



**BUREAU OF LABOR AND INDUSTRIES**

**BEFORE THE COMMISSIONER  
OF THE BUREAU OF LABOR AND INDUSTRIES  
OF THE STATE OF OREGON**

In the Matter of:

**PCC STRUCTURALS, INC.,**

Respondent.

Case No. 108-18

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER

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**SYNOPSIS**

The Agency established by a preponderance of the evidence that Respondent PCC Structurals, Inc. denied family medical leave to Complainant, counted family medical leave against Complainant in determining compliance with its attendance policy and terminated her employment in violation of ORS 659A.183(1),(2) and OAR 839-009-0320(3),(4). The forum awarded lost wages in the amount of \$70,447.32, emotional distress damages of \$20,000 and out-of-pocket expenses in the amount of \$436. The forum also ordered Respondent to cease and desist from (1) denying family medical leave to eligible employees and (2) discriminating against any employee for invoking the Oregon Family Medical Leave Act.

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The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 12, 2019, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by

1 Administrative Prosecutor Adriana Ortega, an employee of the Agency. Complainant,  
2 Michele Mathews (“Mathews”), was present throughout the hearing. Respondent PCC  
3 Structural, Inc. (“PCC”) was represented throughout the proceeding by Attorney Karen  
4 O’Connor and Alisha Kormondy. Kymberlee Dressel, Employee Relations Manager for  
5 PCC, was also present.

6 The Agency called Mathews, Heather Beauchemin and BOLI Civil Rights  
7 Investigator Moayyaad Khosnaw and as its witnesses.

8 Respondent called Heather Beauchemin, Kymberlee Dressel, Debbie Schwanz  
9 and Scott Stipe as witnesses.

10 The forum received into evidence: (a) Administrative exhibits X1 through X15; (b)  
11 Agency exhibits A1-A3, A5-A9, A14-A15, A18-A21, pages 1-2 of A23, and A24-A25,<sup>1</sup> and  
12 (c) Respondent exhibits R1-R17, pages 1-4 of R18, R19-R20, R22 and R25-R26.<sup>2</sup>

13 Having fully considered the entire record in this matter, I, Val Hoyle, Commissioner  
14 of the Bureau of Labor and Industries, hereby make the following Findings of Fact  
15 (Procedural and on the Merits), Conclusions of Law, Opinion, and Order.<sup>3</sup>

16 **FINDINGS OF FACT – PROCEDURAL**

17 1) Complainant Michele Mathews (“Mathews”) filed a verified complaint with  
18 the Agency’s Civil Rights Division on July 26, 2017, alleging that PCC Structural, Inc.  
19 (“PCC”) denied her protected leave under the Oregon Family Leave Act (“OFLA”) and  
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21 <sup>1</sup> Several of the exhibits offered by the Agency and PCC duplicated one another as follows: Exs. A5 and  
22 R6 are the same document; Ex. R7 is the same document as page 2 of Ex. A6; Ex. R11 is the same  
document as page 2 of Ex. A7; and Ex. R12 is the same document as page 1 of Ex. A7.

23 <sup>2</sup> Exhibits R25-R26 were admitted only for the purpose of impeachment.

24 <sup>3</sup> The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings  
of Fact – The Merits.

1 counted absences protected by OFLA against her, resulting in her termination from  
2 employment. (Ex. A1)

3 2) On June 12, 2018, the Agency's Civil Rights Division issued a Notice of  
4 Substantial Evidence Determination ("SED") in which it found substantial evidence that  
5 PCC engaged in the following unlawful employment practices: denial of protected OFLA  
6 leave and termination of employment in violation of ORS 659A.183. (Ex. A18)

7 3) On August 17, 2018, the forum issued a Notice of Hearing to Respondents,  
8 the Agency, and Complainant stating the time and place of the hearing as February 27,  
9 2019, beginning at 9:00 a.m., at the W. W. Gregg Hearing Room of the Oregon Bureau  
10 of Labor and Industries, located at 800 NE Oregon Street, 10th floor, Portland, Oregon.  
11 Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal  
12 Charges, a document entitled "Summary of Contested Case Rights and Procedures"  
13 containing the information required by ORS 183.413, a document entitled  
14 "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice explaining  
15 the significance of the Notice of Hearing, and a copy of the forum's contested  
16 case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

17 4) The Formal Charges alleged that PCC engaged in unlawful employment  
18 practices in violation of ORS 659A.183(1),(2) and OAR 839-009-0320(3),(4),(5). The  
19 Formal Charges sought lost wages of at least \$59,000, out-of-pocket expenses of at least  
20 \$1,000 and damages for emotional, mental and physical suffering in the amount of at  
21 least \$150,000. The Formal Charges also stated that the forum's order may include such  
22 other relief as appropriate to eliminate the effects of the unlawful practices found as to  
23 Complainant and others similarly situated. (Ex. X2b)

1           5)     PCC timely filed an Answer denying the Agency's allegations on September  
2 6, 2018

3           6)     On January 8, 2019, the ALJ issued an interim order requiring case  
4 summaries to be filed no later than January 29, 2019. The Agency and PCC timely filed  
5 their case summaries on January 29, 2019. (Exs. X5, X9, X10)

6           7)     On January 28, 2019, the Agency filed motions to consolidate this case with  
7 Case No. 57-19 and to postpone the hearing in this matter until May 21, 2019, the date  
8 the hearing in Case No. 57-19 was scheduled to begin. PCC filed a brief in opposition to  
9 the motions on February 1, 2019. The ALJ's ruling on the Agency's motion stated, in  
10 pertinent part:

11           "OAR 839-050-0190 provides that the administrative law judge may order a joint  
12 contested case hearing for two or more cases where the administrative law judge  
13 determines that the cases 'involve common questions of law or fact.' Both Case  
14 No. 108-19 and 57-19 involve the same Complainant and the same Respondent,  
15 and both involve allegations that [PCC] took an adverse action against  
16 Complainant because she invoked the Oregon Family Leave Act. However, Case  
17 No. 108-19 primarily involves allegations regarding the termination of Complainant  
18 on June 7, 2017, and events prior to that date. By contrast, Case No. 57-19  
involves an alleged violation that [PCC] directed a recruiting company to rescind  
an offer of employment to Complainant in July of 2018. The record before the  
forum indicates that there are different witnesses to the events at issue in Case  
No. 57-19 than those that have been identified in the parties' case summaries for  
Case No. 108-19. Accordingly, there is insufficient evidence before the forum to  
conclude that the cases 'involve common questions of law or fact.' The Agency's  
motions to consolidate and to postpone are DENIED."

19 (Exs. X8, X11, X13)

20           8)     On February 1, 2019, the Agency filed an unopposed motion for a protective  
21 order regarding tax records of Mathews. PCC responded to the motion on February 8,  
22 2019. The ALJ verbally granted the motion on the record at the commencement of the  
23 hearing. (Exs. X12, X14; A23 - A25; Hearing Record)

1           9)     At the start of hearing, the ALJ orally informed the participants of the issues  
2 to be addressed, the matters to be proved, and the procedures governing the conduct of  
3 the hearing. (Hearing Record)

4           10)    Prior to the parties' opening statements, the Agency stated that it had issued  
5 subpoenas to witnesses Heather Beauchemin and Frank Williams, but the witnesses had  
6 not contacted the Agency and the Agency was not sure if they would appear at hearing  
7 as directed by the subpoenas. The Agency stated that these two witnesses were  
8 employed by PCC and the Agency requested that the ALJ issue an order requiring that  
9 the witnesses be produced. PCC stated that Beauchemin would be appearing to testify  
10 on behalf of PCC and agreed that she could also testify as part of the Agency's case.  
11 However, PCC had not planned to call Williams as a witness and PCC's counsel was not  
12 aware that he had been served with a subpoena. The ALJ required the Agency to provide  
13 a copy of the documents served on Williams and a proof of service to the forum and to  
14 PCC.

