prospective employes who oppose practices, file complaints, institute proceedings, or testify in proceedings, ORS 654.062(5) also protects employes or prospective employes from discrimination because they have exercised 'any right afforded by' the Act. Certain rights are directly provided by the Act. * * * Certain other rights exist by necessary implication. For example: employes may request information from the Accident Prevention Division and not be discriminated against because of their request; employes interviewed by agents of APD in the course of inspections or investigations cannot subsequently be discriminated against because of their cooperation."

An employe requesting information from, and furnishing information to, an agent of the Accident Prevention Division is exercising an employe right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780. The Complainant exercised rights afforded by the Oregon Safe Employment Act.

4) ORS 654.062(5) provides:

> "(a) It is an unlawful employment practice for any

> person to bar or discharge from employment or otherwise discriminate against any employe or prospective employe * * * because of the exercise of such employe * * * of any right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780.

The conduct of Respondent Neal M. Nida in discharging the Complainant was a violation of ORS 654.062(5).

5) The actions, inactions, statements and motivations of Neal M. Nida are properly imputed to Cheryl M. Nida as co-proprietor herein.

6) Pursuant to ORS 654.062, ORS 659.010(2) and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for wage loss and emotional distress sustained and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

Respondents Nida, dba 60 Minute Tune, were found in default, pursuant to OAR 839-30-185(1)(a), for failure to file an answer to the Specific Charges. Respondent Neal Nida and his attorney attended the scheduled hearing, but were not allowed to present evidence or otherwise participate, in accordance with established precedent. *In the Matter of Metco Manufacturing, Inc.,* #50-86 (1987; *aff'd Metco Manufacturing v. Bureau of Labor and Industries,* 93 Or App 317, 761 P2d 1362 (1988).

In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6), OAR 839-30-185(2).

To present a prima facie case in this matter, the Agency must prove the following four elements:

> (1) The Respondent is a Respondent as defined by statute.
>
> (2) The Complainant is a member of a protected class.
>
> (3) The Complainant was harmed by an action of the Respondent.
>
> (4) The Respondent's action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1).

The Agency has established a prima facie case. The credible testimony of Agency witnesses together with documentary evidence submitted was accepted and relied upon herein.

(1) The evidence established that Neal M. and Cheryl A. Nida did business under the assumed name of 60 Minute Tune in Beaverton, Oregon. The Complainant worked there, and the Nidas reserved the control of his work efforts, and that of his fellow workers, and of the means by which their personal services were performed. They hired, fired, set

pay rates, paid, assigned and directed work, controlled the hours of work, set policies, procedures and standards for accomplishing work, and thus was an employer under the applicable statute. While the Complainant's administrative complaint was filed against a corporate name, it was Neal Nida who dealt with the investigation, confirmed his employment of and discharge of the Complainant, and it was the Nidas against whom the Agency filed its Specific Charges, and who are "respondents" under the applicable statutes.

(2) The evidence leads to the conclusion that the Complainant was a worker who exercised rights under the Oregon Safe Employment Act and who was protected against employment discrimination on that basis.

(3) The evidence clearly established that the Complainant was discharged from his employment with Respondents, causing economic and emotional harm.

(4) The evidence also established that the Complainant's call to APD, i.e., the exercise of the above mentioned right, played a key role in the Respondents' discharge of the Complainant.

ORS 654.062(5)(a) makes such a retaliatory discharge an unlawful employment practice. OAR 839-06-025, 839-06-030(2), *In the Matter of Scottie's Auto Body Repair, Inc.,* #16-83 (1985). The evidence showed that the Complainant had been counseled regarding tardiness, but that reason did not appear to guide Respondent's discharge action. Even if it had been a factor, however, it would not form a defense as long as his call to APD was also a factor in the decision.

> "Frequently, the evidence indicates that several factors contribute to causing a respondent's action, of which only one factor is a complainant's protected class. In such cases, the Forum uses the key role test. OAR 839-05-015. Under that test, the crucial question is whether or not the harmful action – here, the discharge – would have occurred had the Complainant not been a member of the protected class."

In the Matter of Peggy's Café, #12-89 (1989); *See also In the Matter of LeeBo Line Construction*, #10-78 (1979).

The Forum has found by a preponderance of the evidence that Respondent discharged Complainant because he exercised rights afforded by the Oregon Safe Employment Act. Respondent's description of the discharge to the investigator does not vary materially from that of the Complainant. The issue was not tardiness or attendance, neither of which were mentioned. The issue was whether the Complainant had called "OSHA," or APD, and Respondent's resulting characterization of the Complainant as a trouble maker. Indeed, Respondent's possible reaction to knowledge that APD was being consulted appears to have con-

cerned his employees to the extent that they discussed who should call, and kept a lookout for him while the call was made. Such facts permit the inference that Complainant's exercise of the rights afforded by statute gave him protected class membership and was the cause of Respondent's action.

The Complainant lost wages for a significant period after the discharge. He found other employment which was temporary and at an earning rate below that he experienced with Respondents. In such a circumstance, his claim for wage loss continued until he obtained employment equaling or surpassing in earnings the position from which he was unlawfully eliminated. *In the Matter of Scottie's Auto Body, supra., In the Matter of Richard Niquette dba Manning's Café,* #21-84 (1986). Interim earnings may be deducted from what the Complainant would have earned but for the unlawful act. By these standards, the Forum has computed the Complainant's wage loss at $6,527.00.

Respondents were in default, and could not contest the wage loss evidence. The Agency's Specific Charges alleged a wage loss of $6,000.00. Because the figures in the Charging Document are the only ones of which Respondents had notice prior to default, the Complainant's recovery is limited to that amount even if the evidence at hearing and resulting calculation therefrom shows a higher figure. *In the Matter of Kevin McGrew dba K. F. McGrew Company,* #10-90 (1990). The lost wages herein are thus limited to $6,000.00. Pre-order interest, however, may be calculated for those portions of the lost wages which should have been paid up to that limit but for the unlawful act. *In the Matter of Lucille Ogden, dba Lucille's Hair Care,* #26-81, (1985), *on remand from Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985). The interest includes calculations made for deficiencies during periods of interim employment.

Awards for mental suffering depend on the facts presented by each complainant. Here, the Complainant testified credibly to embarrassment and upset from being fired and the Forum found that the Complainant experienced some mental suffering. This Forum has previously recognized that the anxiety and uncertainty connected with loss of employment income is compensable. *In the Matter of Spear Beverage Company,* #03-80 (1982). The effect of an unexpected termination and the resulting specter of unemployment and its uncertainties are also compensable when attributable to an unlawful practice. *In the Matter of Arkad Enterprises, Inc.,* #07-90, #08-90 (1990), *In the Matter of Bureau of Police of the City of Portland, et al,* #57-78 (1980). This Complainant established some economic stress and repeated embarrassment from listing his discharge while seeking other employment. In addition, at the time of the discharge, he was subjected to threats of physical

harm and of police involvement (Finding of Fact #23). Finally, there was evidence to indicate that important personal relationships were affected. (Finding of Fact #28). The Forum is therefore awarding the sum of $1000.00 to compensate for his mental distress.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, NEAL M. and CHERYL A. NIDA, dba 60 MINUTE TUNE are hereby ordered to:

