32 BOLI ORDERS

In the Matter of

SCHULTZ MFG., INC.

Case No. 10-12
Final Order of Commissioner Brad Avakian
Issued April 4, 2012

SYNOPSIS

Respondent violated Oregon child labor laws by employing a minor in 2008 and 2009 without first obtaining a validated employment certificate, pursuant to ORS 653.307. The minor was seriously injured while engaged in hazardous work prohibited by Oregon's child labor laws and Respondent was assessed a civil penalty in the amount of $1,000. ORS 653.307; ORS 653.370; OAR 839-019-0010, OAR 839-019-0020, OAR 839-019-0025, OAR 839-021-0104.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 19, 2012, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Case presenter Chet Nakada, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Matthew Schultz represented Schultz Mfg., Inc., as its authorized representative.

The Agency called as witnesses: Matthew Schultz, Respondent's authorized representative; Margaret Trotman, BOLI Wage and Hour Division compliance specialist; Karen Gernhart, BOLI Wage and Hour Division Child Labor administrative specialist; and Trevor Weller, former Respondent minor employee.

Respondent called Matthew Schultz as its only witness.

The forum received as evidence:
a) Administrative exhibits X-1 through X-6;
b) Agency exhibits A-1 through A-11 (filed with the Agency's case summary);
c) Respondent exhibits R-1 through R-7.

Having fully considered the entire record in this matter, I, Brad Avakian, 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 8, 2011, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") alleging that Respondent violated Oregon's child labor law, specifically ORS 653.307(2), by employing Trevor Weller, a minor, without first obtaining an Annual Employment Certificate ("Certificate"). The Agency alleged that Respondent's violation was aggravated by the fact that Weller suffered a serious injury while employed by Respondent, Respondent knew or should have known of the violation, the violation was serious and of great magnitude, and applying for and obtaining a Certificate would not have been difficult. The Agency sought to assess a $1,000 civil penalty.

2) Respondent was served with the Notice and timely filed an answer and a request for hearing through its designated authorized representative Matthew Schultz. In its answer, Respondent admitted it did not have a Certificate when Weller was hired, but contended that Weller's injury was "non-serious" and that $1,000 was an excessive civil penalty, and that already paid a civil penalty to the U.S. Department of Labor related to the same injury.

3) On October 10, 2011, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 11:00 a.m. on March 19, 2012. The Notice of Hearing included a copy of the Notice of Intent to Assess Civil Penalties, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

4) On January 10, 2012, the ALJ issued an order requiring the Agency and Respondent each to submit a case summary by March 9, 2012, and notified them of the possible sanctions for failure to comply with the case summary order.

5) The Agency and Respondent timely submitted case summaries.

6) At the start of hearing, the ALJ verbally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

7) On March 28, 2012, 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. Respondent timely filed exceptions on April 2, 2012, that are addressed in the Opinion section of this Final Order. On April 3, 2012, the Agency filed objections to Respondent's exceptions.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was an Oregon corporation that manufactured motocross parts in Oregon City. At times material, Matthew Schultz was Respondent's corporate president.

2) In October 2008, Respondent, through Schultz, hired Trevor Weller. Prior to being hired, Weller filled out an employment application. On the application, Weller wrote his date of birth is July 8, 1991, a date that is his actual date of birth.

3) Schultz knew that Weller was only 17 years old at the time he hired Weller.

4) Until May 6, 2009, Weller's job duties with Respondent included operating a power-driven band saw. Schultz trained him how to use the band saw. When Weller used the band saw, he used his hands to guide a plastic part against the saw's blade.

5) On May 6, 2009, Weller was operating Respondent's band saw when the middle finger of his right hand came in contact with the blade of the band saw. As a result of the contact, the top knuckle of the middle finger of Weller's right hand was fractured and he suffered a cut around the same knuckle that bled considerably.

6) When Weller was injured, "911" was called and Weller was transported by ambulance to Willamette Hospital in Oregon City. At the hospital, he spent approximately 90 minutes in the emergency room, where his wound was cleaned, his cut was sewn shut with 12 stitches and bandaged, and a padded metal splint was put on his finger. He kept the injury bandaged for about a month.

7) Weller filed for and received workers compensation benefits related to his May 6, 2009, injury.

8) Weller continued to work for Respondent after his injury, but did not operate the band saw again until after his 18th birthday.

9) At the time of hearing, Weller's injury only bothered him when he hits the injured finger against a hard object. His doctor expects the injury to heal completely with no residual effects.

10) Respondent did not apply for or obtain an Annual Employment Certificate ("Certificate") from BOLI at any time while Weller worked for Respondent. Obtaining a Certificate would not have been difficult.

11) When employers apply for a Certificate, BOLI's application requires them to list the machinery that will be operated by the minor employee. Had Respondent applied for a Certificate and stated that Weller would be operating a band saw, BOLI's Child Labor administrative specialist Karen Gernhart would have immediately called Respondent to inform Respondent that it was unlawful for a minor to operate a band

saw. Gernhart would not have issued a Certificate to Respondent if Respondent planned to have a minor employee operating a band saw.

12) Had Respondent obtained a Certificate, Weller would not have been allowed to operate the band saw because Schultz would have learned that minors under the age of 18 are not legally allowed to operate a band saw and would have obeyed the law.

13) Schultz cooperated with the Agency's child labor investigation.

14) Respondent has had no other violations of Oregon's child labor laws.

15) Respondent paid a civil penalty of $1,485.00 to the U. S. Department of Labor ("USDOL") on February 26, 2010, based on the USDOL's finding that Respondent had employed a minor "contrary to the child labor provisions of the [FLSA]."

16) All of the witness testimony was credible and undisputed.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent was an Oregon corporation operating a manufacturing facility that employed one or more persons in Oregon.

2) In October 2008, Respondent hired Trevor Weller, a minor who did not turn 18 years old until July 8, 2009. Respondent, through Schultz, knew that Weller was only 17 years old when he was hired.

3) Until May 6, 2009, Weller's job duties included operating a power-driven band saw. On May 6, 2009, Weller was operating Respondent's band saw when the middle finger of his right hand came in contact with the blade of the band saw and he fractured his top knuckle and suffered a cut around the same knuckle that bled considerably. Weller was transported by ambulance to a hospital, where his wound was cleaned, his cut sewn shut with 12 stitches and bandaged, and a padded metal splint put on his finger.