15           After a brief recess, the ALJ noted that the forum received documents from the  
16 Agency, which were marked as Ex. X15. The ALJ observed that any order to comply with  
17 the subpoena was outside of the ALJ's jurisdiction. See OAR 839-050-0200(9) (stating  
18 that the Agency "may apply to the Oregon Circuit Court to compel obedience to a  
19 subpoena"). However, if a witness did not comply with a subpoena, then the ALJ could  
20 issue an order regarding evidence to be admitted. See OAR 839-050-0200(11). The ALJ  
21 noted that the subpoenas were served by certified mail, but no green return postcard had  
22 been returned. The Agency stated it had trouble on many occasions receiving the green  
23 return postcards, but that an online report from the US Postal Service showed that the

1 subpoena was delivered to Williams's address. PCC's counsel represented that she  
2 spoke to Williams during the break and he had not received the subpoena, and further  
3 stated that PCC would have agreed to produce Williams as a witness if the Agency would  
4 have requested that in advance of the hearing. However, Williams was currently on the  
5 manufacturing floor working. The ALJ stated that there was insufficient proof of service  
6 and that she was unable to issue an order requiring Williams to appear, and noted that it  
7 is easier on all parties when they discuss witness scheduling issues in advance of the  
8 hearing. (Hearing Record; Ex. X15)

9 11) During the hearing, the Agency objected to the expert testimony of PCC's  
10 witness, Scott Stipe, a vocational rehabilitation counselor because PCC's case summary  
11 indicated that he would testify as to subsequent employment opportunities available to  
12 Mathews and there would be evidence that she received subsequent job offers. In  
13 response, PCC's counsel asserted that there is a period of time between the termination  
14 and the subsequent job offers and that he would testify as to job opportunities during that  
15 timeframe. The ALJ overruled the objection. After the direct testimony of Stipe, the ALJ  
16 required that PCC provide a copy of Stipe's file to the Agency to review during a break  
17 prior to cross examination of the witness. At the conclusion of the Agency's cross  
18 examination of Stipe, the Agency made an oral motion for the forum to disregard Stipe's  
19 testimony because he never met with or spoke to Mathews. The ALJ overruled the  
20 Agency's objection, but stated that the Agency's objection would be considered when  
21 evaluating the weight of Stipe's testimony. (Hearing Record)

22 12) PCC's Answer included an affirmative defense which stated, "Without  
23 assuming Complainant's burden of proof, [PCC] asserts that [Complainant's] absences  
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1 were not protected by the Oregon Family Leave Act due to Complainant's own failure to  
2 comply with reasonable procedures set out by [PCC] in accordance with OAR 839-009-  
3 0250(3)." (Emphasis added.) Throughout the hearing, PCC extensively referenced  
4 subsection (3) and repeatedly asserted that Mathews failed to provide sufficient written  
5 notice to PCC that the three absences at issue in this case were for family medical leave  
6 reasons. During the Agency's redirect questioning of BOLI Compliance Specialist  
7 Khosnaw,<sup>5</sup> the administrative prosecutor referred to OAR 839-009-0250(6) in response  
8 to PCC's affirmative defense regarding subsection (3). PCC's counsel objected to the  
9 questioning regarding subsection (6), asserting that the question was beyond the scope  
10 of redirect because PCC's counsel did not ask the witness about subsection (6) during  
11 cross examination. In response, the Agency argued that PCC was having the witness  
12 discuss certain subsections of OAR 839-009-0250 without looking at the entirety of the  
13 regulation, and the Agency wanted to question the witness about the other subsections.  
14 The ALJ noted that subsection (6) was not a violation identified in the Formal Charges  
15 and the witness was not asked about subsection (6) during cross examination, and asked  
16 the Agency to respond. In response, the Agency argued that the witness was questioned  
17 about what permissible actions an employer could take, and subsection (6) talks about  
18 those actions. The ALJ sustained PCC's objection to the question, noting that the witness  
19 did not discuss subsection (6) in the substantial evidence determination he authored and  
20 he was not asked about that subsection during cross examination. However, the ALJ told

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23 <sup>5</sup> At the start of the hearing, the Agency requested that it be permitted to call Khosnaw as a witness on the  
24 second day of hearing, after the completion of the remainder of the Agency's case, due to his schedule. PCC's counsel stated that it did not object to this witness being called out of order. Khosnaw was the last witness to testify at hearing.

1 the prosecutor that she could address subsection (6) during the Agency's closing  
2 argument.

3         Immediately prior to closing arguments, PCC's counsel stated that she would  
4 object if subsection (6) was referenced in the Agency's closing argument because it was  
5 not identified in the Formal Charges. In response, the Agency argued that subsection (3)  
6 cited in PCC's affirmative defense is part of a larger regulation and it "defies logic" that  
7 references to a regulation should be limited in that manner. The prosecutor further stated  
8 that subsection (6) was not a violation and did not need to be cited in the Formal Charges.  
9 The ALJ instructed the Agency not to reference subsection (6) in its closing argument,  
10 but permitted the Agency to file a brief after the hearing regarding whether the forum  
11 should consider subsection (6). PCC was permitted to file an opposition brief.

12         On March 14, 2019, the Agency timely filed a document titled Motion for  
13 Consideration of Closing Argument on OAR 839-009-0250(6). In the motion, the Agency  
14 argued that BOLI Compliance Specialist Khosnaw "was questioned extensively, over the  
15 Agency's objection, by [PCC's] counsel, on ORS 659A.183 and OAR 839-009-0250(3)."  
16 The Agency argued that the administrative prosecutor's redirect questioning of Khosnaw  
17 regarding subsection (6) and the reference to subsection (6) in the Agency's closing  
18 argument were permissible rebuttal evidence and argument. The Agency further argued  
19 that it was not basing a violation on subsection (6) and, thus, was not required to cite to  
20 that subsection in the Formal Charges.

21         PCC filed a timely response to the Agency's motion on March 21, 2019. In its  
22 opposition brief, PCC reasserted the objections made at hearing. In addition, PCC  
23 argued:  
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1 "Contrary to the Agency's position, it was the Agency that raised this particular  
2 subsection and it did so *after* the conclusion of both direct examination and cross  
3 examination questioning, with a witness taken out of order. Even assuming the  
4 Agency's belated raising of this issue was proper, at a minimum, Respondent  
5 should have been entitled to present evidence on the matter, and the Agency's  
6 actions prevented that simple justice."

7 (Emphasis in original).

8 After further review of the record, the forum notes that multiple subsections of OAR  
9 839-009-0250 were referenced throughout the hearing without objection. For example,  
10 in its opening statement and in the cross examination of Khosnaw, PCC referred to OAR  
11 839-050-0250(4)(c),<sup>6</sup> which discusses one of the options available to an employer when  
12 an employee fails to give notice of foreseeable leave. The forum finds that the  
13 subsections of OAR 839-009-0250 elaborate and define what it means for an employee  
14 to provide "notice" of family leave to her employer under ORS 659A.165. ORS 659A.165  
15 discusses actions that an employer may take in terms of requiring that employees provide  
16 notice of family medical leave. The actions that an employer may take are not the basis  
17 for an unlawful employment practice. The notice provisions only became at issue due to  
18 PCC's defense and did not originate from the Agency. Accordingly, the Agency was not  
19 required to cite to OAR 839-009-0250(6) in the Formal Charges. Additionally, although  
20 PCC states that it did not have the opportunity to provide a response to the Agency's  
21 reference to subsection (6), it was permitted to do so in its opposition brief filed on March  
22 21, 2019. In its briefing, it did not identify any additional evidence that it would have

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23 <sup>6</sup> PCC's counsel referred to subsection (3)(c) in opening statements. However, the language she quoted  
24 is actually in subsection (4)(c).

1 presented in response to subsection (6). Therefore, PCC's objections to the Agency's  
2 references to OAR 839-009-0250(6) are OVERRULED.

3 13) On April 28, 2020, the Agency filed a Notice of Reassignment, stating that  
4 the case had been reassigned to Chief Prosecutor Cristin Casey. (Forum File)

5 14) In emails dated May 27, 2020, the Agency and PCC's counsel informed the  
6 forum that the Agency and PCC agreed to receive filings (including the Proposed Order,  
7 exceptions to the Proposed Order and the Final Order) from the parties, the Contested  
8 Case Coordinator and the ALJ by email, because of challenges associated with the  
9 COVID-19 virus. (Forum File)

10 15) On June 4, 2020, the ALJ issued a Proposed Order that notified the  
11 participants they were entitled to file exceptions to the Proposed Order within ten days of  
12 its issuance. After obtaining an extension of time to file exceptions, the Agency and PCC  
13 timely filed exceptions on July 3, 2020.