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

a) ONE THOUSAND EIGHT HUNDRED NINETY DOLLARS ($1890), representing wages Complainant lost between December 7, 1988, and January 24, 1989 (7 weeks) as a result of Respondent's unlawful practice found herein; PLUS,

b) TWO HUNDRED EIGHT DOLLARS AND SEVENTY-ONE CENTS ($208.71), representing interest on said lost wages at the annual rate of nine percent accrued between January 24, 1989, and April 10, 1990, computed and compounded annually; PLUS,

c) ONE THOUSAND SEVEN HUNDRED SIXTY-FIVE DOLLARS ($1765.), representing wages Complainant lost between January 25, 1989, and April 2, 1989 (9.5 weeks) as a result of Respondent's unlawful practice found herein; PLUS,

d) ONE HUNDRED SIXTY-TWO DOLLARS AND THIRTY-THREE CENTS ($162.33), representing interest on said lost wages at the annual rate of nine percent accrued between April 2, 1989, and April 10, 1990, computed and compounded annually; PLUS,

e) TWO THOUSAND THREE HUNDRED FORTY-FIVE DOLLARS ($2345.), representing wages Complainant lost between April 3, 1989, and July 13, 1989 (14.24 weeks) as a result of Respondent's unlawful practice found herein; PLUS,

f) ONE HUNDRED FIFTY-SIX DOLLARS AND SEVENTY CENTS ($156.70), representing interest on said lost wages at the annual rate of nine percent accrued between July 13, 1989, and April 10, 1990, computed and compounded annually; PLUS,

g) Interest on the foregoing, at the legal rate, accrued between April 11, 1990, and the date Respondent complies with the Final Order herein, to be computed and compounded annually; PLUS,

h) ONE THOUSAND DOLLARS ($1000.), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS

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

2) Cease and desist from discriminating against any worker who opposes any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780, makes any complaint or institutes or causes to be instituted any proceeding under or has testified or is about to testify in any such proceeding, or because of the exercise of such employe on behalf of the employe or others of any right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780.

In the Matter of

ROBB WOCHNICK dba Sports Warehouse

Case No. 79-02

Final Order of Commissioner Dan Gardner

Issued August 31, 2004

Where Respondent, a sole proprietor, employed Complainant, a female, subjected her to unwelcome conduct of a sexual nature, ignored her complaints about the conduct, including that of non-employees, and refused to take appropriate corrective action, the forum found Respondent liable for Complainant's resulting mental suffering and awarded her damages totaling $40,000. *Former* ORS 659.030(1)(b). The forum further found that by subjecting Complainant to unwelcome sexual conduct and ignoring her complaints about the conduct, Respondent intentionally created intolerable working conditions because of Complainant's sex and that her subsequent resignation was a constructive discharge, in violation of *former* ORS 659.030(1)(a). Finally, the forum found that Respondent retaliated against Complainant by forcing her constructive discharge because she opposed his unlawful employment practices, in violation of *former* ORS 659.030(1)(f). In addition to the mental suffering damages, the forum awarded Complainant $1,200 in lost wages. *Former* ORS 659.030(1)(a) & (b), *former* ORS 659.030(1)(f), *former* OAR 839-005-0030(1)(a) & (b), *former* OAR 839-005-0030(3), *former* OAR 839-005-0030(7).

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 May 13-15, 2003, in the WW Gregg Hearing Room of the Bureau of Labor and Industries located at 800 NE Oregon Street, Portland, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Lisa Sims ("Complainant") was present throughout the hearing and was not represented by counsel. Thomas L. La Follett, Attorney at Law, represented Robb Wochnick ("Respondent"), who was present throughout the hearing.

The Agency called as witnesses: Lisa Sims, Complainant; Tracy Madsen (telephonic), former Respondent employee; Brett Robinson, MD (telephonic), Complainant's physician; and Donald Sims, Complainant's husband.

Respondent called as witnesses: Robb Wochnick, Respondent; Dave Cruz (telephonic), Respondent's business associate; Bud Ranson, Jr. (telephonic), one of Respondent's customers; Melissa Bishop (telephonic), former Respondent employee; and Diana Anderson, Respondent's former bookkeeper.

The forum received as evidence:

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

b) Agency exhibits A-1, A-2a, A-2d, A-2j, A-2l, A-2o, A-2p (submitted prior to hearing); and A-3, A-4, A-5 (submitted during hearing);

c) Respondent exhibit R-1 (submitted prior to 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, as amended herein.

FINDINGS OF FACT – PROCEDURAL

1) On or about July 31, 2001, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of the unlawful employment practices of Respondent. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations of the complaint.

2) On March 19, 2003, the Agency submitted Formal Charges to the forum alleging Respondent discriminated against Complainant by directing unwelcome physical and/or verbal conduct of a sexual nature at Complainant because of her gender that was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive working environment for Complainant, in violation of *former* ORS 659.030(1)(b). The Agency also alleged that Complainant was

compelled to quit her employment due to the intolerable working conditions created by Respondent, in violation of *former* ORS 659.030(1)(a). The Agency further alleged that Respondent retaliated against Complainant because she opposed his unlawful employment practices, in violation of *former* ORS 659.030(1)(f). The Agency requested a hearing.

3) On March 20, 2003, the forum served Formal Charges on Respondent that were accompanied by the following: a) a Notice of Hearing setting forth May 13, 2003, in Portland, 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 March 24, 2003, the Agency moved to amend the Formal Charges by interlineation to correctly spell Complainant's name wherever it appeared in the Formal Charges and to designate Complainant's correct address. Respondent filed no objection to the motion and on April 2, 2003, the forum granted the Agency's motion.

5) On April 8, 2003, Respondent, through counsel, timely filed an answer to the Formal Charges.

6) On April 8, 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; 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 May 2, 2003, and notified them of the possible sanctions for failure to comply with the case summary order.

7) The Agency and Respondent timely filed case summaries.

8) On May 7, 2003, the Agency filed a supplemental case summary.

9) On May 12, 2003, the Hearings Unit received Respondent's request for a postponement of the hearing. The forum subsequently denied the motion because it was untimely.

10) On May 13, 2003, the forum issued a Protective Order governing the disclosure of medical information submitted in the Agency's case summary.

11) 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.

12) During the hearing, the participants stipulated that junk e-

mail is a recognized problem common to most Internet users and that junk e-mail includes unsolicited advertisements, including pornography.

13) During the hearing, the ALJ requested and received information related to unsolicited bulk e-mail from Laura A. Heymann, Assistant General Counsel, America Online, Inc. ("AOL"), by facsimile transmission. The ALJ provided the participants with copies of the documents Heymann provided.

14) During the hearing, the Agency offered exhibits A-2j (Tracy Madsen Investigative Interview) and A-3 (Brett Robinson, MD, response to Agency inquiry). Respondent objected to both exhibits on relevance grounds and the ALJ reserved ruling on Respondent's objections until the proposed order. The ALJ subsequently found both exhibits relevant and admitted both pursuant to OAR 839-050-0260(9). For those reasons, Respondent's objections to the exhibits are overruled.

15) The participants presented their closing arguments on May 23, 2003, and the record closed on the same date.

16) The ALJ issued a proposed order on June 28, 2004, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency and Respondent timely filed exceptions which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Robb Wochnick ("Respondent") was a sole proprietor operating a sports memorabilia mail order business in Oregon under the assumed business name of Sports Warehouse, and was an employer utilizing the personal services of one or more persons.

2) In January 2000, Respondent hired Complainant, a female, to perform office work for his mail order business located in Wilsonville, Oregon. Respondent was Complainant's only supervisor.

3) After two or three months, Complainant began working full time for Respondent. Her pay rate was $12.50 per hour.

4) Respondent considered Complainant the "office manager" and her duties included answering the telephone, taking telephone orders, filling out company invoices, taking digital photographs of Respondent's sports memorabilia ("product"), editing the photographs, and assisting in listing "eBay" auction items. Her work time was primarily spent at a computer terminal or photographing product. Complainant, Respondent and the other employees wore casual clothing to work, including jeans and tee shirts. During the summer, they sometimes wore shorts and tank tops.