4) Respondent did not apply for or obtain an Annual Employment Certificate from BOLI at any time while Weller worked for Respondent.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 653.305 to 653.370. ORS 653.010(3); OAR 839-019-0004(5)

2) The actions, inaction, statements, and motivations of Matthew Schultz, Respondent's corporate president, are properly imputed to Respondent.

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

4) Respondent violated ORS 653.307(2) by employing a minor under 18 years old in Oregon during 2008 and 2009 without first obtaining a validated annual employment certificate to employ minors.

5) 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 a civil penalty against Respondent for its violation of ORS 653.307. ORS 653.370, OAR 839-019-0010(1), and OAR 839-019-0025.

OPINION

In its Notice of Intent, the Agency alleges that Respondent committed a single violation of Oregon's child labor laws by employing a minor without first obtaining the Employment Certificate ("Certificate") required by ORS 653.307. Under ORS 653.370, the Agency seeks to assess a civil penalty of $1,000 for that violation. Although Respondent does not dispute that it committed the alleged violation, the forum sets out the pertinent statute and rule to provide additional context to the amount of civil penalty assessed in this proposed order.

ORS 653.307 provides, in pertinent part:

> "(1) In accordance with the applicable provisions of ORS chapter 183, the Wage and Hour Commission shall adopt rules governing annual employment certificates required under this section. * * *
>
> "(2) An employer who hires minors shall apply to the Wage and Hour Commission for an annual employment certificate to employ minors. The application shall be on a form provided by the commission and shall include, but not be limited to:
>
> "(a) The estimated or average number of minors to be employed during the year.
>
> "(b) A description of the activities to be performed.
>
> "(c) A description of the machinery or other equipment to be used by the minors.
>
> "(3) Once a year, the Bureau of Labor and Industries shall provide to all employers applying for an annual employment certificate an information sheet summarizing all rules and laws governing the employment of minors."

A "minor" is "any person under 18 years of age." OAR 839-019-0004(7).

OAR 839-021-0220 contains the rules promulgated by the Wage and Hour Commission pursuant to ORS 653.307 governing annual employment certificates. Those rules provide:

> "(1) Unless otherwise provided by rule of the commission, no minor 14 through 17 years of age may be employed or permitted to work unless the employer:

> "(a) Verifies the minor's age by requiring the minor to produce acceptable proof of age as prescribed by these rules; and
>
> "(b) Complies with the provisions of this rule.
>
> "(2) An employer may not employ a minor without having first obtained a validated employment certificate from the Bureau of Labor and Industries. Application forms for an employment certificate may be obtained from any office of the Bureau of Labor and Industries or by contacting the Child Labor Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon Street Suite 1045, Portland OR 97232, 971-673-0836.
>
> "(a) The Bureau of Labor and Industries will issue a validated employment certificate upon review and approval of the application. The validated employment certificate will be effective for one year from the date it was issued, unless it is suspended or revoked.
>
> "(b) If, after the issuance of a validated employment certificate, the duties of the minors are changed from those originally authorized under the employment certificate or the employer wishes to employ minors at an additional establishment, the employer must submit a 'Notice of Change (to Annual Employment Certificate)' form to the Child Labor Unit, Wage and Hour Division of the Bureau of Labor and Industries. The '"Notice of Change (to Annual Employment Certificate)' form must be submitted within 15 days of the change on a form provided by the bureau. The bureau will approve or deny any change(s) in duties and notify the employer. If the bureau denies the changes, the employer must immediately reassign any affected minor to approved duties or terminate the minor's employment."

The statute and rule leave no doubt that a primary purpose of the Employment Certificate requirement is to protect minors by ensuring they are not allowed to perform job duties or work in occupations deemed hazardous to minors by requiring that BOLI screen all minor's stated job duties prior to their commencement of work. Respondent did not apply for and obtain a Certificate, thereby violating ORS 653.307(20) and exposing Weller to injury.

CIVIL PENALTY

In its amended answer, Respondent admitted its violation of ORS 653.307, but alleges immunity from a civil penalty under ORS 653.307(5)(a). In the alternative, Respondent alleges several mitigating factors that make the Agency's proposed civil penalty of $1,000 excessive.

First, Respondent contends that its payment of a civil penalty to the U. S. Department of Labor ("USDOL") for a violation of the child labor provisions of the Federal Fair Labor Standards Act ("FLSA") makes Respondent immune from an civil penalty pursuant to ORS 653.370(5)(a). Respondent introduced evidence that it paid a penalty of $1,485.00 to the USDOL on February 26, 2010, based on the USDOL's

finding that Respondent had employed a minor "contrary to the child labor provisions of the [FLSA]." ORS 653.370(5)(a) provides:

> "(5)(a) Notwithstanding subsection (1) of this section, the commissioner may not impose a civil penalty pursuant to this section upon any person who provides evidence satisfactory to the commissioner that:
>
> "(A) The person has paid a civil penalty to the United States Department of Labor for violation of the child labor provisions of the Federal Fair Labor Standards Act (29 U.S.C. 201 et seq.); and
>
> "(B) The civil penalty involved the same factual circumstances at issue before the commissioner."

There is no evidence in the record as to the specific factual circumstances on which the USDOL based its assessment of civil penalties. Without evidence that the USDOL's penalty was based on the "same factual circumstances" as those before the Commissioner in this case, Respondent's defense must fail.

Respondent, through Schultz, presented undisputed testimony that Respondent cooperated with BOLI's investigation, that it has had no prior or subsequent violations, that its employees have suffered no other serious injuries, and that it did not allow Weller to operate the band saw after his injury until he was 18 years old. Respondent also did not dispute the Agency's contention that it would have been relatively simple for Respondent to apply for and obtain a Certificate, an action that would have prevented Weller's injury from occurring.[1]

Finally, Respondent contends that Weller's injury was "non-serious." Respondent argues that Weller's injury was "non-serious" because he was released to return to work the day after the injury, a fact not disputed by the Agency. For added support, Respondent cites ORS 161.015(8), a provision of the Oregon Criminal Code that defines "serious physical injury" as "physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." That definition relates only to crimes and is inapplicable to this proceeding.