#### 14 **FINDINGS OF FACT – THE MERITS**

15 1) At all times material herein, PCC was an active domestic business  
16 corporation registered with the Oregon Secretary of State Business Registry that  
17 employed 25 or more persons in the State of Oregon. PCC manufactures stationary  
18 components that form portions of the fan, compressor, combustor and turbine sections of  
19 a jet aircraft engine. (Exs. X2b, X3, A14)

20 2) Mathews began working as a radiographer for PCC on or about April 26,  
21 2012. Her duties as a radiographer included radiographing and setting up castings for  
22 radiography. She previously worked for PCC from approximately 1988-1994. (Testimony  
23 of Mathews; Exs. X2b, X3)

1           4)<sup>7</sup> During March through May of 2017, Mathews worked from 6:00 a.m. to 2:30  
2 p.m. Sunday through Thursday, but that was later changed to a Monday through Friday  
3 schedule. (Testimony of Mathews)

4           5) PCC has an Attendance and Punctuality policy, which provides that an  
5 “employee’s employment will be terminated when the employee has reached seven (7)  
6 unexcused absence days.” An employee receives a whole attendance “hit” for missing  
7 an entire shift or one half of a “hit” for missing half of a shift. Employees do not receive  
8 an attendance hit for using up to 40 hours of Oregon sick time. It is the employee’s  
9 responsibility to maintain and manage their own attendance “hits.” Absences related to  
10 protected family medical leave is updated “as information is received.” Prior to March 29,  
11 2017, Mathews had 4.5 attendance hits. (Testimony of Beauchemin; Exs. R4, R8)

12           6) In the past, employees received a summary of their absences on the first  
13 day of each month with their paycheck, but that practice was discontinued. Starting in  
14 November of 2016, PCC notified employees that they could view their attendance  
15 information electronically at “EPMS” stations by clicking on an “attendance” button. An  
16 EPMS station is a bar code reader station. Everything an employee does involves using  
17 their identification badge at an EPMS station. This includes clocking in and out, and using  
18 machine parts. Mathews had to use an EPMS station several times throughout the day  
19 to clock in and out, and to perform her job. (Testimony of Beauchemin; Exs. R4, R18)

20           7) The attendance policy is strictly applied. When an employee does not  
21 submit required forms on time, that results in an attendance hit. Attendance is one of the  
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23 \_\_\_\_\_  
24 <sup>7</sup> There is no Finding of Fact – The Merits, #3.

1 most common reasons for employee terminations at PCC. (Testimony of Beauchemin,  
2 Dressel)

3 8) Mathews had a medical authorization on file with PCC for intermittent leave  
4 for a chronic neck injury. More specifically, on February 8, 2017, Mathews provided a  
5 signed Certification of Healthcare Provider form to PCC for "neck injury – chronic cervical  
6 pain." The form noted that she would need intermittent leave or a reduced work schedule  
7 "as needed." The benefits department keeps certifications for intermittent FML leave on  
8 file for six months. She had previously submitted healthcare provider certifications to  
9 PCC for intermittent leave for the same injury, including certifications submitted on August  
10 7, 2015, and May 6, 2016, and had been approved to take family medical leave for this  
11 injury several times each year, starting in 2013. (Testimony of Mathews, Schwanz; Exs.  
12 A14, R5)

13 9) PCC has a five-page "Family Medical Leave & Military Family Leave" policy.  
14 Page three of the policy contains a section titled "Employee's Obligation to Provide  
15 Notice." That section reads, in pertinent part:

16 "An employee who wishes to take FML should complete a leave request form and  
17 submit it to Human Resources.

18 "\* \* \* If it is not possible to provide thirty (30) days' notice for any leave, the  
19 employee is required to provide as much advance notice as its practicable. In  
20 emergency situations (e.g. an unanticipated serious health condition), the  
employee or someone on the employee's behalf should make an oral request  
within twenty-four (24) hours after the leave begins and submit a completed form  
within three (3) days of returning to work."

21 Mathews received this policy when she began her employment in 2012, and understood  
22 that she was expected to follow the policy. Mathews understood that when a PCC  
23 employee is absent for unanticipated family medical leave, the employee must first call  
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1 PCC's absence call-in line to report the absence. She also understood that she needed  
2 to submit a FML request form within three days of returning to work after an unanticipated  
3 absence. The FML request form contains instructions on the bottom to "return form to"  
4 Debbie Schwanz or Amy Bertsch. Schwanz receives the completed forms in several  
5 ways, including by in person delivery, from the department's mail slot, through email, fax,  
6 from the human resources department, or from one of the manufacturing administrators,  
7 such as Heather Beauchemin. After receiving FML request forms, Schwanz reviews the  
8 form and the employee's information in the system to determine if the request is approved,  
9 denied or pending. Schwanz sends a letter to the employee to let them know if the  
10 request was approved or denied. Sometimes employees call in to report a FML absence,  
11 but do not turn in the FML form. If the benefits department does not receive the FML form  
12 and approve OFLA leave, the absence is not counted as protected OFLA leave.  
13 (Testimony of Mathews, Beauchemin, Schwanz; Exs. R3, R17)

14 10) PCC's FML form also states, "You should retain a date stamped copy of  
15 your completed Request Form for your records." Because the benefits department  
16 receives "hundreds and hundreds" of requests each month, in case there is an issue with  
17 the timeliness of the form, an employee can use the date stamped copy to show that the  
18 form was submitted on time. (Testimony of Schwanz; Ex. R17)

19 11) Mathews was told to place the completed FML forms on the desk of Adam  
20 Thompson, who was the "lead" of her department. Accordingly, whenever Mathews  
21 submitted FML forms, she placed them on the lead desk in her work area for a supervisor  
22 to sign. She never handed the forms directly to someone in the benefits department,  
23 which is in a different building from her work site. She does not know how the forms were  
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1 transmitted from the lead desk in her work area to the benefits department. When  
2 Manufacturing Administrator Heather Beauchemin receives a FML request form, she will  
3 forward the form to the benefits department for processing and files it. If Beauchemin is  
4 out of the office for longer than a day, a person covering for her would process it in the  
5 same way. (Testimony of Mathews, Beauchemin)

6 12) In order to be paid for an absence, the employee must also fill out a  
7 multipurpose form, which is used to designate how an employee is to be paid, such as  
8 through the use of vacation or sick pay. The multipurpose form is to be signed by the  
9 employee and the employee's supervisor. (Testimony of Mathews; Exs. R16, R17)

10 13) On March 29-30, 2017, Mathews's neck was strained and pinching, and she  
11 was unable to come to work. She used PCC's attendance call-in line to report her FML  
12 absence. (Testimony of Mathews, Beauchemin; Ex. A14)

13 14) Mathews returned to work for her next scheduled shift on April 2, 2017, and  
14 placed the required forms for her absences on the lead desk, as she had done in the past.  
15 At the top upper right hand of her multipurpose form, Mathews handwrote the letters  
16 "FML." She signed the form on April 2, 2017. Mathews designated that she wanted to  
17 use vacation and sick pay to be paid for those absences. Her supervisor, Frank Williams,  
18 signed the form on April 3, 2017. (Testimony of Mathews, Beauchemin; Ex. A14)

19 15) Manufacturing Administrator Beauchemin processes multipurpose forms for  
20 payroll purposes and files the forms. She also tracks attendance. Beauchemin has had  
21 a "little bit" of family medical leave training. She does not process FML request forms,  
22 but she receives FML forms and forwards those forms to the benefits department.  
23 Beauchemin places a date stamp on any FML request forms that she receives. If an  
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1 employee turns a form in on a day when Beauchemin is not working, the employee can  
2 turn in the form to a lead or supervisor, who can then tell Beauchemin that the employee  
3 turned in the form on a particular date. Alternatively, Beauchemin can date stamp the  
4 FML form on the day she returns to the office. For example, Beauchemin stamped a  
5 FML form for Mathews's absence on March 16, 2016, when she returned to the office and  
6 treated the form as being timely received. (Testimony of Beauchemin; Exs. R16, R17)

7 16) Sometime during the week of April 3, 2017, Beauchemin received  
8 Mathews's multipurpose form for the March 29-30, 2017, absences, which contained the  
9 handwritten "FML" notation. When an employee writes "FML" on the multipurpose form,  
10 Beauchemin considers that to be informing her that the employee was out for family  
11 medical leave. However, the FML notation is not a request for family medical leave. The  
12 words "FML" on a multipurpose form do not matter to her, but she will mark an absence  
13 as "FML pending" in the attendance system when an employee calls in to report a FML  
14 absence. After a month or more passes, Beauchemin will run a report to determine if  
15 FML was approved or denied. The attendance record will be updated to show an  
16 attendance hit if FML was not approved. PCC considers it to be the employee's  
17 responsibility to turn in the FML request form on time. At some point in time, there was a  
18 notation in the "comments" section of the attendance record for the absences Mathews  
19 took on March 29-30, 2017, which stated: "ORIG CALLED IN FMLA; NO REQ REC'D."  
20 (Testimony of Beauchemin; Exs. A5, R8, p. 3)