5) Respondent's product included vintage jerseys, hats, cleats, trading cards, bats, balls, mitts, autographs, and other sports memorabilia for sale to collectors. Photos of the items were electronically transmitted through eBay, Respondent's online website, and displayed in a mail order catalogue that Respondent periodically distributed. Most of Respondent's business derived from the eBay auctions and was conducted by e-mail or telephone. Walk-in traffic was rare, but customers often set up appointments to view particular items or ask questions about the origin of specific product.

6) Initially, Respondent's business was located in a warehouse in Wilsonville. Complainant worked in a small room off a hallway that contained two desks and two computer terminals that she shared with Tracy Madsen, a part time co-worker. A smaller room, attached by an open doorway, served as the shipping area and contained a desk and computer terminal. Further down the hallway, Respondent worked in a room that had a door and opened into a warehouse where the product was stored. A fourth computer terminal was located in the warehouse. The entire office space was approximately 16' x 32' and the warehouse area was approximately twice the size of the office space. All four computer terminals were located next to a telephone. Everyone used the terminal at the shipping desk. Although Complainant usually worked on the same computer, she and others, including Respondent, used more than one computer depending upon the task at hand.

7) Respondent also employed a part time bookkeeper, Diana Anderson, who worked every other Monday, "as needed." Respondent's son, Brian, was employed full time elsewhere during regular business hours, but he and his wife Kirsten sometimes performed computer work for Respondent. Occasionally, Brian helped prepare product for shipping, but not often and not on Fridays.

8) America Online ("AOL") was Respondent's Internet service provider. As part of its service, AOL permitted Respondent to select up to five "screen names" for use on his account. Respondent used the screen name "sportswhse" for all of his customer and sales transactions. He used other screen names, such as "robbietheox," "refforlife," and "ashleyg," for storing photographs of merchandise, as well as for personal transactions. Complainant and Madsen used the "sportswhse" screen name while performing their job duties. Complainant only used the other account names when she had to "load photos" or had to "get on the Internet fast." Respondent's son and daughter-in-law used the screen name "farwestsports" when performing work for Respondent.

9) As part of his mail order business, Respondent received voluminous e-mails. A "huge

amount" was not business related, but consisted of "junk mail," *i.e.*, unsolicited advertisements, including pornography. Even Respondent's business e-mail address, "sportswhse," received a substantial amount of junk mail. Junk mail is a recognized problem common to most Internet users.

10) Usually, the pornographic junk e-mail could be identified by the subject line that appeared in the "mailbox" and deleted without viewing the content. One time, Madsen opened an e-mail without reading the title and found the content to be "clearly pornographic" and she immediately deleted it. Thereafter, she checked the subject lines of incoming e-mail more carefully and if the origin of a particular e-mail was suspicious she sought clarification from Respondent or Complainant. Most of the time, she quickly identified those e-mails that were not business related because the titles, such as "Hot Chicks," were obvious. On at least two occasions, Respondent downloaded "obscene pictures" because the subject line was innocuous.

11) Complainant was offended by the volume of unsolicited pornographic e-mail and the graphic nature of the subject lines. The e-mails she found particularly odious included titles such as "Hot Teenage Anal Sex" and "Hot Pussy." Although she deleted the offending e-mails immediately, she found it upsetting to deal with them while trying to perform her job duties.

12) Complainant and Madsen complained to Respondent about the amount of offensive "junk mail" they received on their computers. He initially responded by saying "What do you want me to do about it?" in a manner that suggested to Complainant he was not interested in an answer to his question. After Respondent moved his business to Canby, Oregon, the amount of junk mail increased.[1] Beginning in February through May 2001, Complainant and Madsen regularly forwarded the offending e-mails to Respondent to illustrate the volume and type they received daily. Ultimately, he left it up to Complainant to resolve the offensive junk mail problem.

13) AOL provided a "mail blocking" service designed to block specific e-mails, but Complainant believed it was not a practical option because it was time intensive for a mail order business to designate which ones to block and she was told that junk mail addresses can be readily changed. To "find a fix for the problem," Complainant contacted the "website Internet company" that had previously provided assistance with Respondent's website. The company representative told her that pornographic junk mail could be reduced or avoided by either not visiting websites that attracted objectionable e-mails or by deleting the offending e-mails. At this point,

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[1] *See infra* Proposed Finding of Fact 18 – The Merits.

Complainant believed that Respondent regularly accessed pornographic websites and that he was the reason for the influx of objectionable junk mail. She also believed that if he stopped accessing those websites the pornographic junk mail would stop.

14) Several times during her employment, Complainant arrived at her work station in the morning to find a page from an adult website depicting adult sexual activity on her computer screen. When she moved her computer mouse to disengage the screen saver, images of nude men and women engaged in sexual acts, "women with women," or male and female genitalia appeared on her monitor. She believed Respondent was using her computer regularly after work hours and on weekends to access pornographic websites and that he intentionally left sexually explicit images on the screen for her to view when she arrived at work in the mornings. Respondent often worked late into the evening and early morning hours and frequently worked on weekends. Complainant was the first person to arrive at work and she often found the sexually explicit images on her computer screen on Monday mornings.

15) Complainant was reluctant to express her disapproval to Respondent because she thought he would deny everything. One afternoon, Madsen came in and moved the computer mouse at a work station and a pornographic image appeared. She "jumped back and shrieked and said, what in the hell is this?" Complainant took a look and said "oh, that happens all the time." Madsen said, "That is not cool – that should not be happening." After some discussion, they agreed Complainant should talk to Respondent about the offensive images. Complainant confronted Respondent and he denied responsibility for the website images and claimed he was unsure of how "it started" or how "to stop it." The images continued to appear on Complainant's computer monitor and, at some point, Complainant complained again to Respondent. He speculated that his son, Brian, might be responsible for accessing the pornographic websites. Complainant did not believe Brian was responsible based on her observations that he was rarely present in the workplace and never "lingered" when he was there because he had a young family awaiting him at home each evening, and because she had never heard Brian tell "off-color" jokes. Complainant perceived Brian as a respectful person.

16) In January 2001, Respondent moved his business to Canby, Oregon. The business relocated to an older house with a basement, main floor, and upstairs loft. Complainant and Madsen worked in the living/dining room area and Respondent's office was in one of two bedrooms. Shipping preparation took place in the other bedroom and the product inventory was stored in the basement. Three of the com-

puters were in the living/dining room and the fourth was in the shipping room. Respondent did not have a computer terminal in his office because he preferred a laptop that he could take with him when he traveled. A washer and dryer were located in the bathroom and were used occasionally.

17) Complainant considered the Canby move an improvement of the physical location. The facility was more spacious with greater distance between desks and everyone had "individual spaces." Even with the added space, however, everyone worked in close proximity, passing each other in the hallway and exchanging paperwork. After the move, Complainant purchased a 17 inch computer monitor for her work station because it was larger than the others at the work site. Madsen and Respondent often used Complainant's larger monitor and she used Madsen's work station or the "shipping station" when hers was in use. Even when Complainant was not using her computer terminal, other computers were readily available for use most of the time.

18) After the Canby move, Complainant experienced an increase in the number of times she arrived at work to find sexually explicit images on her computer screen. Respondent often used her work station because he liked the larger monitor and she believed he was continuing to use it after hours and on weekends to access pornographic websites and deliberately leave sexually explicit images on her computer screen. Each time she came to work and found an offensive image on her computer screen, Complainant felt "instant disgust." She continually asked herself, "is this really happening" and "why is this happening to me?"