Whether or not Weller's injury was "serious" is particularly significant based on the following rules adopted by the Wage and Hour Commission in its schedule of civil penalties for child labor violations:

> OAR 839-019-0025(4) provides:
>
> "When a minor incurs a serious injury or dies while employed in violation of any of the following statutes and rules, the violation is considered to be so serious

[1] It is undisputed that Weller would not have been allowed to operate the band saw, had Schultz known the law prohibits minors from operating a band saw, something Schultz would have learned almost immediately from Gernhart if he had applied for an Employment Certificate on Respondent's behalf at the time Weller was hired.

and of such magnitude that the maximum penalty will be imposed when the Commissioner determines to impose a civil penalty:

"* * * * *

"(d) Employment of a minor in violation of * * * OAR 839-021-0104."

OAR 839-021-0104 provides:

"(1) Except as provided in OAR 839-021-0285, an employer may not employ a minor under 18 years of age in any occupation declared particularly hazardous or detrimental to their health or well-being, except under terms and conditions specifically set forth by rules of the Wage and Hour Commission.

"(2) Those occupations set out in Title 29 CFR, Part 570.51 to and including Part 570.68 as amended July 19, 2010 are hereby adopted as occupations particularly hazardous or detrimental to the health and well-being of minors 16 and 17 years of age and the regulations pertaining to these occupations set out in Title 29 CFR, Part 570.51 to and including Part 570.68 as amended July 19, 2010 are hereby adopted and incorporated by reference herein and are attached as Appendix 1."

Title 29 CFR, Part 570.65 - Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14) provides:

"(a) Findings and declaration of fact. The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

"(1) The occupations of operator of or helper on the following power-driven fixed or portable machines except machines equipped with full automatic feed and ejection:

"* * *

"(ii) Band saws.

"* * *

"(b) Definitions. As used in this section:

"*Band saw* shall mean a machine equipped with an endless steel band having a continuous series of notches or teeth, running over wheels or pulleys, and used for sawing materials.

"*Operator* shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine."

There is no dispute that Weller's injury occurred while he was the operator of machinery that fits within the above definition of band saw. The very fact that Weller was hand-feeding the plastic piece to be cut at the time he was injured demonstrates that Respondent's band saw was not equipped with "full automatic feed and ejection."

Given these facts, under OAR 839-019-0025(4) the forum has no choice but to assess the maximum civil penalty of $1,000 if it determines that Weller's injury was "serious."

The term “serious injury" is not defined in Oregon's child labor statutes, BOLI’s administrative rules, or any prior BOLI Final Orders, including three BOLI Final Orders assessing a maximum civil penalty when a minor died or was injured during their employment.[2] The “injury” in this case was a fracture to the top joint of Weller's middle finger on his right hand and a cut that bled a considerable amount and required immediate medical attention. Weller had to be driven by ambulance to a local hospital, where he received 12 stitches, a bandage that had to be changed for a month, and a metal splint. Although Weller’s doctor anticipates no residual effects, the finger is still painful whenever Weller accidentally bumps it against a hard object. It is also apparent to the forum, given the type of machinery Weller was operating and the particular injuries he suffered, that his finger could have been severed instead of fractured and cut. Under these facts, the forum concludes that Weller suffered a “serious injury” within the meaning of OAR 839-019-0025(4).

As alluded to earlier, there have been three previous cases in which the forum has assessed civil penalties when a minor employee was injured or killed while performing the minor’s job duties. In 1992, the commissioner imposed the maximum civil penalty of $1,000 when a minor was killed[3] while employed in the hazardous occupation of driving a motor vehicle on a public road or highway in violation of OAR 839-21-104 (subsequently renumbered as OAR 839-021-0104). In 1994, the commissioner imposed the maximum civil penalty of $1,000 when a minor suffered a “devastating back injury” while employed in hazardous occupation of logging in violation of Oregon law.[4] In 2009, the commissioner again imposed the maximum civil penalty of $1,000 in the case of *In the Matter of Spud Cellar Inc.,* 30 BOLI 185, 189, 192-93 (2009) based on the respondent's failure to obtain a validated Certificate, when a minor employee sliced off the tip of her thumb on a meat slicer and was taken to the hospital, where she received seven to nine stitches, was left with a permanently scarred thumb, and still suffered discomfort two years later from the injury. Following its precedent, the forum exercises its authority under ORS 653.370 to assess a $1,000 civil penalty against Respondent for its single violation of ORS 653.307(2).

RESPONDENT'S EXCEPTIONS

Respondent's exceptions argues two points. First, that the civil penalty of $1,000 proposed by the ALJ is excessive and should be reduced to $100 because Weller’s injury was “non-serious" and Respondent's first offense. Second, that the USDOL already assessed a penalty based on similar facts. The forum rejects Respondent's exceptions for the reasons stated below.

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[2] *See* discussion of these cases*, infra.*
[3] *In the Matter of Panda Pizza,* 10 BOLI 132, 144 (1992).
[4] *In the Matter of Ronald Turman,* 13 BOLI 166, 174-75.

First, Respondent attached an exhibit to its exceptions that was not offered at the hearing and requested that it be considered as evidence. That exhibit is the USDOL's "Notice to Employer-Employment of Minors Contrary to the Fair Labor Standards Act" that advised Respondent that USDOL's investigation to determine that Weller had been employed by Respondent to operate a band saw. The Notice further indicated the USDOL's conclusion that Weller had sustained a "Nonserious" injury "in illegal employment." Respondent gave no reason for not offering this exhibit at hearing and the forum will not reopen the record to consider it now. Even if the forum did reopen the record to consider this exhibit, the USDOL's conclusion that Weller sustained a "Nonserious" injury would not be binding on the forum. For the reasons stated in the proposed order, the forum stands by its conclusion that Weller's injury was "serious" as defined by OAR 839-019-0025(4).

Second, forum rejects Respondent's argument that the USDOL already assessed a penalty based on similar facts. The penalty assessed in this case is based on Respondent's failure to obtain an Employment Certificate, not Weller's injury. The injury is relevant to the amount of penalty assessed but is not the reason a penalty was assessed. In contrast, according to Respondent's statement, the USDOL's penalty was assessed based on the fact that Weller suffered an injury.

ORDER

NOW THEREFORE, as authorized by ORS 653.370, and as payment of the penalties assessed for Respondent Schultz Mfg., Inc.'s violation of ORS 653.307(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Schultz Mfg., Inc.,** to 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 the amount of ONE THOUSAND DOLLARS ($1,000), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Schultz Mfg., Inc., complies with the Final Order.