21 17) On May 6, 2017, Mathews was scheduled to work an overtime shift on a  
22 date that was not on her regular schedule. However, she was unable to come to work  
23 because her neck was pinching and strained. She called in to PCC's absence line to  
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1 report that she would be absent that day for FML reasons. She placed the required  
2 paperwork on the desk of the lead in her work area on her next scheduled shift on May  
3 8, 2017. Beauchemin did not see Mathews's multipurpose form for this absence until  
4 June 2, 2017. Since it was an overtime day and she did not show up to work, the  
5 multipurpose form is typically just filed, unless the employee is eligible for Oregon sick  
6 pay. (Testimony of Mathews, Beauchemin)

7 18) At some point after the absence taken on May 6, 2017, PCC performed an  
8 "attendance scrub" to check and confirm whether her absences were excused or  
9 unexcused. On June 2, 2017, Mathews's supervisor, Williams, approached her and said  
10 that there was a problem with her paperwork and some of it was missing. Mathews spoke  
11 to Employee Relations Specialist, Sara Aili. Aili told Mathews that she was pending  
12 termination, but she could file an appeal and resubmit the required paperwork. Mathews  
13 obtained a copy of her multipurpose form from Beauchemin for the absences taken on  
14 March 29-30, 2017. Beauchemin did not have the FML request form for those absences.  
15 Beauchemin did not have Mathews's multipurpose form or the FML form for her absence  
16 taken on May 6, 2017.<sup>8</sup> (Testimony of Mathews, Beauchemin; Exs. A8, A14)

17 19) On June 2, 2017, Mathews submitted appeal forms for the absences taken  
18 on March 29-30 and May 6, 2017. Beauchemin received the appeal forms on June 2,  
19 \_\_\_\_\_

20 <sup>8</sup> Mathews testified that Beauchemin told her that she threw away the multipurpose form for the absence  
21 on May 6, 2017, because it was not needed since it was an overtime day. Beauchemin agreed that she  
22 did not need the multipurpose form for that absence since Mathews had been scheduled to work an  
23 overtime shift, but denied that she threw away the form. Schwanz testified that Mathews told different  
24 stories about what happened to the form, and Mathews disputed Schwanz's version of events. However,  
it is not necessary for the forum to resolve this issue. Regardless of whether Beauchemin never received  
this multipurpose form or threw it away, Mathews provided verbal notice of her FML leave by calling in on  
May 6, 2017, and this was noted in PCC's electronic attendance record for Mathews. (Ex. R3, p. 3)  
Therefore, as stated below, someone at PCC should have followed up and requested any required form  
that the benefits department did not receive.

1 2017, and forwarded them to the benefits department. (Testimony of Mathews,  
2 Beauchemin, Schwanz; Exs. A7, R11, R12)

3 20) On the appeal form for the March 29-30 absences, Mathews wrote: "I have  
4 left all documentation at lead desk for supervisor signature and have received nothing  
5 back, this is where I have always left all docs [sic] per supervisor instructions and have  
6 had no previous issues." On June 7, 2017, Debbie Schwanz from PCC's benefits  
7 department denied the appeal, stating, "FML must be turned in within 3 days of returning  
8 to work. It is [employee's] responsibility to make sure to have request date stamped and  
9 be given a copy when handing in." (Testimony of Mathews, Schwanz; Ex. A7)

10 21) On the appeal form for the May 6 absence, Mathews wrote: "I have left all  
11 documentation at lead desk for supervisor signature and have not received anything back,  
12 this is per supervisor instruction. Also the reason I was not paid for this day was because  
13 it was an overtime day for me and I am not on PSL time yet." Amy Bertsch from PCC's  
14 benefits department denied the appeal on June 6, 2017, stating, "Employee didn't provide  
15 any documentation that would show timely submission of paperwork." (Testimony of  
16 Mathews; Ex. A7)

17 22) PCC terminated Mathews's employment on June 7, 2017, under PCC's  
18 Attendance and Punctuality Policy because she had reached at least seven absence hits.  
19 More specifically, after the absence of May 6, 2017, Mathews had a total of 7.5 hits. (Exs.  
20 A14, R8)

21 23) Mathews submitted a grievance form to PCC on June 12, 2017, asking to  
22 retain her employment status, and stating that she was discriminated against for asserting  
23 her FMLA rights. Employee Relations Manager, Kym Dressel, sent Mathews a letter on  
24

1 July 3, 2017, stating that Mathews's requests for family medical leave were untimely and  
2 that the issue was "considered closed." (Exs. R13, R14)

3 24) Mathews earned \$55,407 in wages from PCC in 2016, the year prior to her  
4 termination. In 2017, she only earned \$29,353, which consisted entirely of her wages  
5 from PCC. After her termination, she continued to seek employment as a radiographer.  
6 She received a job offer for a radiographer position on June 25, 2018, which she declined.  
7 (Testimony of Mathews; Exs. A24-A25)

8 25) Mathews felt traumatized after her termination because she felt that she had  
9 done all that PCC required of her. She felt that she was lied to regarding the family  
10 medical leave paperwork and she had no reason to believe she had done anything wrong.  
11 Mathews was out of work for approximately a year and a half. She had to move out of  
12 her home and into her sister's house, and had to place her belongings in storage. She  
13 was no longer self-sufficient and her children teased her about that. She lost sleep, and  
14 her weight fluctuated up and down. She felt that she had been an excellent employee  
15 and volunteered to work overtime when it was needed. (Testimony of Mathews)

16 26) Mathews had to pay federal tax penalties in the amount of \$436 in 2017  
17 because she no longer had health insurance. (Testimony of Mathews; Ex. A25)

18 27) The testimony of Mathews, Khosnaw, Beauchemin, Dressel and Schwanz  
19 was credible as to relevant matters, including their understanding regarding PCC's  
20 policies and the actions taken with regard to Mathews's requests for OFLA leave that are  
21 at issue in this case. Some witnesses gave speculative testimony as to what may have  
22 happened to the FML request form after Mathews placed it on the lead desk in her work  
23  
24

1 area. The forum disregarded all of this testimony and is unable to draw any conclusion  
2 as to what happened to that paperwork.

3 28) The testimony of vocational rehabilitation expert Stipe was credible with  
4 respect to statistics of job openings available to Mathews based on the skillsets identified  
5 in her resume. However, his testimony was not specific as to particular radiographer jobs  
6 that Mathews should have applied for, but did not. Accordingly, the forum gave little  
7 weight to Stipe's testimony on the issue of attempts made by Mathews to mitigate lost  
8 wage damages.

#### 9 **CONCLUSIONS OF LAW**

10 1) At all times material herein, PCC was an employer as defined in ORS  
11 659A.001(4) and a "covered employer" as defined in ORS 659A.150(1) and ORS  
12 659A.153(1). Mathews was an "eligible employee" of PCC under ORS 659A.150(2).

13 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of  
14 the persons and of the subject matter herein. ORS 659A.800 - ORS 659A.865.

15 3) PCC unlawfully denied Mathews leave to which she was entitled, and  
16 violated ORS 659A.183(1) and OAR 839-009-0320(3).

17 4) PCC counted OFLA leave against Mathews when determining her  
18 compliance with PCC's attendance policy in violation of ORS 659A.183(2) and OAR 839-  
19 009-0320(4).

20 5) PCC terminated Mathews because she invoked the provisions of the  
21 Oregon Family Leave Act in violation of ORS 659A.183(2).

22 6) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and  
23 Industries has the authority under the facts and circumstances of this case to award  
24

1 Mathews back pay and money damages for emotional and mental suffering she sustained  
2 and to protect the rights of Mathews and others similarly situated. The sum of money  
3 awarded and the other actions required of PCC in the Order below are an appropriate  
4 exercise of that authority.

#### 5 **OPINION**

6 In the Formal Charges, the Agency asserts three violations of Oregon's Family  
7 Medical Leave law. First, the Agency asserts that PCC denied family leave to Mathews  
8 for her absences on March 29-30 and May 6, 2017. Second, the Agency alleges that  
9 PCC counted OFLA leave for those dates against Mathews when determining her  
10 compliance with PCC's attendance policy. Finally, the Agency contends PCC terminated  
11 Mathews "for requesting OFLA leave" for those dates. Each alleged violation is discussed  
12 below.

#### 13 **DENIAL OF OFLA LEAVE**

14 In the Formal Charges, the Agency alleges that PCC unlawfully denied Mathews  
15 family leave for March 29-30 and May 6, 2017, citing to ORS 659A.183(1) and OAR 839-  
16 009-0320(3). ORS 659A.183(1) states that it is an unlawful practice for a covered  
17 employer to "[d]eny family leave to which an eligible employee is entitled under ORS  
18 659A.150 to 659A.186[.]" OAR 839-009-0320(3), provides:

19 "Pursuant to ORS 659A.183, it is an unlawful employment practice for an employer  
20 to deny family leave to an eligible employee or retaliate or in any way discriminate  
21 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."