19) Throughout her employment, Respondent regularly approached Complainant from behind without warning and "caressed" her shoulders and back. She did not perceive the touching as a "good guy pat on the back." She responded by either "pulling away" or "turning around to get away from him." Madsen observed Respondent "massaging" Complainant's shoulders several times and perceived it as a "here, I'm going to help you relax kind of thing." Madsen also observed that Complainant always appeared to be offended by the touching and "squirmed away" or "made a face" that indicated she was "not cool" with Respondent's conduct toward her. Complainant also remarked to Madsen that she "hated it" when Respondent touched her. Despite her apparent resistance to his touching, he continued to sneak up on her throughout her employment and subject her to unwanted physical contact.

20) On one occasion, Complainant handed Respondent some paperwork and he "rubbed" her hand in a caressing motion and stared into her eyes in a manner she found offensive. To avoid further physical contact with Respondent, Complainant began

placing the paperwork on his desk rather than hand it to him directly. Madsen did not observe Respondent touching Complainant's hand, but Complainant complained to her about the touching soon after it happened.

21) After the move to Canby, Complainant told Respondent she was bringing some personal items from home to photograph for sale on the eBay online auction, which was one of the benefits Respondent provided his employees. She brought in bags of clothes and stored them upstairs in the loft. She later discovered that someone had rifled through the bags and had separated the lingerie, which had been at the bottom of one bag, from the rest of the clothes. She asked her co-workers if they had gone through the bags and they said they had not, but that she should take the bags home. She later found her "small lacy teddy" in the washing machine and it had been washed. She perceived the incident as sexually motivated and particularly directed toward her. She did not confront Respondent, but immediately removed the bags of clothes without photographing them as a means of eliminating the opportunity for future incidents.

22) Several times, Complainant arrived at work to discover that someone had opened the bottom drawer of her desk at work, unzipped her bag of personal products and rifled through the contents. The bag was kept in a drawer she used exclusively for her "personal stuff, munchies, and purse." She never offered and no one ever asked to use the contents of her personal products bag which remained zipped when it was in the drawer.

23) Throughout Complainant's employment, Respondent repeatedly told sexually explicit jokes to Complainant and Madsen. His jokes were always particularly derogatory toward women and related to sexual conduct and women's anatomy. He usually told the jokes to both when they were together "in a group environment," would laugh, and then leave the room. Madsen was "not particularly offended," but is "always surprised when someone is blatantly inappropriate. It seems like such an unwise thing to do or to be." Madsen did not laugh at the jokes and either turned away or kept her head down at her desk and kept on working. Complainant was offended by the jokes. Although she never said anything directly to Respondent, she would turn to Madsen and say: "Can you believe he said that?" Complainant and Madsen would remark to each other that it was inappropriate to tell such jokes, particularly in an office with an all woman work force.

24) At some point during her employment, Complainant started taking medication that caused her breasts to become larger and fuller. About that time, one of Respondent's regular customers, Bud Ranson, Jr., became friendlier with Complainant. Ranson called periodically to schedule ap-

pointments with Respondent to look at specific equipment. Respondent was not always there when Ranson came in and Complainant was required to show him the equipment he was interested in purchasing. Ranson used those opportunities to ask Complainant out for lunch or dinner and she always declined. She was "extremely uncomfortable" with his manner which included staring at her breasts and "leering" at her. At one point, he asked her if Respondent was keeping her from accepting his dinner invitations and Complainant, mindful that he was a customer, quipped that it was her husband who might have a problem with his invitations. One day when Respondent was not present, Ranson came in to look at a baseball bat and Complainant asked him to leave when she felt he was "excessively leering" at her. Later, she told Respondent that she did not want to be left alone with Ranson again because he "continually leers" and "stares at [her] breasts." Respondent replied, "What's wrong with that?" He later accommodated Complainant's request that he be present whenever Ranson was there and Complainant had no further problems with Ranson. Complainant did not flirt with Ranson or give him any encouragement. She found him "distasteful."

25) On or about May 4, 2001, Complainant went in to work to install software that Respondent planned to use in the business. When she arrived, she found a pornographic website page on her computer screen. A large photograph on the page depicted a nude female performing oral sex on a nude male. The "sign on screen" at the top of the page showed that "robbietheox" was the last screen name to log on the computer. Complainant also noticed her keyboard was askew and there was a suspicious substance on her desk that she believed was semen. She observed a used tea towel on the floor and an impression in the substance that appeared to be a man's handprint. She "grabbed some antiseptic wipes" from her desk and immediately began to clean her desk. She was "disgusted," "angry," and felt "icky." Her husband, who had accompanied her to the worksite, came through the door as she was cleaning her desk and observed the website page on her computer screen. She told him for the first time about the previous pornographic images that had regularly appeared on her screen. She did not tell him she had been removing what she thought was semen from her desk until two weeks later. They discussed how to stop the use of her workstation for sexual entertainment and decided she should immediately implement a "screensaver password." Complainant activated the password through "a standard Windows application." Afterward, she was the only one with access to the computer at her workstation. After this incident, Complainant realized that "this was really happening" and she

decided to update her resume and begin a job search.

26) When Complainant returned to work the following Monday, May 7, 2001, she found two yellow post-it notes written by Respondent on her computer. "Why is there a screensaver?" was written on one and "There shouldn't be a screensaver on this computer!" was written on the other. About the same time she discovered the notes, an advertisement for a dating service "popped up" on the computer screen. The ad depicted voluptuous women, scantily dressed. Complainant showed the ad to Madsen, who agreed they should print the ad and show it to Respondent as an example of the material to which they were regularly exposed. Respondent was angry when he arrived at work, and when Complainant showed him the printout he told her he "did not care," that the equipment was his, and that he needed access to all of his computers. Complainant told him that "if that crap is going to be accessed at this terminal then I am going to put a stop to it." She also told him the presence of pornographic images in the workplace was sexual harassment and if he could guarantee that "it would stop," she would remove the password. Respondent continued to say that it was his equipment and business and she needed to remove the password. His face began to turn red and he would not say that he would stop the adult website access, so Complainant said, "I quit." She believed the screensaver password she implemented was the only way to limit the offensive material on her computer screen. She also believed that Respondent was not going to stop accessing pornography from her workstation. Respondent was at all times free to use one of the other computers when Complainant was not at her work station because the other computers were also available most of the time.

27) May 7, 2001, was Complainant's last day of work.

28) During her employment, Complainant developed a rash and suffered from anxiety, "depression," sleep disturbances, including nightmares, and "panic attacks." She missed work frequently due to the rash and anxiety. Her doctor prescribed Xanax, which she took only when having a panic attack. She attributed some of her anxiety to financial stressors and personal problems she experienced prior to and while in Respondent's employ. The other symptoms began when her work environment began to deteriorate in or around November 2000. She thought about the above-described work incidents more often than any other circumstance in her life. She was distressed about "having to intentionally avoid certain situations" and her work situation was "always on [her] mind." Complainant's anxiety and stress were exacerbated by her continued exposure to Respondent's sexual conduct in the workplace.

29) The day she left Respondent's employ, Complainant applied for unemployment benefits. She told the Employment Department representative why she quit her job and the representative suggested she take her information to the Bureau of Labor and Industries.

30) Complainant's physical and emotional well being improved almost immediately after she quit her employment. The rash disappeared. She stopped having nightmares and panic attacks. She was able to quit her anxiety medication. On June 13, 2001, she accepted a position at Xerox Corporation. Her pay started at $14 per hour and she received a raise soon thereafter. Complainant uses e-mails and websites in her new job and the junk mail is 100 per cent controlled. She receives "no surprises" when she uses her computer. Complainant has become familiar with the terminology used by her new employer's "IT Department" and has a better understanding of the technology available to prevent mass amounts of junk mail from entering the workplace.