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In the Matter of

CYBER CENTER, INC., dba Cybercenter Sports Grill and GARY SPEAKS as Aider/Abettor

Case No. 29-11
Final Order of Commissioner Brad Avakian
Issued April 24, 2012

SYNOPSIS

The Agency established by a preponderance of the evidence that Respondent Cyber Center, Inc. ("CCI"), acting through its general manager, demoted Complainant, a pregnant woman, from her position as assistant night manager and cut her pay based on her sex/pregnancy, in violation of ORS 659A.030(1)(b). The Agency also proved that CCI fired Complainant based on her sex/pregnancy in violation of ORS 659A.030(1)(a) and that Respondent Gary Speaks, CCI's CEO and corporate vice president, aided and abetted CCI in Complainant's discharge, thereby violating ORS 659A.030(1)(g). The forum awarded Complainant $44.40 in back pay and $20,000.00 in emotional and mental suffering damages based on her demotion and pay cut, with CCI solely liable for those damages. The forum also awarded Complainant $12,172.00 in back pay and $120,000.00 in emotional and mental suffering damages based on her discharge, with CCI and Speaks jointly and severally liable for those damages. ORS 659A.029, ORS 659A.030(1)(a) & (b), ORS 659A.030(1)(g); OAR 839-005-0021, OAR 839-005-0026.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The evidentiary portion of the hearing was held on January 24 and 25, 2012, at the Oregon Employment Department office located at 119 N. Oakdale Avenue, Medford, Oregon. Closing arguments were made by telephone on January 26, 2012.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. Complainant Amanda Glover was present throughout opening statements and the evidentiary portion of the hearing and was not represented by counsel. Both Respondents were represented by G. Jefferson Campbell, Jr., attorney at law. Respondent Gary Speaks was present throughout the hearing. Susan Speaks, a corporate officer of Cyber Center, Inc. ("CCI"), was present throughout opening statements and the evidentiary portion of the hearing as the person designated to assist Respondents' attorney in the presentation of CCI's case.

The Agency called the following witnesses: Complainant; Peter Martindale and Felice Villarreal, senior investigators, BOLI Civil Rights Division (telephonic); Josh Trenton, Patricia (Allred) McCarty,[1] David Barber, and Mike Barlow (telephonic), Complainant's former co-workers; and Christopher Jones, Complainant's boyfriend.

Respondent called the following witnesses: Gary Speaks, Susan Speaks, and Jason "Jay" Winegar, CCI's former general manager.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to hearing);
b) Agency exhibits A-1 through A-14 (submitted prior to hearing), and A-15 (submitted at hearing);
c) Respondent exhibits R-1 through R-6 (submitted prior to hearing), and R-7 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On October 2, 2009, 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 Cyber Center, Inc. ("CCI"). On June 23, 2010, the Agency amended the complaint to name Gary Speaks as a Respondent, alleging that he was an aider and abettor to CCI's alleged unlawful acts. After investigation, the Agency issued a Notice of Substantial Evidence Determination on July 14, 2010, in which it found substantial evidence that CCI had engaged in unlawful employment practices in violation of ORS 659A.030(1)(a) & (b) based on Complainant's sex/pregnancy and that Respondent Gary Speaks had aided and abetted CCI in the commission of the unlawful employment practices.

2) On November 18, 2011, the Agency issued Formal Charges alleging, among other things, that:

> (a) Respondent CCI was Complainant's employer and unlawfully discriminated against Complainant based on her sex/pregnancy in terms and conditions of employment by demoting her from her assistant manager position and reducing her work hours and pay, in violation of ORS 659A.029, ORS 659A.030(1)(b), and OAR 839-005-0030(1)(d)(A), OAR 839-005-0030(1)(d)(B), OAR 839-005-021, and OAR 839-005-0026(1) & (2);

[1] Patricia Allred was married after she left Respondent CCI's employment and her married name is McCarty.

(b) Respondent CCI terminated Complainant based on her sex/pregnancy "and/or because of related medical conditions or occurrences" in violation of ORS 659A.030(1)(a);

(c) Respondent Speaks is president and co-owner of Respondent CCI and aided, abetted, incited, compelled or coerced Respondent CCI's unlawful employment actions in violation of ORS 659A.030(1)(g).

The Formal Charges sought "[l] lost wages, including but not limited to, lost benefits and out-of-pocket expenses to be determined at hearing but estimated to be at least $8,000" and "[d]amages for emotional, mental and physical suffering in the amount of at least $100,000." The Formal Charges also requested that Respondents and any current employees "be required to attend training recognizing and preventing discrimination in the workplace based on protected class."

3) On November 14, 2011, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Complainant stating the time and place of the hearing as January 24, 2012, beginning at 9:00 a.m., at the Oregon Employment Department, 119 N. Oakdale Ave., Medford, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Formal Charges, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

4) On December 12, 2011, Respondents jointly filed an answer through G. Jefferson Campbell, Jr., attorney at law. In the answer, Respondents denied that Respondent CCI engaged in the alleged unlawful employment practices or that Respondent Speaks aided, abetted, incited, compelled or coerced Respondent CCI's alleged unlawful employment actions.

5) On December 19, 2011, the ALJ issued an interim order requiring the Agency and Respondents to file case summaries by Friday, January 13, 2012.

6) On January 13, 2012, Respondents and the Agency filed case summaries. On January 16, 2012, the Agency filed an amended case summary.

7) At the start of the hearing, 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.

8) At hearing, the Agency stipulated it was seeking back pay for the Complainant from the time of her demotion as assistant night manager until November 1, 2009, then from April 1, 2010, until mid-April 2010.

9) On March 9, 2012, the ALJ issued an interim order reopening the record and requiring Respondents to provide, no later than March 23, 2012, "copies of time records for employees of the CyberCenter Sports Grill for June 6, 2009, through

October 31, 2009, and from April 1, 2010 through April 15, 2010." On March 14, 2012, Respondents filed a motion for clarification of the reason for the ALJ's interim order. In the motion, Respondents argued that it was improper under OAR 839-050-0410 for the ALJ to reopen the record to obtain this evidence if the purpose of the Interim Order was to allow additional evidence relating to Complainant's lost income because it was the Agency's burden to establish Complainant's damages at hearing, the Agency could have requested these time records from Respondent CCI and offered them at hearing, and the Agency did not do so. On March 16, 2012, the ALJ issued an interim order retracting the March 9 interim order.