22 To establish a prima facie case, the Agency must show that: 1) PCC was a covered  
23 employer as defined in ORS 659A.153(1); 2) Mathews was an eligible employee, i.e., she  
24

1 was employed by a covered employer at least 180 calendar days immediately preceding  
2 the date her medical leave began; 3) Mathews had a “serious health condition” as defined  
3 in OAR 839-009-0210(14)(e); 4) Mathews used or would have used OFLA leave to  
4 recover from or seek treatment for her serious health condition; and 5) PCC did not allow  
5 Complainant to use OFLA leave to which she was entitled in the manner required by ORS  
6 659A.150 to 659A.186. *In the Matter of WinCo Foods, Inc.*, 28 BOLI 259, 294 (2007).

7 PCC does not dispute that it was a covered employer or that Mathews was an  
8 eligible employee. Additionally, on February 8, 2017, Mathews provided a Certification  
9 of Healthcare Provider form signed by her health care provider to PCC for “neck injury –  
10 chronic cervical pain.” (Finding of Fact, #8). The certification form noted that she would  
11 need intermittent leave or a reduced work schedule “as needed.” Beginning in 2013, PCC  
12 had approved multiple requests for Mathews’s intermittent leave for that condition.  
13 Although PCC denied in its Answer that Mathews had a serious health condition, PCC  
14 did not refute the evidence at hearing that demonstrated that Mathews was unable to  
15 work due to pain from her neck injury on the dates in question. Consequently, the forum  
16 concludes that Mathews had a serious health condition as defined by OAR 839-009-  
17 0210(20)(e). The only remaining issue in dispute is whether PCC denied Mathews use  
18 of OFLA leave to which she was entitled in the manner required by law.

19 In its Answer, PCC raised an affirmative defense which alleged that Mathews’s  
20 absences were not protected by OFLA because of Mathews’s “own failure to comply with  
21 reasonable procedures set out by [PCC] in accordance with OAR 839-009-0250(3).”  
22 OAR 839-009-0250(3) states:

23 “When taking OFLA leave in an unforeseeable situation, an employee must give  
24 verbal or written notice within 24 hours before or after commencement of the leave.

1 This notice may be given by any other person on behalf of an employee taking  
2 unforeseeable OFLA leave. The employer may require written notice by the  
employee within three days of the employee's return to work."

3 PCC agrees that Mathews satisfied the "verbal" notice requirement of OAR 839-009-  
4 0250(3) when she called in to report her absences on March 29-30, and May 6, 2017.

5 However, it claims that she did not submit the correct written form in a timely manner and,  
6 thus, was not eligible for family medical leave. PCC requires employees to submit  
7 "Request for Family Medical Leave" or "FML" form to request that an absence be  
8 designated as family medical leave. The instructions that accompany the FML form state  
9 that it must be turned in to the Benefits Specialist. Additionally, employees also submit a  
10 "Multi-Purpose Request Form" to a Manufacturing Administrator. This form is used for  
11 payroll purposes to indicate whether a person is requesting to use vacation pay, sick pay  
12 or another type of paid leave.

13 *Absences Taken on March 29-30, 2017*

14 Mathews called in to report her absences on March 29-30, 2017, as required by  
15 PCC policy. When she returned to work on April 2, 2017, she submitted a multipurpose  
16 form for those absences. On the top right hand side of the form, Mathews handwrote the  
17 letters "FML." The multipurpose form was signed by Mathews's supervisor, Frank  
18 Williams, on April 3, 2019. Mathews asserts that she also completed the FML form and  
19 placed it on the desk of the "lead" in her department. However, the benefits department  
20 did not receive the form within three days of her return to work. On or about June 2, 2017,  
21 Mathews became aware that the absences for March 29-30, 2017, were not counted as  
22 family medical leave. At that time, she filled out a new FML form for those absences and  
23 submitted it.

1 Mathews also submitted a Family Medical Leave Appeal form on June 2, 2017, for  
2 the absences taken on March 29-30, 2017. She stated that the reason for the appeal  
3 was as follows: "I left all documentation at lead desk for supervisor signature and have  
4 received nothing back, this is where I have always left all docs [sic] per supervisor  
5 instructions and have had no previous issues." On June 6, 2017, the Benefits Department  
6 denied her appeal, stating, "FML must be turned in within 3 days of returning to work. It  
7 is ee's responsibility to make sure to have request date stamped and given a copy when  
8 handing in." (Finding of Fact, #20)

9 Mathews did not strictly comply with all of the requirements of PCC's written policy  
10 in that she did not transmit the FML request form directly to PCC's benefits department  
11 and did not obtain a date stamped copy showing the date she submitted it. Therefore,  
12 PCC asserts it was entitled to deny her leave request because she did not comply with  
13 the requirement to provide written notice within three days of returning to work. However,  
14 although the FML form states that it must be returned to the benefits department,  
15 Manufacturing Administrator Beauchemin and Benefits Specialist Schwanz both testified  
16 that FML forms are often routed to the benefits department by other individuals, such as  
17 supervisors, leads and from Beauchemin herself.

18 Additionally, while an employer may institute procedures for employees to follow  
19 when requesting leave, the law also requires that the employer take steps to inform  
20 employees when it is aware of a leave request, but has not received all the required  
21 paperwork. For example, under OAR 839-009-0250(6), when an employer acquires  
22 knowledge that an employee's leave may be for OFLA qualifying reasons, the employer  
23 must provide a written request for information to the employee within five business days  
24

1 to request verifying information.<sup>9</sup> In the case of *In the Matter of Income Property*  
2 *Management*, 31 BOLI 18, 37-38 (2010), the employer became aware that the employee  
3 was planning to return to work after her OFLA leave, but might need more time than she  
4 had originally planned. The forum found as follows:

5 "There is no dispute that Complainant was on authorized OFLA leave between  
6 January 9 and February 9, 2006. There is no dispute that Respondent knew on  
7 January 20, 2006, that Complainant was 'off work until an unknown date.'  
8 Respondent also knew that on January 24 Complainant was going to be evaluated  
9 for possible back surgery that could entail a longer leave period. Respondent knew  
10 all of this because on January 20, Complainant gave Respondent verbal notice  
11 that she did not know when she was going to return to work, i.e., that she may  
12 need more leave than originally authorized. There is nothing in Respondent's  
13 policy manual or OFLA leave policies that suggests Complainant was not following  
14 Respondent's 'known, reasonable and customary procedures' when she verbally  
15 indicated she may need additional leave.

16 "*Even if her statement did not constitute sufficient notice, and the forum finds that*  
17 *it did, Respondent had more than enough reason to believe that Complainant's*  
18 *continuing absence after February 9 qualified as OFLA leave and at that point had*  
19 *a duty to request additional information and treat the continuing absence as*  
20 *authorized unless Complainant failed to provide the requested information. Instead*  
21 *of requesting additional information, Respondent waited for a few days after*  
22 *Complainant's release expired and applied it's 'no call, no show' policy to end*  
23 *Complainant's employment. Respondent's argument that Complainant had notice*  
24 *she was required to submit medical verification when her release expired is*  
*inconsistent with the law. Merely handing Complainant a packet of OFLA papers*  
*in December 2005, without any follow-up, and expecting her to determine what her*  
*obligations are under OFLA does not satisfy Respondent's obligation to provide*  
*her with written notice each time Respondent requires her to provide medical*  
*verification and of the consequences if she fails to do so. OAR 839-009-0260(3)."*

(Emphasis added.) The forum has also previously found that an employer unlawfully  
denied OFLA leave to an employee when it was on notice that the employee was a  
candidate for OFLA leave, but did not seek additional information from the employee to

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<sup>9</sup> See also *In the Matter of Magno-Humphries, Inc.*, 25 BOLI 175 (2004), *aff'd without opinion*, *Magno-Humphries, Inc., dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), *rev den* 342 Or 523, 156 P3d 69 (2007).

1 make that determination. *In the Matter of Magno-Humphries, Inc.*, 25 BOLI at 196.  
2 Federal cases interpreting the Family Medical Leave Act have reached similar  
3 conclusions.<sup>10</sup> For example, the Ninth Circuit Court of Appeals has held that “it is the  
4 employer’s responsibility, not the employee’s, to determine whether a leave request is  
5 likely to be covered” by FMLA. *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112,  
6 1130-31 (2001) (when the employee provided two doctor’s notes regarding her absences,  
7 the company was placed on notice that the leave might be covered by FMLA, “and could  
8 have inquired further to determine whether the absences were likely to qualify for FMLA  
9 protection.”)