31) Complainant was a credible witness. She was very composed, but her demeanor did not mask the distress she associated with her experiences while in Respondent's employ. She had a clear recollection of key events and her testimony was sincere and unembellished. She was not impeached in any way and the forum credits her testimony in its entirety.

32) Madsen's testimony was credible in every respect. She exhibited no bias toward or against Respondent or Complainant. Although she acknowledged that Respondent's conduct did not affect her to the same degree as Complainant, she was unequivocal about the nature of the conduct she observed, its impact on Complainant, and that much of it appeared to be directed primarily toward Complainant. Madsen was not impeached in any way and the forum credits her testimony in its entirety.

33) Sims, Complainant's husband, was a credible witness. Despite a natural bias, Sims testified only to his personal knowledge and observations without any discernible embellishment. The forum credits his testimony in its entirety.

34) Dr. Robinson's testimony was credible. He readily acknowledged that he had no independent recollection of Complainant's office visits and that he relied primarily on his contemporaneous notes. His answers were reflective and he took care not to speculate about what Complainant told him during her office visits. The forum credits his testimony in its entirety.

35) Respondent's testimony was internally inconsistent, self serving, and except for his admissions to certain key facts, generally unbelievable. For example, he admitted during cross

examination that he accessed "adult" websites that he defined as sites for "those over 21 years old, and legal," from his home computer. Later in his testimony, he denied accessing pornography from home. To reconcile the discrepancy, he claimed he was referring to "entrepreneurial and business websites" when he said he had accessed adult websites from home and that he regarded business websites as "adult" websites. However, given the text and context of the query on cross-examination, the forum does not believe that Respondent's first thought upon hearing the words "adult website" was of an entrepreneurial website. Rather, the forum infers Respondent understood the question pertained to pornographic websites and that his answer was a statement against interest he later wished to retract. The forum concludes, therefore, that Respondent's affirmation that he accessed adult websites from home was, in fact, an admission that he accessed pornographic websites from his home computer.

Additionally, Respondent testified unequivocally that Complainant wore "normal dress" to work that included shorts or pants, tops, and "a dress a couple of times." Later, after acknowledging that Complainant advised him that Ranson caused her discomfort by staring at her breasts, Respondent insinuated that she encouraged Ranson's conduct by wearing "skimpy, suggestive clothing." His latter testimony apparently anticipated, albeit belatedly, Ranson's assertion that Complainant's attire was risqué and invited his stares.[2] The forum, however, finds Respondent's first assessment of Complainant's work apparel more convincing because it was spontaneous and comports with other credible evidence in the record.

Finally, the forum finds Respondent's "contemporaneous" notes about Complainant's "work" activities suspicious, at best. They consist of an odd assortment of entries that range from one that does not pertain to Complainant at all to many others that appear specifically designed to limit potential damages. Although Respondent contends the entries reflect noteworthy work related events, few are related to Complainant's work activities and all are innocuous compared to the events Respondent acknowledges occurred, yet neglected to record. For instance, Respondent testified that he became aware of Complainant's concerns about pornographic e-mails when she and Madsen started forwarding the offensive e-mails to him from February 2001 through May 2001. He also acknowledged that Complainant complained about pornographic images on her computer screen during a March 2001 staff meeting, after which he purportedly instructed her to contact AOL and told her he would pay whatever necessary to correct the problem. Despite their signifi-

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[2] *See infra* Finding of Fact 36 – The Merits.

cance, Respondent did not document those events. Moreover, he did not document Complainant's complaints about Ranson or any concerns he purportedly had regarding her attire or conduct with customers. The forum concludes the notes were created in anticipation of litigation and are not trustworthy.

Based on Respondent's admissions, the forum accepts as fact that Complainant complained often and directly to him about receiving offensive e-mails and at least twice about the appearance of pornographic websites on her computer, that he frequently used Complainant's workstation in the evening and on weekends, that he had previously accessed adult websites, that he often told "off-color" jokes in the workplace, and that he regularly used chat rooms and conversed with a "buddy" nicknamed "Q Cups" as Complainant and others alleged. Other than Respondent's admissions, the forum has not credited Respondent's testimony unless it was corroborated by other credible evidence or was a statement against interest.

36) Ranson's telephonic testimony was not credible. He embellished his career as an "actor" which brought into question the reliability of his testimony as a whole. His statements seemed scripted, even acted, and the forum gave no credence to his claims that Complainant "flirted" with him, invited him to "hang out at the river," or told him she did not wear underwear. Moreover, his claim that he told Respondent she was trying to "hustle" him and he did not want to be left alone with her was ludicrous given his earlier statement that, "to be honest," he "looked twice" at Complainant because she was "heavily breasted" and he thought to himself, "whoa!" His statement that her clothing was "risqué" was contrary to more credible evidence in the record, including Respondent's admission that Complainant dressed in "normal" casual attire. Notwithstanding his evasive demeanor and his bias as Respondent's friend, Ranson's outrageous statements were not supported by a scintilla of evidence and the forum disregarded his testimony in its entirety.

37) Dave Cruz's testimony was not wholly credible. His bias as Respondent's long time business associate was evident by his half hearted attempt to portray Complainant as a "tease." Essentially, he testified that he and Complainant had regular business contact and sometimes "flirted with each other over the phone." He stated that he asked her what she looked like and she had unsuccessfully attempted to send him a photograph via computer. However, he acknowledged that she told him she was married and the forum inferred from his demeanor and the context of his testimony that he was more interested in flirting with her than she with him. The forum gave Cruz's testimony little, if any, weight.

38) Anderson's testimony was defensive and influenced by

her long-term friendship and current work relationship with Respondent. Moreover, her opportunity to observe daily workplace activities was limited because she worked as Respondent's bookkeeper every other Monday as needed. Although she downplayed the significance of Complainant's complaints, Anderson was aware that Complainant was offended by "derogatory, explicit e-mail and instant messages" and the sexually explicit images that periodically appeared on her computer screen. Additionally, Anderson was present when Complainant quit her employment, observed that she was upset, and heard her tell Respondent that he was "causing sexual harassment" by refusing to deal with Complainant's complaints. The forum credited Anderson's testimony where it was consistent with or corroborated by other credible testimony.

39) Bishop's close friendship and prior, long-term business relationship with Respondent influenced her objectivity. She portrayed Respondent as a flawless employer who never told off-color jokes or viewed pornographic websites in her presence. According to Bishop, Respondent was always kind and fair with her and she relied on his judgment even when making personal decisions. However, in light of other credible evidence that Respondent indulged in accessing adult websites, and, by his own admission, told off-color jokes in the workplace, the forum finds Bishop's character assessment somewhat exaggerated. Additionally, she moved to Ireland before Complainant was hired and therefore had no personal knowledge of Complainant's working conditions while in Respondent's employ. The forum has given Bishop's testimony little, if any, weight.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent conducted a business in Oregon using the assumed business name of Sports Warehouse and was an employer utilizing the personal services of one or more persons.

2) Between January 2000 and May 7, 2001, Respondent subjected Complainant to a course of conduct that was sexual in nature, directed toward her because of her gender, and included unsolicited shoulder massages and hand stroking, sexually explicit jokes that degraded women, and Respondent's use of Complainant's workstation to access pornography for sexual gratification.

3) Respondent repeatedly and intentionally left Complainant's computer screen so that Complainant was unavoidably exposed to pornography against her will and disallowed Complainant's reasonable measures to cease his behavior.

4) Respondent's conduct was offensive and unwelcome to Complainant, which she communicated to Respondent by her words and actions.

5) Between January 2000 and May 7, 2001, Complainant complained repeatedly to Respondent about the barrage of unsolicited pornographic e-mails she received daily from outside the workplace and requested that it stop. Respondent took no action to reduce or eliminate the incoming pornographic e-mails.