10) On March 21, 2012, 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 CCI was an Oregon corporation that engaged or utilized the personal services of one or more persons, including Complainant, and conducted business in Medford, Oregon.

2) At all times material herein, Respondent Gary Speaks, Susan Speaks, and Chris Speaks, Gary Speaks's son ("the Speaks"), each owned one-third of CCI's corporate shares. Gary Speaks was vice president and chief executive officer of CCI during Complainant's employment.

3) CCI operated a wholesale computer business and gaming center in a Medford warehouse prior to Complainant's employment. In 2006, the Speaks decided CCI should expand its business to fill the unused part of the warehouse, opting to build and operate a sports bar/restaurant and call it the "Cybercenter Sports Grill" (the "Grill"). They planned the Grill to be a family-oriented business that would provide amenities for both parents and their children so that parents could enjoy themselves while their children were being entertained with various activities, including a gaming center. Construction of the Grill began in 2006, but was not completed until March 2008.

4) The Speaks did not want to run the Grill themselves and hired Monica Snow as manager in 2006. They paid Snow a salary of $500 per week until the Grill actually opened to ensure she would still be available to manage the Grill when it opened.

5) When the Grill finally opened March 2008, Gary and Susan Speaks were vacationing in Australia.

6) Snow quit several months after the Grill opened. Instead of hiring another manager, Gary and Susan Speaks began actively managing the Grill, working 16-18 hour days.

7) When the Speaks began actively managing the restaurant, Gary, Susan, and Chris Speaks agreed that no Grill employees could be fired unless all three of them were in agreement.

8) Complainant, a female, was hired in November 2008 to work as a server/bartender in the Grill. Complainant, who lived in Shady Cove at the time, likes to work nights and had eight years of experience as a server/bartender. She had previously managed two sports bars. Complainant was hired at the wage rate of $8.40 per hour, plus tips.

9) When Complainant was hired, Gary and Susan Speaks were still the Grill's only managers.

10) During Complainant's employment, Respondent's hours of operation were 11 a.m. to 10 p.m., Sunday through Thursday, and 11 a.m. to midnight on Friday and Saturday.

11) Complainant worked as a server/bartender at the Grill through January 2009. While she worked as a server/bartender, she worked five to six shifts a week, 30 to 35 hours a week, and averaged $400 a week in tips. She usually worked evening shifts.

12) Complainant's performance as a server/bartender was "exceptional" and Gary and Susan Speaks thought she "was a very, very good employee." While she worked as a server/bartender, Complainant was never counseled about her work or given any warnings about her work performance.

13) During the time that Complainant worked as a server/bartender, Gary and Susan Speaks began looking for someone to give them a break from the long hours they had to work to manage the Grill. They decided they could best accomplish this by hiring an assistant night shift manager. They believed that Complainant, who was available to work nights, was qualified to be assistant night manager, and felt confident that she could handle the job based on her exceptional work performance as a server/bartender. In January 2009, Gary Speaks took Complainant aside after a shift, complimented her highly on her work, and offered her the position of assistant night manager starting February 1, 2009, with a raise to $10 per hour, plus tips.

14) Complainant accepted the offer and began working as assistant night manager on February 1, 2009. She was happy about her promotion and the pay raise that came with it. She understood she would be closing the Grill the majority of her shifts.

15) As assistant night manager, Complainant's primary job duties included:

- training the staff
- supervising the cooks and servers
- making sure customers' orders were filled and paid for

- ensuring that employees took appropriate breaks
- ensuring that all servers balanced their accounts before they went home
- giving the servers cash for the tips that had been written on charge slips
- at closing, turning all the lights down, making sure that everything was clean, and turning off all electronics, including 40 televisions

She closed the Grill about 70 percent of the time, alternating with another employee, and "pre-closed" most other nights, which required staying at work until about 30-60 minutes before closing time.

16) While she was assistant night manager, Complainant continued to average $400 a week in tips.

17) As assistant night manager, Complainant worked all of her assigned shifts without complaining about the scheduling. Before she became pregnant, she also worked extra shifts for employees who called in sick.

18) On one occasion when Complainant was assistant night manager and before she learned she was pregnant, she sold a beer to a 20-year-old male who was an Oregon Liquor Control Commission (OLCC) "decoy" after she examined his driver's license and failed to notice that he was not yet 21 years old. Gary Speaks, who had been told by an OLCC representative just before that a "decoy" would be coming in, talked to Complainant about her mistake and its possible consequences. Complainant understood the seriousness of her mistake and was afraid she would be fired. However, she was not disciplined and continued working as assistant night manager. There was no evidence about the date on which this incident occurred.[2]

19) While Complainant was assistant night manager, the Grill issued different types of discount coupons to encourage people to eat at the Grill. One of the coupons offered a 10 percent discount; another offered a free meal when two meals were purchased, with the free meal being the meal of lesser value. On one occasion, Complainant gave a 20 percent discount to two customers who each brought in 10 percent discount coupons. On another occasion when a customer brought in a “free meal” discount coupon, Complainant charged the customer for the less expensive instead of the more expensive meal. Complainant was not counseled or disciplined either time. There was no evidence about the dates on which these incidents occurred.[3]

20) Other employees also had problems charging customers correctly when the customers used the Grill’s discount coupons.

[2] The forum infers that it occurred before Winegar was hired as general manager because neither of the Speaks nor Complainant testified that Winegar was present or aware of this incident and Winegar did not mention the incident in his testimony.
[3] *Id.*

21) On April 21, 2009, Gary Speaks posted four Grill job openings on the Medford Craigslist. The openings were for restaurant general manager, sales manager, server, and line cook. Gary and Susan Speaks told Complainant they were planning to hire a general manager and assured her that her job was not in jeopardy.

22) In late April 2009, Complainant learned she was pregnant, news that made her very happy. In early May, she told her co-workers and Gary and Susan Speaks that she was pregnant.

23) Jason Winegar was hired as general manager for the Grill on May 1, 2009. He was scheduled to work during the Grill's day shift, with the understanding that he would be working from about 10 in the morning until evening, 4p.m. or later. His first day of work was May 9, 2009. There were no changes in Complainant's employment status when Winegar was hired.