10 In this case, there is no question that both Mathews’s supervisor, Williams, and  
11 Manufacturing Administrator Beauchemin were aware that Mathews was absent for family  
12 medical leave reasons after she called in with verbal notice and wrote “FML” on her  
13 multipurpose form. Upon receiving this information, a note was made in the “comments”  
14 section of Mathews’s attendance record to indicate that a FML leave request was  
15 pending. Moreover, Mathews already had a medical certification on file signed by her  
16 medical provider which stated that she needed intermittent medical leave for her neck  
17 injury. Accordingly, if PCC was missing the required specific form to complete this leave  
18 request, someone should have contacted Mathews and asked her to complete that form.

19 PCC argues that Mathews should have known that the required FML form was  
20 missing because she could click on the “attendance” button when she was logged into  
21 PCC’s EPMS computer system. However, there was no evidence in the record as to  
22

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23  
24 <sup>10</sup> OFLA is to be construed in a manner consistent with similar provisions of the FMLA. ORS 659A.186(2).

1 what Mathews's attendance status was in the EPMS system during March, April and May  
2 of 2017. As well, Beauchemin testified that when an employee calls in to report an FML  
3 absence, the absence will be initially marked as "pending" for a period of time until she  
4 determines that an FML request was not approved by the benefits department, at which  
5 time it is changed to an attendance hit. (Finding of Fact, #16) Moreover, as explained  
6 above, the law puts the onus on the employer, not the employee, to follow up with the  
7 employee when it becomes aware of potential OFLA leave. Accordingly, the forum  
8 concludes that PCC violated ORS 659A.183(1) when it failed to designate Mathews's  
9 absences on March 29-30, 2017, as family medical leave.

10 *Absence Taken on May 6, 2017*

11 The circumstances of the absence Mathews took on May 6, 2017, are substantially  
12 the same as those with respect to the March 29-30 absences in that Mathews called in to  
13 report an FML absence, a medical certification was on file for this absence and her  
14 attendance record initially reflected that she had called in to request FML leave and the  
15 request was pending. The only difference with respect to this absence is that Beauchemin  
16 did not have a multipurpose form with the letters "FML" written on it. The forum concludes  
17 that regardless of whether the multipurpose form was turned in or received, PCC still had  
18 sufficient information that this absence might qualify as OFLA protected leave and  
19 someone should have followed up with Mathews to request any required paperwork.  
20 Therefore, the forum also concludes that PCC violated ORS 659A.183(1) when it failed  
21 to designate Mathews's absence on May 6, 2017, as family medical leave.<sup>11</sup>

22 \_\_\_\_\_  
23 <sup>11</sup> There is also evidence in the record that Mathews called in as absent in October and December of 2016  
24 for OFLA protected leave, and that she received an attendance hit for those absences. (See Ex. R8)  
However, the Agency did not assert a violation for these absences in the Formal Charges.

1 **COUNTING OF OFLA LEAVE UNDER ATTENDANCE POLICY**

2 The Agency asserts that PCC counted OFLA leave for March 29-30 and May 6,  
3 2017, against Mathews in determining her compliance with PCC's attendance policy in  
4 violation of ORS 659A.183(2) and OAR 839-009-0320(4). Under ORS 659A.183(2), it is  
5 an unlawful employment practice for a covered employer to "[r]etaliat[e] or in any way  
6 discriminate against an individual with respect to \* \* \* any other term or condition of  
7 employment because the individual has inquired about the provisions of ORS 659A.150  
8 to 659A.186, submitted a request for family leave or invoked any provision" of the Oregon  
9 Family Leave Act. OAR 839-009-0320(4) further explains, that it "is an unlawful  
10 employment practice for an employer to count OFLA leave against an employee in  
11 determining the employee's compliance with attendance policies[.]" In this case,  
12 Mathews invoked a protected right under OFLA when she called in and requested that  
13 her March 29-30 and May 6, 2017, absences be counted as OFLA leave. PCC made an  
14 adverse decision when it counted those absences against Mathews using its attendance  
15 points system. Accordingly, the Agency established that PCC violated ORS 659A.183(2)  
16 and OAR 839-009-0320(4).

17 **TERMINATION FOR INVOKING OFLA**

18 The Agency also alleges that PCC violated ORS 659A.183(2) and OAR 839-009-  
19 0320(5), when it "terminated [Mathews] for requesting OFLA leave for March 29, March  
20 30 and May 6, 2017." Because Mathews was terminated based on PCC's use of its points  
21 based attendance system, the assertion of a violation of ORS 659A.183(2) for the  
22 termination is an extension the previous allegation discussed above. In other words,  
23 because the OFLA absences were unlawfully counted against Mathews, she accrued  
24

1 enough attendance hit points to result in her termination. Accordingly, the forum finds  
2 that PCC's termination of Mathews also violated ORS 659A.183(2).

3 The allegation of a violation of OAR 839-009-0320(5) is different in that this section  
4 of the regulation makes it an unlawful employment practice "to discharge, expel or  
5 otherwise discriminate against any person because the person has filed a complaint,  
6 testified or assisted in any proceeding in connection with the Oregon Family Leave Act."  
7 At the time of her termination on June 7, 2017, Mathews had not yet filed a complaint,  
8 testified of assisted in any proceeding to enforce OFLA. Accordingly, the Agency has not  
9 established that her termination violated OAR 839-009-0320(5).

## 10 **DAMAGES**

### 11 *Lost Wages*

12 Mathews is eligible for a back pay award due to the violations described above.  
13 ORS 659A.850. The Formal Charges assert that Mathews is entitled to lost wages of "at  
14 least \$59,000." The purpose of a back pay award in employment discrimination cases is  
15 to compensate a complainant for the loss of wages and benefits the complainant would  
16 have received but for the respondent's unlawful employment practices. *In the Matter of*  
17 *Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238 (2015). Back pay awards are  
18 calculated to make a complainant whole for injuries suffered as a result of the  
19 discrimination. *Id.* A complainant who seeks back pay is required to mitigate damages  
20 by using reasonable diligence to find other suitable employment. *Id.*

21 In its closing argument, the Agency requested lost wages "as proven" at hearing,  
22 and argued that the damages consist of wages Mathews would have received from the  
23 date of her termination until a final order is issued. Mathews earned \$55,407 in wages  
24

1 from PCC in 2016, the year prior to her termination. In 2017, she only earned \$29,353 in  
2 wages from PCC and had no further income. The wages earned in 2017 amount to  
3 \$1,304.58 for each of the 22.5 weeks she worked in that year.

4 Mathews credibly testified that she continued to seek employment as a  
5 radiographer, and received a job offer on June 25, 2018, which she declined. Accordingly,  
6 the forum finds that she incurred damages from the date of her termination up until the  
7 date she declined the job offer, resulting in 54 weeks of lost wages. Therefore, she  
8 sustained total lost wages in the amount of \$70,447.32 (54 weeks x \$1,304.58).

9 *Emotional Distress Damages*

10 The Agency seeks damages on behalf of Complainant in the amount of at least  
11 \$150,000 for emotional, mental and physical suffering. Pursuant to ORS 659A.850, the  
12 Commissioner of the Bureau of Labor and Industries has the authority to award money  
13 damages for emotional, mental, and physical suffering sustained. *In the Matter of Frehoo*  
14 *Inc.*, 36 BOLI 42, 71 (2015). The commissioner has the authority to fashion a remedy  
15 adequate to eliminate the effects of unlawful employment practices. *Id.*

16 In determining an award for emotional and physical suffering, the forum considers  
17 the type of discriminatory conduct, and the duration, frequency, and severity of the  
18 conduct. It also considers the type and duration of the mental distress and the  
19 vulnerability of the aggrieved persons. A complainant's testimony, if believed, is sufficient  
20 to support a claim for mental suffering damages. *Id.*, citing *In the Matter of Dr. Andrew*  
21 *Engel, DMD, PC*, 32 BOLI 94, 141 (2012).

22 Mathews testified briefly about the mental and emotional harm she suffered as a  
23 result of PCC's unlawful employment practices. She credibly testified that she felt  
24

1 traumatized after her termination because she felt that she had done all that PCC required  
2 of her. She felt that she was lied to regarding the family medical leave paperwork and  
3 she had no reason to believe she had done anything wrong. Mathews was out of work  
4 for approximately a year and a half. She had to move out of her home and into her sister's  
5 house, and had to place her belongings in storage. She was no longer self-sufficient and  
6 her children teased her about that. She lost sleep, and her weight fluctuated up and  
7 down. She felt that she had been an excellent employee and volunteered to work  
8 overtime when it was needed.