6) Between January 2000 and May 7, 2001, Complainant complained to Respondent that one of his regular customers made her uncomfortable in the workplace by "leering" at her and staring at her breasts and she requested that Respondent be present when Complainant waited on the customer. Respondent complied with Complainant's request.

7) Respondent's course of conduct, including his failure to stop the daily influx of pornographic e-mail in the workplace, was sufficiently severe or pervasive to alter the conditions of Complainant's employment and create a hostile, intimidating, and offensive work environment.

8) The continued harassment based on Complainant's gender caused her emotional distress, characterized by a rash, anxiety, and heightened "depression" that extended over a six month period.

9) Complainant attempted to reduce or eliminate the appearance of pornographic websites on her computer screen by placing a password on her computer that only she could access. Complainant told Respondent she would remove the password when he remedied the pornography problem. Respondent communicated to her his unwillingness to change the status quo and insisted that she remove the password. Complainant reasonably believed she had no other choice but to quit her employment and on May 7, 2001, she quit.

10) Complainant suffered a loss of income and mental distress as a result of her forced termination.

11) Complainant found replacement employment with Xerox Corporation on June 13, 2001.

12) Complainant's lost income totaled $1,200.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was an employer subject to the provisions of *former* ORS 659.010 to ORS 659.110. ORS 659A.872.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. *Former* ORS 659.492(2); *former* ORS 659.010 to 659.110; ORS 659A.780; ORS 659A.850(2) and ORS 659A.850(4).

3) By subjecting Complainant to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe or pervasive to alter her work conditions and create a hostile, intimidating, and offensive work environment, Respondent dis-

criminated against Complainant on the basis of sex, contrary to the provisions of *former* OAR 839-005-0030(1)(a) & (b) and in violation of *former* ORS 659.030(1)(b).

4) By failing to take immediate and appropriate corrective action when he knew Complainant was offended by the volume and sexual content of daily incoming e-mails, Respondent subjected Complainant to unwelcome sexual harassment contrary to the provisions of *former* OAR 839-005-0030(1)(a) & (b) and in violation of *former* ORS 659.030(1)(b), and is liable for the harassment even though it was committed by non-employees. *Former* OAR 839-005-0030.

5) By intentionally creating and maintaining discriminatory working conditions based on Complainant's gender that were so intolerable Complainant was compelled to leave her employment, Respondent constructively discharged Complainant and committed an unlawful employment practice in violation of *former* ORS 659.020(1)(a) and *former* OAR 839-005-0035.

6) By forcing Complainant's constructive discharge through a pattern of sexually offensive conduct despite Complainant's requests that it cease and by thwarting her attempt at self-help, Respondent retaliated against Complainant in violation of *former* ORS 659.030(1)(f).

OPINION

The Agency alleges Respondent unlawfully discriminated against Complainant because of her gender by subjecting her to unwelcome sexual conduct that was implicitly a condition of her employment and sufficiently severe or pervasive to have the effect of creating a hostile work environment. The Agency further alleges that Respondent intentionally created or maintained working conditions so intolerable that Complainant was forced to quit her employment. Additionally, the Agency alleges that Respondent's reaction to Complainant's requests that the unwelcome sexual conduct cease constitutes retaliatory discrimination against Complainant because she opposed Respondent's unlawful employment practices. The Agency seeks a judgment of $1,200 for Complainant's loss of income and $40,000 in mental suffering damages against Respondent.

Under *former* OAR 839-005-0030(3), "[a]n employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer." In this case, Respondent, as a sole proprietor and Complainant's employer, is strictly liable for any unwelcome sexual conduct he personally directed toward Complainant because of her gender that was implicitly a condition of her employment or that resulted in a hostile, intimidating or offensive work environment. He is also liable for any work place harassment Complainant was

subjected to by non-employees if he knew or should have known of the conduct and failed to take immediate and appropriate corrective action. *Former* OAR 839-005-0030(7).

SEXUAL HARASSMENT

Former ORS 659.030(1) stated, in pertinent part:

> "For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:
>
> "(a) For an employer, because of an individual's * * * sex * * * to refuse to hire or employ or to bar or discharge from employment such individual. * * *
>
> "(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Former OAR 839-005-0030(1) provided:

> "Sexual harassment is unlawful discrimination on the basis of gender and includes the following types of conduct:
>
> "(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's gender, and
>
> "(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
>
> "(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual.
>
> "(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of * * * creating a hostile, intimidating or offensive working environment."

In order to prevail on its claim that Respondent sexually harassed Complainant, the Agency must present evidence to show: (1) Respondent was an employer subject to *former* ORS 659.010 to 659.110; (2) Respondent employed Complainant; (3) Complainant is female; (4) Respondent made unwelcome sexual advances, requests for sexual favors, or engaged in unwelcome conduct of a sexual nature directed toward Complainant because of her gender; (5) the unwelcome conduct was made an implicit term or condition of Complainant's employment or was so severe or sufficiently pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) Complainant was harmed by the unwelcome conduct. *See In the Matter of Western Stations Co.*, 18 BOLI 107, 119 (1999). The first three elements are undisputed. The remaining issues are addressed as follows:

1. Unwelcome Sexual Conduct Based on Gender

Respondent's Conduct

Based on Complainant's credible testimony, which was corroborated by other credible evidence, the forum has accepted as fact that Respondent regularly approached Complainant from behind and caressed her neck and shoulders in a manner that caused her extreme discomfort, stroked her hand in a sexual manner on at least one occasion, and repeatedly told her and another female employee sexually explicit jokes that were degrading to women. The forum has also accepted as fact that Respondent used Complainant's workstation on several occasions to access pornographic websites on her computer for sexual gratification and purposely left behind evidence of his activities, including sexually explicit images on her computer screen and apparent semen traces on her desk. Respondent's general denial that he touched Complainant or that he accessed pornographic websites for sexual stimulation during regular work hours flies in the face of the credible, disinterested testimony to the contrary. Moreover, despite his assertion that other employees, including his son, had access to the computers and could have logged on to adult websites, credible evidence establishes that his female employees had no interest in viewing pornography in the workplace and were, in fact, repelled by its presence. Furthermore, there is no evidence whatsoever that Respondent's son accessed pornographic websites at his father's business.

On the other hand, Respondent acknowledged that he often used Complainant's work station, frequently worked late into the night and on weekends during her employment, accessed adult websites and chat rooms during that time, and told sexually explicit jokes to Complainant and others during work hours. Respondent's admissions, Complainant's credible testimony, and Madsen's observations sufficiently demonstrate that Respondent engaged in sexual conduct directed toward Complainant because of her gender.

Finally, the key element to any sexual harassment claim is whether the alleged conduct was unwelcome. *In the Matter of Barbara Bridges*, 25 BOLI _ (2003). A preponderance of credible evidence established that Complainant neither welcomed nor invited Respondent's sexual conduct. Madsen credibly testified that Complainant stated several times that she "hated it" when Respondent touched her and was noticeably distressed whenever he massaged her neck and shoulders without invitation. Madsen also credibly testified that Complainant openly expressed her disgust whenever Respondent recited his offensive jokes to both of them and that she and Complainant signaled their disinterest by words or body language. Moreover, credible evidence shows Complainant was outspo-

ken to Madsen and others, including Respondent, about the appearance of sexually explicit website images on her computer screen and was frustrated by her inability to stop its recurrence. The Agency has established by a preponderance of credible evidence that Complainant did not welcome Respondent's conduct and the forum finds there is no conceivable way Respondent could have believed otherwise.