24) Gary Speaks did not know Winegar before he received Winegar's application for the Grill general manager position.

25) After Complainant became pregnant, she never asked for any accommodation in her schedule nor told the Speaks or Winegar that she only wanted to work days and no longer wanted to work nights.

26) Between May 9 and May 22, 2009, Complainant worked the following dates: May 9-10, May 14, May 18, and May 20-22. She was scheduled to work on May 11, but was sick. She worked until closing on May 14, May 18, and May 21-22.

27) On May 22, 2009, Winegar told Complainant that she was being demoted to her former position as a server and that her pay was being cut to minimum wage of $8.40 per hour. When Complainant asked why this was happening, Winegar told her "I don't feel you are going to have the availability we are looking for in the future because you are pregnant." Complainant became very upset and cried. Prior to Complainant's demotion, Winegar had discussed it with Gary Speaks, who instructed Winegar to take whatever action Winegar thought best. On May 23, 2009, Complainant began working again as a server. That same day, Jennifer McKenzie, a server whom Complainant had supervised, was promoted to the position of assistant night manager.

28) Complainant was upset when she was demoted. Her demotion caused some "problems" at home. In the same period of time, she had a $70 overdraw at her bank that caused the bank to decline to provide a checking account to Complainant and Jones.

29) As assistant night manager, Complainant wore black pants and a black shirt. After her demotion, she had to wear a red shirt, which made her feel degraded. Some of her long-time customers asked her why she was wearing a red shirt. Complainant responded by telling them she had been demoted and she was "pretty

sure it was because she was pregnant." Complainant only volunteered information about her demotion in response to her long-time customers' specific inquiries.

30) The $10 per hour Complainant earned as assistant night manager is the highest hourly wage Complainant had ever been paid, and she was "extremely happy" in the assistant manager position.

31) Complainant and McKenzie had no arguments or altercations after Complainant's demotion and Complainant tried to work with McKenzie.

32) Complainant and McKenzie worked the following total hours in the weeks between March 28 and May 29:[4]

Week	Complainant	McKenzie
March 28-April 3	**32.5** hours	**32.75** hours
April 4-10	**36.5** hours	**32.5** hours
April 11-17	**27.5** hours	**32.5** hours
April 18-24	**33.75** hours	**34** hours
April 25-May 1	**34.75** hours	**36** hours
May 2-8	**34.75** hours	**38.5** hours
May 9-15	**13.25** hours[5]	**36.5** hours
May 16-22	**19.25** hours	**30.25** hours
May 23-29	**20.5** hours[6]	**37** hours

33) Winegar and Complainant worked the same days on May 9, 14, and 20-24. After May 24, they never worked on the same day. Between May 9 and May 22, Complainant started work before 5 p.m. on only two days that Winegar also worked, once at 11 a.m. (May 9), and once at 4:45 p.m. (May 14).

34) Between May 23 and June 2, 2009, Complainant, Winegar, and McKenzie worked the following schedules:

Date:	Complainant	Winegar	McKenzie
5/23	1p-9:15p	day shift[7]	5:30p-12:15p
5/24	11:15a-7p	day shift	9:30p-2:45a
5/25	10:45a-5:15p	did not work	5p-10:30p
5/26	not scheduled	did not work	3:45p-10:45p
5/27	not scheduled	day shift	5p-10:30p
5/28	sick	day shift	6p-7p
5/29	not scheduled[8]	day shift	5p-12:30a

[4] There is no documentary evidence in the record of the hours worked by Complainant during any weeks prior to April 4, 2009.
[5] Includes one sick day.
[6] Includes one sick day.
[7] *See* Finding of Fact #23 – The Merits.

5/30	not scheduled	day shift	6p-12:30a
5/31	4:45p-10p	did not work	did not work
6/1	6p-8p	did not work	5p-10:30p
6/2	fired/no work	day shift	5p-11p

35) On May 24, Complainant declined the opportunity to work at a party scheduled to continue until 2:30 a.m. because she had already worked a full shift that day. McKenzie and Allred worked the party, both working until 2:45 a.m. This was the only time after Complainant announced her pregnancy that any servers had to work later than 12:30 p.m.

36) Complainant was not scheduled to work on May 26 or May 27.

37) Complainant went to the emergency room on May 28 because of bleeding related to her pregnancy. She called Susan Speaks and told her she was going to the emergency room due to bleeding possibly related to her pregnancy and that she had arranged for Alisa, another server, to work her shift.

38) During Complainant's absence on May 28-29, Complainant was temporarily taken off the work schedule and other employees scheduled to work in the times she had originally been scheduled to work. When she returned to work,[9] Gary Speaks and Winegar juggled the schedule and scheduled Complainant to work seven hours during the week of May 30-June 5.

39) On May 31, Complainant worked from 4:45pm to 10pm, and on June 1, she worked from 11am to 2pm, for a total of 7.25 hours.

40) On June 1, Gary Speaks, Susan Speaks, and Winegar met and decided to fire Complainant. During that conversation, Winegar stated "because of [Complainant's] constant references to her pregnancy we really need to cover our butts." Later that day, Winegar called Complainant at home and left a message that she was fired because of her "attitude." Complainant listened to the message when she arrived home after work that night. Complainant returned Winegar's call but he never called back.

41) After Complainant announced her pregnancy and while she was still assistant night manager at the Grill, David Barber, a cook employed at the Grill, overheard Gary Speaks and Winegar discussing Complainant's pregnancy. During the conversation, Barber heard them say that they would probably have to let Complainant go because she would be in the way. Barber told Complainant what he heard.

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[8] Respondent argues that Complainant was scheduled to work on May 29 but missed work due to sickness. For reasons set out in the Opinion, the forum has concluded that Complainant was not scheduled to work on May 29.

[9] The forum has been unable to determine from the record whether Complainant attempted to return to work on May 30 or May 31.

42) After Complainant announced her pregnancy, Josh Trenton overheard part of a conversation between Gary Speaks and Winegar in which they were discussing Complainant's pregnancy. Trenton heard Speaks say that Complainant "wouldn't be worth anything."

43) Complainant received no oral or written counseling about her attitude while she worked for the Grill.