9 In light of the harms she experienced as a result of PCC's unlawful employment  
10 practices, the forum concludes that Mathews sustained emotional distress damages.  
11 However, the evidence presented by the Agency at hearing did not include sufficient  
12 information to indicate a severe and long lasting level of damages that would support an  
13 award of "at least \$150,000" as requested in the Formal Charges. The forum's cases  
14 awarding damages at the level requested by the Agency contained substantially more  
15 evidence of emotional and mental harm of a greater severity and duration. See, e.g.  
16 *Bravo Event Service, Inc., & Dan Kor*, 36 BOLI 250, 268-69 (2018) (\$100,000 awarded  
17 to complainant who was sexually harassed and experienced harm that impacted her  
18 relationships and how she conducted herself at her current place of employment); *In the*  
19 *Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill*, 34 BOLI 67, 76-77 (2015)  
20 (\$120,000 awarded for emotional and mental suffering following a termination); *In the*  
21 *Matter of Cyber Center, Inc.*, 32 BOLI 11, 40-41 (2012) (the forum awarded \$120,000 to  
22 the complainant who "testified credibly and at length" about the emotional and mental  
23 suffered she endured). The record in this matter was not as significantly developed as  
24

1 those in the cases with higher awards. Based on the evidence presented at hearing in  
2 this matter, the forum concludes that an appropriate award for the harm experienced by  
3 Mathews is \$20,000. See, e.g., *Lioness Holdings, LLC dba Tan Republic and Peter*  
4 *Lamka*, 36 BOLI 229, 248 (2018) (concluding that \$20,000 was an appropriate award of  
5 emotional distress damages); *In the Matter of Hey Beautiful Enterprises, Ltd. and*  
6 *Kimberly Schoene*, 34 BOLI 188 (2015); (awarding \$10,000 emotional distress damages);  
7 *In the Matter of Blue Gryphon, LLC and Flora Turnbull*, 34 BOLI 216, 239 (2015) (finding  
8 that the complainant suffered harm that resulted in \$20,000 of emotional distress  
9 damages).

#### 10 *Out-of-Pocket Expenses*

11 In the Formal Charges, the Agency seeks recovery of out-of-pocket expenses  
12 incurred by Mathews of “at least \$1,000.” Economic loss that is directly attributable to an  
13 unlawful employment practice is recoverable from a respondent as a means to eliminate  
14 the effects of any unlawful practice found, including actual expenses. *In the Matter of*  
15 *Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett*, 33 BOLI 121,  
16 158 (2014). Mathews credibly testified that she incurred storage unit expenses after her  
17 termination when she had to move out of her home and move in with her sister. She did  
18 not testify as to the amount of the storage unit expenses, but referred to Ex. A22, which  
19 included an itemization of those expenses. However, Ex. A22 was not offered or received  
20 into evidence. Additionally, there was no evidence that the storage unit expenses  
21 exceeded the monthly housing expenses Mathews paid prior to her termination.  
22 Accordingly, the forum declines to award out-of-pocket expenses for the storage unit  
23 expenses.

1 Mathews also credibly testified that she had to pay federal tax penalties in the  
2 amount of approximately \$436 in 2017 because she no longer had health insurance.  
3 Accordingly, the forum awards out-of-pocket expenses in the amount of \$436.

#### 4 **OTHER REQUESTED RELIEF**

5 In its Formal Charges, the Agency asked the forum to issue a cease and desist  
6 order against PCC, requiring it to immediately stop all of the unlawful employment  
7 practices alleged in the Formal Charges. BOLI's Commissioner is authorized to issue an  
8 appropriate cease and desist order reasonably calculated to eliminate the effects of any  
9 unlawful practice found. ORS 659A.850(4). Among other things, that may include  
10 requiring a respondent to:

11 "(a) Perform an act or series of acts designated in the order that are reasonably  
12 calculated to:

13 "(A) Carry out the purposes of this chapter;

14 "(B) Eliminate the effects of the unlawful practice that the respondent is found to  
15 have engaged in, including but not limited to paying an award of actual damages  
16 suffered by the complainant and complying with injunctive or other equitable  
17 relief; and

18 "(C) Protect the rights of the complainant and other persons similarly situated[.]"

19 The forum finds that the Agency's requested cease and desist order to be  
20 appropriate relief in this case.

#### 21 **EXCEPTIONS TO THE PROPOSED ORDER**

##### 22 *Agency's Exceptions*

##### 23 I. Lost Wage Damages

24 The Agency takes exception to two portions of the lost wages determination. First,  
the Agency disagrees with the forum's conclusion that lost wages damages ended on  
June 25, 2018, the date Mathews received a new job offer, which she declined. Second,

1 the Agency disagrees with the forum basing its wage calculation on the wages Mathews  
2 earned in 2016, and asks the forum to use the monthly average of the wages earned in  
3 2017 instead.

4 First, the Agency argues that the forum should not conclude that the lost wage  
5 damages ended on the date Mathews turned down a job offer from Element, which was  
6 transmitted to her on June 25, 2018. In support of its position, the Agency argues that  
7 Mathews turned down the offer for that position because she received a job offer around  
8 that same time from PCC, but she was terminated from that new position for "poor work  
9 history" immediately after completing the orientation session. The Agency attempted to  
10 introduce evidence of the circumstances regarding her 2018 job offer from PCC and  
11 PCC's termination of that offer. Because those issues are the subject matter of another  
12 BOLI Contested Case, the forum granted PCC's objection regarding the introduction of  
13 that evidence. The issue of whether it was unlawful for PCC to terminate Mathews from  
14 the new position in 2018 will be addressed in the ruling for Contested Case No. 79-19,  
15 not in this matter. Accordingly, this portion of the Agency's exception is OVERRULED.

16 Second, the Agency requests that the forum base its wage calculation on the  
17 wages Mathews earned in 2017, instead of 2016. The forum agrees with the Agency's  
18 position that lost wages should be calculated based on the more recent 2017 figures and  
19 GRANTS the Agency's exception, as reflected in the Opinion and Order.<sup>12</sup>

20 ///

21 ///

22 \_\_\_\_\_  
23 <sup>12</sup> The Agency requested a calculation of lost wages based on Mathews's average monthly wages. The  
24 forum's analysis above is substantially the same, but is based on a weekly average, instead of monthly  
average.

1 II. Emotional Distress Damages

2 The Agency also takes exception to the amount of emotional distress damages  
3 awarded and requests that the amount be increased to \$50,000 from the \$20,000 set  
4 forth in the Proposed Order. In support of its position, the Agency points to essentially  
5 the same facts that were relied on in the Proposed Opinion for calculating the damages,  
6 but argues that Mathews's "descriptions [of her emotional distress] are indicative of  
7 damage that occurs over a period of time and damages should be weighted accordingly."  
8 The forum notes that the Mathews's testimony regarding her emotional distress damages  
9 lasted for only approximately one to two minutes, and she provided little detail as to how  
10 the termination affected her daily life. Moreover, the forum could not locate any past  
11 cases in the range of the \$50,000 requested by the Agency which would support such an  
12 award in this case. Accordingly, this exception is OVERRULED.

13 *PCC's Exceptions*

14 I. Exceptions to Proposed Findings of Fact

15 PCC requests that the forum "take into account" 11 additional proposed statements  
16 of fact, which are discussed below.

17 Several of PCC's proposed additional facts were already included in the Proposed  
18 Order as follows:

- 19 • The facts in Exception II.a. are addressed in Findings of Fact #9 and #15.
- 20 • The facts in Exception II.b. are addressed in Finding of Fact #9.
- 21 • The pertinent information discussed in Exception II.e. is contained in Finding of  
22 Fact #16.
- 23 • The facts in Exception II.f. is addressed in Finding of Fact #18.
- 24 • The information in Exception II.g. is mentioned in Footnote 10
- The facts in Exception II.j. are mentioned in Finding of Fact # 9.

23 Accordingly, Exceptions II.a., II.b., II.e., II.f., II.g. and II.j. are OVERRULED.

1 Exceptions II.c. and II.d. are GRANTED as reflected in revisions to the Findings of  
2 Fact above.

3 Exception II.h. pertains to issues that are addressed in Footnote 7 of Finding of  
4 Fact #18. The Exception is GRANTED, in part, as reflected in additions to Footnote 7  
5 above, but is otherwise OVERRULED.

6 With Exception I.e., PCC asks the forum to consider that Beauchemin did not think  
7 it made sense for Mathews to leave the FML form on a lead desk. However, Beauchemin  
8 did not have knowledge of Mathews's communications with her supervisor and Mathews  
9 credibly testified that she was told to place the FML form on the lead desk. Accordingly,  
10 Exception II.i. is OVERRULED.