Non-employee Conduct

(Unsolicited Pornographic E-mails)

The Agency has established that Complainant and her co-workers were subjected to a daily barrage of sexually explicit e-mail that was unwelcome and sufficiently pervasive to alter Complainant's working conditions and create a hostile working environment. As Complainant's employer, Respondent had an obligation to take prompt remedial action to eliminate harassment even where the offensive conduct was by others he did not employ. *Former* OAR 839-005-0030(7). While that rule has historically applied to customers and vendors, the forum finds that in workplaces where employees have the ability to send and receive e-mail at will, employers have a duty to determine what steps can be taken to stop offensive e-mail that generates from outside the workplace. While evidence in this case shows that current technology does not provide a fail-safe mechanism for filtering out or blocking all unwanted junk e-mail, an employer's principal obligation is to use whatever current technology is available to block patently inappropriate e-mail and reduce the volume of offensive junk mail.

Respondent's assertion that he had no control over the volume or type of e-mail messages Complainant and her co-workers were subjected to daily was contradicted by credible evidence showing that AOL had blocking mechanisms in place that could have reduced the volume of unsolicited junk mail, particularly patently offensive e-mail. There is no evidence that Respondent explored those options or that he took any other proactive measures to cure the problem. Instead, he relied on Complainant's attempts to resolve the issue to justify his own inaction. Beyond Respondent's testimony, which the forum does not accept, there is no evidence that Respondent instructed Complainant to contact the necessary resources or offered to bear the expense of any required technology to correct the influx of offensive e-mails. Indeed, the mere purchase of another large computer monitor and Respondent's refraining from use of Complainant's computer at all would have alleviated much of the problem. Moreover, even if he had specifically delegated the task to her, the burden was not on Complainant to "fix" the pornographic e-mail problem. Respondent received ongoing complaints from Complainant and Madsen about extremely offensive e-mail messages that triggered *his* duty to take immediate corrective

action. Since his employees' essential job duties involved continued exposure to e-mail messaging, including an inordinate amount of sexually explicit messages that deeply offended them, he had an obligation to do whatever was within the realm of possibility to reduce or eliminate that exposure. The forum finds that Respondent did not exercise reasonable care in preventing or reducing the influx of pornographic e-mails and he is therefore liable for Complainant's continued exposure to harassing materials.

(Ranson's Conduct)

Respondent acknowledged that Complainant told him she was offended by customer Ranson's conduct toward her that included excessive "leering" and staring at her breasts. On the other hand, Complainant testified that Respondent ultimately complied with her request that he be present when Ranson was in the workplace conducting business. Based on Complainant's testimony that she had no problems with Ranson thereafter, the forum infers that Respondent's action effectively ended the harassment. The forum concludes that Respondent took sufficient remedial action in response to Complainant's complaint and is not liable for the harassment caused by Ranson.

2. Hostile, Intimidating, or Offensive Work Environment

The standard for evaluating whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in the Complainant's particular circumstances. *Former* OAR 839-005-0030(2).

In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the frequency of the conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *See Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 302, 309-10 (1998). In this case, a preponderance of credible evidence shows that Respondent engaged in a pattern of verbal and physical conduct that, when viewed as a whole, permeated the workplace with more than a modicum of hostility and intimidation toward women in general and Complainant in particular.

First, Respondent regularly told sexually explicit jokes that cannot be characterized as isolated instances of social banter. The jokes were frequent, particularly targeted at women as sexual objects, and directly affronted Complainant's sensibilities. Even Madsen, who claimed she was not particularly offended, turned away and kept her head down when Respondent repeated his jokes that she characterized as degrading to women and inappropriate for the workplace. Complainant and Madsen were the only employees present and a captive audience to Respondent's con-

duct that occurred often and in relatively close quarters. Since neither ever encouraged his conduct and, in fact, discouraged it by their words and actions, the forum infers that Respondent intended their discomfort.

Additionally, Respondent demonstrated a disregard for Complainant's personal boundaries by regularly approaching her from behind and massaging or caressing her shoulders and back unexpectedly and without her permission. Despite her clear discomfort with his touching, obvious even to Madsen, he continued to sneak up on her throughout her employment and subject her to unwanted physical contact. His continued resistance to her obvious cues further demonstrates his apparent intent to cause her particular discomfort.

Along with Respondent's overt conduct, Complainant was subjected to a more insidious form of harassment that continued over a six month period and ultimately led to her resignation. Despite Respondent's denial and disingenuous attempt to divert blame to his son, the totality of credible evidence establishes that he regularly used Complainant's work station in the evenings and on weekends to access pornographic websites and purposely left behind graphic sexual images for her to discover. The recurring nature of his conduct, *i.e.*, leaving sexual images on Complainant's computer screen, negates the possibility that his failure to log out of the websites was inadvertent. The forum finds that Respondent's use of Complainant's work station for sexual gratification, as evidenced by the offensive images left on the computer and Complainant's discovery of semen on her desk, was sufficiently severe so as to seriously affect Complainant's working conditions.

Finally, the forum has already determined that Complainant was exposed to a daily barrage of sexually explicit e-mail that was unwelcome and sufficiently pervasive to alter Complainant's working conditions and create a hostile working environment. Additionally, evidence shows and the forum finds that Respondent's resistance to taking corrective action was part of an overall pattern of sexual conduct that Respondent imposed on his employees, particularly Complainant.

Complainant was not required to be constantly on guard against Respondent's unexpected and unwanted touching and his stealthy use of her workstation for prurient purposes, and she certainly was not required to acquiesce to the sustained appearance of sexually explicit materials, that particularly objectified women, in her workplace for the privilege of being allowed to work and make a living. The forum concludes that Respondent engaged in a pattern of offensive conduct that particularly demeaned women and that, from the perspective of a reasonable person in Complainant's circumstances, it was sufficiently pervasive so as to create a hostile

and intimidating working environment.

CONSTRUCTIVE DISCHARGE

Respondent is liable for a constructive discharge if it is established that he (1) intentionally created or maintained discriminatory working conditions related to Complainant's gender that were (2) so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them, (3) Respondent desired to cause Complainant to leave her employment as a result, or knew or should have known that Complainant was certain, or substantially certain, to leave her employment as a result of the working conditions, and (4) Complainant left her employment as a result of the working conditions. *Former* OAR 839-005-0035.

In this case, the forum has already found that Respondent engaged in a course of conduct constituting a continuing pattern of sexual harassment directed toward Complainant that she rejected either by words or body language. Credible evidence established that when Complainant quit her employment following a particularly egregious incident involving Respondent and her computer station, she reasonably believed that Respondent had no intention of stopping his offensive conduct or of eliminating the causes of the hostile and intimidating work environment to which she was subjected, despite his knowledge that it caused her distress. The forum finds that a reasonable person in Complainant's position would have resigned under those circumstances. Given the circumstances in this case, the forum has no difficulty imputing knowledge to Respondent of the substantial certainty that Complainant would quit her employment once she realized her efforts to stop the ongoing harassment were futile.

RETALIATION

Former ORS 659.030 stated, in pertinent part:

> "For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:
>
> " * * * * *
>
> "(f) For any employer * * * to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * *."

In order to establish a prima facie case of retaliation, the Agency is required to prove that (1) Complainant opposed an unlawful employment practice; (2) Respondent made an employment decision that adversely affected Complainant; and (3) there is a causal connection between Complainant's opposition and Respondent's adverse employment action.

Complainant's Opposition to Unlawful Employment Practice

Former ORS 659.030(1)(b) forbids an employer to discriminate against an employee based upon gender. The forum has

found that Respondent engaged in a course of unwelcome sexual conduct against Complainant based on her gender that created a hostile and offensive working environment, constituting an unlawful employment practice. The Agency has established by a preponderance of credible evidence that Complainant opposed that conduct on numerous occasions when she requested that Respondent eliminate the presence of pornographic e-mails and images in the workplace and when she told him she was not comfortable waiting on a customer who "leered" at her breasts and asked her out on dates despite her continued rejection.