44) At the time of her termination, Complainant intended to keep working as a server at the Grill, then take family leave and then resume working at the Grill when her leave ended.

45) Complainant is an independent person who has always been employed and has never had trouble finding a job. In her words, being fired when she was pregnant was the "most degrading, unhappy time probably in a long-time time that I've ever had * * * It went from a happy moment to an 'Oh my God, what am I going to do, I have to get on food stamps now, now I'm back on welfare * * *." "Once I was let go and I was pregnant, it was extremely difficult to find another job." She was "beyond upset" for a couple of months after she was fired.

46) Complainant felt "depressed" after being fired and didn't want to go anywhere. She went from being excited about being pregnant to being depressed after she was fired and just wanted to be left alone. Because of her depression, it was harder for her to look for work. She "cried a lot" from losing her job. She was nervous about how she would support her baby and herself.

47) Complainant felt "belittled" by her discharge. Complainant and Christopher Jones, her live-in boyfriend and the father of her baby, "bickered" a lot more after she was fired because of the financial stress caused by the loss of her job and also because a baby was on the way. At the time, Jones was unemployed and receiving unemployment benefits and stamps. Complainant was more stressed out because she and Jones were now both unemployed and concerned over the responsibility of having a child and how they would pay for the expenses associated with having a child.

48) Complainant did not seek counseling for her depression after she was fired because she had no money to pay for counseling services. Complainant and Jones talked about going to "couples counseling" after Complainant was fired but did not go because Jones did not want to go and, in any event, they had no money to pay for counseling services.

49) Complainant applied for food stamps after she was fired. This made her feel embarrassed and degraded. She also had to get financial help from her mother to pay for "a lot of things for [her] baby."

50) Complainant first began looking for work approximately a month after her termination. She unsuccessfully sought work until about Halloween 2009,[10] when she stopped due to her pregnancy. During her job search, she believed no one would hire her because she was obviously pregnant; this was degrading to her. She still feels frustrated that she was fired instead of being able to keep her job until she went on family leave, then return to work after her leave. She thinks about her discharge frequently and it still bothers her.

51) Complainant's pregnancy was not a major factor in the depression and upset she experienced as a result of being fired.

52) Complainant's baby was born on December 29, 2009. She began looking for work again about April 1, 2010.

53) In mid-April 2010, Complainant was hired at the Rogue River Lodge, located in Trail, Oregon, as a server/bartender. Although she stopped looking for work at that time, she did not actually start work until August 11, 2010. She worked for minimum wage and tips. In the summer she received an average of $200 per night in tips. In the winter, she received an average of $30 to $40 per night in tips. At the time of hearing, she was still employed at the Rogue River Lodge.

54) Other than the financial help she received from her mother, Complainant's only income was food stamps and WIC from the date of her discharge until August 2010.

55) The Grill remained in business at least through January 2010.

56) As a result of her demotion and termination, Complainant suffered lost wages and tips in the amount of $12,216.40, calculated as follows:

- 27.75 hours (actual hours worked from May 23 through June 1, 2009) x $1.60 per hour = $44.40
- Average hours worked per week from March 28 to May 29, 2009 = 31.6 (252.75 total hours ÷ 8 weeks = 31.6 hours)
- 17 weeks from July 1 through October 31, 2009
- 31.6 hours x 17 weeks = 537.2 hours
- 537.2 hours x $10 per hour = $5,372
- 17 weeks x $400 average weekly tips = $6,800
- $44.40 + $5,372 + $6,800 = $12,216.40

57) Complainant works nights at the Rogue River Lodge, with her shifts ending between 10 p.m. and midnight, and drives home from Trail to her present home

[10] The forum takes judicial notice that Halloween fell on October 31 in 2009.

in White City. This is approximately the same distance as from Shady Cove to Medford and involves driving on the same highway, Oregon Highway 82.

58) Sometime after Complainant was fired, CCI hired Jennifer Speaks, Gary Speaks's daughter, to work in CCI's game center. Jennifer Speaks was pregnant when hired and worked within a week of her baby's birth, then was fired a couple of months after she returned to work.

CREDIBILITY FINDINGS

59) Mike Barlow was employed as a cook at the Grill during Complainant's employment and testified that he is "friends" with Complainant. Only part of his testimony was credible. The forum has credited his testimony that Complainant was "a very good assistant manager" because he was supervised by Complainant and his statement was not linked to a specific date or event. However, the forum also notes that the Grill's time records reveal that Barlow did not work as often with Complainant as he claimed.[11] His testimony that "Gary [Speaks] is a real ass to everyone" revealed an animus towards Speaks.

The Agency's primary reason for calling Barlow as a witness was to testify as to statements made by Gary Speaks and "Jay" that showed a possible discriminatory animus based on Complainant's pregnancy. Barlow testified that he heard Jay Reese, whom he identified as the new general manager, tell the "owners" they better put Complainant back on the schedule or they would be a big trouble.[12] He testified that this conversation took place on a day when Complainant missed work because she was sick, and that this was the same day she was demoted from assistant manager. He also testified that his memory of the timing of Complainant's demotion and her subsequent schedule was not clear.[13]

The forum has not credited any of Barlow's testimony concerning this conversation for two reasons. First, Jay Winegar, not Jay Reese, was employed as the Grill's general manager at the time of the alleged conversation. Second, Complainant was demoted from assistant night manager effective May 23, and the only days she missed work in May due to sickness were on May 11, May 28, and May 29.

60) David Barber, a cook at the Grill during Complainant's employment, testified in person and responded in a forthright manner to questions on direct and cross

[11] Barlow testified that he usually worked until "3-4 p.m.," but the time records show he typically worked until 2 p.m.

[12] Barlow's specific testimony was that "Gary Speaks said he 'didn't think [Complainant] could do her job because of being pregnant and getting sick and he took her off the schedule' and Jay Reese said 'you better put her back on the schedule because they could get you for that or something.' I don't know the exact words but I was standing 10 feet away." Barlow also testified that Jay Reese also said "You can't fire someone just for being pregnant."