11 In Exception II.k., PCC asks the forum to note that Mathews "never saw a mental  
12 health provider because of her termination." PCC does not indicate where this  
13 information may have been in the record, and the forum could not locate a reference to  
14 any such testimony.<sup>13</sup> The forum notes that the lack of medical consultation or the failure  
15 to seek counseling pertains to the severity of mental suffering, not necessarily to its  
16 existence. See *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 41 (2012). Accordingly,  
17 Exception II.k. is OVERRULED.

## 18 II. Conclusions of Law

19 In Section III of PCC's Exceptions, PCC requests that the forum revise four  
20 Conclusions of Law, stating in a conclusory fashion that the "Proposed Conclusions of  
21 Law are not supported by substantial evidence in the record, and there is no rational

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22  
23  
24 <sup>13</sup> It is possible this is mentioned at some point in the record, but the forum declines to search the record  
for this information when the award of emotional distress damages was based on Mathews's testimony.

1 connection between the facts in the record and the legal conclusions.” The reasoning  
2 regarding each conclusion is discussed in more detail in the Opinion and in the discussion  
3 regarding the remainder of PCC’s Exceptions below. Accordingly, for reasons addressed  
4 elsewhere in this Final Order, the Exceptions to the Conclusions of Law are  
5 OVERRULED.

6 III. Application of Law in the Opinion

7 In this section of its Exceptions, PCC takes issue with two portions of the analysis  
8 in the Proposed Opinion.

9 First, in Exception IV.A., PCC states that it “is a clearly erroneous application of  
10 Oregon law to find [that PCC] violated OFLA where its policies and procedures are lawful,  
11 and [Mathews] admittedly did not follow them.” In making this argument, PCC  
12 mischaracterizes the forum’s conclusions. While the forum noted that Mathews did not  
13 follow the written instructions to obtain a “date stamped copy” of her FML request so that  
14 she had proof that she submitted it, the forum nevertheless concluded that she placed  
15 completed FML forms on the desk of the lead in her department, as she had been  
16 instructed to do and had done in the past. The credible evidence established that she  
17 filled out the form, but that the benefits department did not receive it – not that Mathews  
18 failed to fill out the form as PCC argues. Accordingly, Exception IV.A. is OVERRULED.

19 Second, in Exception IV.B., PCC argues that it did not have sufficient notice that it  
20 should have followed up with Mathews regarding her leave requests. With respect to the  
21 absences of March 29-30, 2017, PCC argues that “something as scant as writing the  
22 letters ‘FML’ on a payroll form” does not constitute sufficient notice. In making that  
23 argument, PCC ignores the other evidence, in addition to the handwritten FML notation  
24

1 on the multipurpose form, showing that it was aware that those absences were for OFLA  
2 reasons, including:

- 3 • Mathews called in and provided verbal notice that she would be absent for family  
4 medical leave reasons.
- 5 • A notation was made in the comments section of Mathews's attendance record  
6 indicating that a FML leave request was pending.
- 7 • Prior to the absence, Mathews had a medical certification on file signed by her  
8 medical provider stating that she needed intermittent medical leave for her neck  
9 injury.

10 With respect to Mathews's absence of May 6, 2017, Mathews also called in and  
11 provided she was absent for medical leave reasons, the attendance record noted that she  
12 had called in to report a FML absence and the medical certification was on file. Given  
13 that these absences were entered into the payroll system as OFLA absences, someone  
14 should have followed up and notified Mathews that the benefits department did not have  
15 the specific form that it needed. PCC should not be able to escape liability when it clearly  
16 was aware that Mathews intended to take FML leave for those absences and had  
17 provided a certification from her medical provider. Accordingly, this exception is also  
18 OVERRULED.

#### 19 IV. Damages

##### 20 A. Emotional Distress Damages

21 In Exception V.A., PCC argues that emotional distress damages are not an  
22 available award for OFLA violations. In the Formal Charges, the Agency bases its request  
23 for damages on ORS 659A.850(4). Notably, the forum has awarded emotional distress  
24 or mental suffering damages as a remedy for OFLA violations in the past, pursuant to  
25 ORS 659A.850(2) and (4). See, e.g. *In the Matter of Income Property Management*, 31  
26 *BOLI 18, 41 (2010)*; *In the Matter of Gordy's Truck Stop, LLC*, 26 *BOLI 234, 252-54*

1 (2005). In contrast, PCC's Exceptions reference unpublished decisions from the U.S.  
2 District Court of Oregon which do not appear to analyze ORS 659A.850(4).

3 As previously stated, the Agency cites to ORS 659A.850(4) in support of the claim  
4 for damages, which reads, in part:

5 "(4) After a hearing under this section, the commissioner shall issue an appropriate  
6 cease and desist order against any respondent found to have engaged in any  
7 unlawful practice alleged in the complaint. The order must be signed by the  
8 commissioner and must take into account the need to supervise compliance with  
9 the terms of order. The order may require that the respondent:

10 "(a) Perform an act or series of acts designated in the order that are reasonably  
11 calculated to:

12 "(A) Carry out the purposes of this chapter;

13 "(B) Eliminate the effects of the unlawful practice that the respondent is  
14 found to have engaged in, including but not limited to paying an award of  
15 actual damages suffered by the complainant and complying with injunctive  
16 or other equitable relief; and

17 "(C) Protect the rights of the complainant and other persons similarly  
18 situated[.]"

19 The forum finds that the statute is sufficiently broad to include violations of ORS  
20 659A.183. Accordingly, PCC's Exception V.A. is OVERRULED.

21 B. Lost Wages and Out-of-Pocket Expenses

22 PCC also objects to the award of lost wages and out-of-pocket expenses.

23 With respect to the amount of lost wages, the forum's conclusion is based on the  
24 wages Mathews earned close in time to her termination, and there was no evidence that  
her wages would have been reduced or that she would have been terminated for other  
reasons. Accordingly, this exception is OVERRULED.

With respect to out-of-pocket expenses, PCC argues that Mathews merely  
speculated as to the amount of her 2018 tax penalty. Upon review of the record, the  
forum agrees with PCC as Mathews testified that she "had to assume" and "guess" as to

1 the amount of the 2018 penalty. Accordingly, this exception is GRANTED, as reflected  
2 in the Opinion above.

3 **ORDER**

4 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS  
5 659A.850(4), and to eliminate the effects of Respondent **PCC Structurals, Inc.** violations  
6 of ORS 659A.183(1),(2) and OAR 839-009-0320(3),(4), and as payment of the damages  
7 awarded, the Commissioner of the Bureau of Labor and Industries hereby orders  
8 Respondent **PCC Structurals, Inc.** to deliver to the Administrative Prosecution Unit of  
9 the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street,  
10 Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and  
11 Industries in trust for Complainant **Michele Mathews** in the amount of:

12 1) SEVENTY THOUSAND FOUR HUNDRED AND FORTY-SEVEN  
13 DOLLARS AND THIRTY-TWO CENTS (\$70,447.32), less lawful deductions,  
14 representing wages lost by Michele Mathews as a result of Respondent PCC  
15 Structurals, Inc.'s unlawful employment practice found herein; plus,

16 2) TWENTY THOUSAND DOLLARS (\$20,000), representing  
17 compensatory damages for emotional and mental suffering Michele Mathews  
18 experienced as a result of Respondent PCC Structurals, Inc.'s unlawful  
19 employment practices; plus,

20 3) FOUR HUNDRED AND THIRTY-SIX DOLLARS (\$436) representing  
21 out-of-pocket expenses incurred by Michele Mathews as a result of Respondent  
22 PCC Structurals, Inc.'s unlawful employment practices; plus,

23 4) Interest at the legal rate on the sum of NINETY THOUSAND EIGHT  
24 HUNDRED AND EIGHTY-THREE DOLLARS AND THIRTY-TWO CENTS  
(\$90,883.32) from the date the Final Order is issued until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 659A.850(4),  
and to eliminate the effects of Respondent PCC Structurals, Inc.'s unlawful employment  
practices found herein, the Commissioner of the Bureau of Labor and Industries hereby

1 orders Respondent **PCC Structural, Inc.** to cease and desist from (1) denying family  
2 medical leave to eligible employees and (2) discriminating against any employee for  
3 invoking the Oregon Family Medical Leave Act.

4   
5 \_\_\_\_\_  
6 Val Hoyle, Commissioner  
7 Bureau of Labor and Industries

8 ISSUED ON: August 6, 2020  
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