Respondent's Adverse Employment Decision

The Agency established that Respondent forced Complainant's constructive discharge by continuing a pattern of offensive conduct, despite Complainant's requests that he cease the conduct, and by thwarting her attempt at self-help. For the purposes of *former* ORS 659.030(1)(f), a constructive discharge is the legal equivalent of an actual discharge and by forcing the constructive discharge, Respondent made an employment decision that adversely affected Complainant.

Causal Connection

Finally, the Agency has established a causal connection between Complainant's opposition to Respondent's unlawful conduct and her constructive discharge. Credible evidence shows that Complainant quit as a direct result of Respondent's actions that signaled to Complainant the sexual harassment would not only continue, but any further attempts on her part to stop or limit the scope of the harassment would be futile. The forum concludes that, by forcing Complainant's constructive discharge, Respondent retaliated against Complainant for having opposed sexual harassment, constituting an unlawful employment practice, in violation of *former* ORS 659.030(1)(f).

DAMAGES

Back Pay

It is well established in this forum that the purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. *In the Matter of H. R. Satterfield*, 22 BOLI 198, 210 (2001).

In this case, Complainant suffered lost wages from May 7 until June 13, 2001, as a result of her constructive discharge. She accepted a position at Xerox Corporation only five weeks after her constructive discharge at a higher pay rate than the $12.50 per hour she earned while in Respondent's employ. Her prompt acceptance of replacement employment establishes that she mitigated her damages and is entitled to compensation for the interim period she was unemployed.

The Agency seeks $1,200 as payment in lost wages. Undisputed evidence shows Complainant was working full time for Respondent when she quit and, although there is no evidence establishing the precise number of hours she worked each week, the forum finds she would have earned *at least* $1,200 as a full time employee between May 7 and June 13, 2001, but for her constructive discharge.[3] Respondent owes Complainant $1,200 for the wages she lost due to the unlawful employment practices found herein.

Mental Suffering

In determining a mental suffering 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). The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999).

Based on Complainant's credible testimony, the forum finds she suffered significant emotional distress as a direct result of Respondent's unlawful employment practices. Her disgust with Respondent's conduct and her anxiety about its continued escalation increased when she realized his offensive behavior was focused more consistently on her. As a result, she experienced rashes, "panic attacks," and occasional nightmares that caused her to lose sleep. She reported these symptoms to her physician, who placed her on medication for anxiety and recommended counseling for home and work-related stress. Although, her physician's notes reflect that she gave him more details about personal stressors, *i.e.*, "living with her husband's nephew who had been abused," and some "agitation" due to her premature menopause, than about the stress she experienced at work, her testimony that she saw no value in describing the details of her work related stress to her physician was believable and consistent with her stoic demeanor during the hearing. Moreover, she explained that she had been living with the nephew for three years prior and had not experienced "itching and hives all that time," and that her issue with the premature menopause concerned only the discomfort associated with her increased breast size. She also readily acknowledged that she

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[3] $1,200 divided by Complainant's hourly rate of $12.50 amounts to 96 hours worked in a 5 week period which is an average of about 19 hours per week. The forum infers from the record that Complainant worked closer to a 40 hour work week. The Agency, however, did not amend its charging document at hearing and the forum is precluded from awarding more than the Agency sought in its pleading.

had experienced financial distress before and during her employment, but that her financial worries made her less equipped to leave her employment to obtain relief from Respondent's conduct.

Respondent is not liable for distress caused by Complainant's personal circumstances, her unrelated medical problems, or her prior financial difficulties. However, this forum has consistently held that "employers must take employees as they find them." *In the Matter of Entrada Lodge, Inc.*, 20 BOLI 189, 188 (2000), *citing 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). In this case, Complainant's credible testimony established that her stress level was significantly exacerbated by the hostile work environment Respondent created and maintained for over at least six months during her employment, that the additional stress was considerable, and that it manifested in physical symptoms that she had not experienced before or after her employment. The forum concludes that $40,000 is appropriate compensation for the suffering caused by Respondent's unlawful employment practice.

AGENCY'S EXCEPTIONS

The Agency suggested certain language be interposed in the findings of fact and ultimate findings of fact for clarification. Accordingly, the forum has supplemented the factual findings where appropriate.

RESPONDENT'S EXCEPTIONS

A. Factual Findings and Conclusions of Law

Respondent's substituted factual findings and conclusions of law, and proposed "corrections" to the existing factual findings are based either on facts not in evidence or are reliant upon substantially different credibility findings than those established in the proposed order. This forum has previously held that an administrative law judge's ("ALJ") credibility findings are accorded substantial deference by the forum and, absent compelling reasons for rejecting such findings, they are not disturbed. *In the Matter of Staff, Inc.*, 16 BOLI 97, 117 (1997). While Respondent expresses a different perspective on certain credibility findings, he has not proffered convincing reasons for disturbing them. Indeed, the record shows that certain witnesses the ALJ deemed credible were not impeached in any way during the hearing and Respondent's attempt to do so now, based on purported facts which are not in the record, is inappropriate. The forum concludes that the factual findings, including the ALJ's credibility findings, are based on the evidence in the record and are supported by a preponderance of that evidence; therefore, Respondent's exceptions as to the factual findings and conclusions of law are DENIED.

B. Opinion

Respondent's exception to the proposed opinion merely recites

certain elements of the applicable law governing sexual harassment, constructive discharge, retaliation, and mental suffering damages and asserts that Respondent's conduct did not meet those elements. Respondent essentially reiterates his arguments at hearing which are controverted by the record as a whole. The opinion adequately addresses the issues framed by the pleadings. Respondent's exception to the proposed opinion is without merit and is therefore DENIED.

C. Due Process

Respondent asserts that his federal and state Due Process rights were denied because the proposed order was issued 13 months after the contested case hearing which "is an unreasonable delay and it has severely hampered Respondent's ability to respond to these unfounded allegations." Respondent further claims that "there is no transcript of the proceedings available to assist Respondent in responding to the allegations and alleged factual statements contained in the Proposed Order."

Neither the Administrative Procedures Act nor the Division 50 Contested Case Hearing Rules imposes a time limit for issuing proposed or final orders in contested cases. Moreover, prior to the hearing in this matter, Respondent was given notice of the matters asserted by the Agency and of his opportunity for a hearing. At the hearing, Respondent was represented by counsel and was afforded ample opportunity to respond to each and every allegation. Based on the record herein, the forum found the allegations were not "unfounded" as Respondent asserts; instead, the record supports Complainant's allegations by a preponderance of the evidence. Respondent does not contend and the record does not show that he contacted the Bureau of Labor and Industries and inquired about the status of the proposed order or requested a copy of the audio record. The forum therefore concludes that Respondent has no basis for a constitutional claim and his request for a dismissal of this case on those grounds is DENIED.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent's violation of *former* ORS 659.030(1)(a)(b) & (f), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Robb Wochnick** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Lisa Sims in the amount of**:

2) ONE THOUSAND TWO HUNDRED DOLLARS ($1,200), less lawful deduc-

tions, representing income lost by Lisa Sims between May 7 and June 13, 2001, as a result of Respondent's unlawful practices found herein; plus,

3) Interest at the legal rate from June 14, 2001, on the sum of $1,200 until paid; plus,

4) FORTY THOUSAND DOLLARS ($40,000), representing compensatory damages for mental distress Lisa Sims suffered as a result of Respondent's unlawful practice found herein; plus,

5) Interest at the legal rate on the sum of $40,000 from the date of the Final Order until Respondent complies herein; and,

6) Cease and desist from discriminating against any employee based upon the employee's gender.

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