[13] In Barlow's words, Complainant was "taken off the schedule, then put back on the next day or later that afternoon or whatever it was."

examination. He candidly acknowledged that he did not recall the dates of events he was asked about, but was able to testify in detail about the specific circumstances of the conversation he overheard between Gary Speaks and Jay Winegar.[14] In an earlier interview with an Agency investigator, Barber stated that "he has had problems with the owner because he [Gary Speaks] thinks he can do anything he wants and not suffer any consequences" and he is a “jerk who thinks he can do whatever he wants.” Barber also testified during cross examination that he had no conversations with Gary Speaks or Jay Winegar about Complainant's pregnancy or demotion; whereas on 12/1/09 he told the Agency investigator that “he tried to talk to Gary about the situation with Complainant but [Gary] would not talk to him." Barber explained this apparent inconsistency by stating he did not recall making it to the Agency investigator. Since this inconsistency is not related to a material issue and Barber’s testimony was otherwise consistent and unimpeached, the forum credits Barber’s testimony related to Complainant’s work performance and the overheard conversation in its entirety, despite Barber’s expressed dislike of Gary Speaks.

61) Patricia (Allred) McCarty, who testified in person, was employed as a server at the CSG during Complainant's employment. For several reasons, the forum has only credited her testimony when it was corroborated by other credible evidence. First, she testified that Jay Winegar began visiting the Grill a couple of months after she was hired and worked his way into a management position; whereas no other witness testified to this fact. Second, she testified she did not recall “any written limitations” on the Grill’s coupons. The forum finds it highly improbable that the Speaks would give out coupons for meals with no limitations on their use. Third, McCarty's demeanor changed considerably on cross-examination; she became testy and defensive and was evasive in responding when questioned as to whether Complainant made complaints about her demotion being related to her pregnancy. However, the forum has credited her testimony that she heard Winegar state that the Grill “needed to cover their butts” with respect to Complainant’s pregnancy and any employment actions that might be taken against her” because Gary Speaks testified that Winegar made that statement to him.

62) Josh Trenton, who testified in person, was employed as a cook at the Grill during Complainant's employment and freely admitted that Complainant helped him get that job. He testified in a sober, forthright manner, and his testimony was not impeached during cross-examination. His earlier statement to an Agency investigator that Complainant was demoted to assistant manager, then again demoted to server after Jay Winegar was hired, though inaccurate, did not detract from the forum’s assessment of the overall credibility of his testimony. The forum has credited his testimony in its entirety.

63) Peter Martindale and Felice Villarreal, both senior investigators employed by BOLI’s Civil Rights Division who investigated this case, were called as witnesses to testify as to the interviews they conducted and authenticate exhibits. Both were credible witnesses.

[14] *See* Finding of Fact #41 -- The Merits.

64) Christopher Jones, who testified in person, is Complainant's live-in boyfriend and the father of her child. He and Complainant have lived continuously together since before Complainant began work at the Grill. Jones was an unsophisticated witness whose memory was not particularly good and who testified mainly in generalities. His only knowledge of Complainant's circumstances at work was what Complainant told him. The forum has credited his testimony regarding Complainant's reactions to her demotion and discharge but not relied on any of his testimony regarding Complainant's employment history at the Grill.

65) Jennifer McKenzie and Alisha Fuhrman were listed as witnesses in the Respondents' and Agency's respective case summaries. At hearing, the Agency case presenter and Respondent's attorney both stated that they had not been able to contact either witness. Exhibits A-5 and R-7, consisting of investigative interviews with Fuhrman and McKenzie conducted by Martindale and Villarreal, were offered and received into evidence as a putative substitute for their testimony. For several reasons, the forum has given Exhibits A-5 and R-7 and the testimony of Martindale and Villarreal concerning them no weight whatsoever. First, the outcome of this case rests primarily on an assessment of the credibility of the witnesses. Second, numerous other witnesses testified about the issues Fuhrman and McKenzie would have testified about and were subject to cross examination. Finally, neither Fuhrman nor McKenzie was present to testify under oath and be cross-examined like the other witnesses.

66) Jay Winegar, who testified in person, was general manager of the Grill at the time of the alleged discriminatory actions, but has not worked for Respondents since June 5, 2009, when he quit because of differences with Gary Speaks's management style. For several reasons, the forum has only credited his testimony when it was corroborated by other credible evidence. First, he denied ever making a "cover our butts" comment regarding Complainant's pregnancy and her job status with the Grill. In contrast, two Agency witnesses and Gary Speaks credibly testified that Winegar did make that comment. Second, he testified that Complainant was demoted from lead position effective May 23, 2009, because she told him she did not want to work until closing. Complainant credibly testified that she never said this to Winegar or anyone else, no one but Winegar testified to the contrary, and Complainant's work history before, during, and after working for the Grill shows that working until closing was not a problem for her. Third, Winegar had no recollection of Complainant being temporarily taken off the Grill's work schedule, an undisputed fact that occurred while he supervised Complainant. Fourth, he testified that he met with Gary and Susan Speaks about two weeks after he was hired and they decided that an assistant was needed to close at night if Winegar was going to work days. Except for Winegar's testimony, the evidence is undisputed that Complainant was already that assistant and was either closing or pre-closing the majority of shifts that she worked.

67) Gary Speaks's testimony on several issues central to the case was either internally inconsistent or inconsistent with prior statements. On June 2, 2010, he told Martindale that neither he nor Winegar ever made a comment about needing to "cover

their butts" regarding Complainant and any action taken affecting her job status. At hearing, he testified twice that Winegar stated, during their conversation on June 2 regarding Complainant's discharge, that "because of [Complainant's] constant reference to her pregnancy we really need to cover our butts." At hearing, he testified that he advertised on Craigslist in April 2009 and at that time planned to fire Complainant and hire a new server to replace her. He made no mention of this plan in his interview with Martindale or in either letter he drafted in response to the complaint or the investigation.[15] In fact, in one of those letters he stated "[i]n closing, Amanda would still be here working if it had not been for insubordination towards Jason and owners."[16] Related to the same issue, Speaks testified that he had decided to fire Complainant in mid-April because of her poor performance as assistant manager and that he did not consider demoting her, as demoting employees has never worked out for him in the past.

In the initial position statement Speaks submitted to the Civil Rights Division ("CRD") he stated that "Amanda resented Jason from the onset and this was when Amanda went downhill fast." At hearing, Speaks said nothing about Complainant resenting Winegar.

At hearing, Speaks testified that he, Susan Speaks, and Winegar decided to fire Complainant because of the complaints they were receiving from customers and Complainant's attitude towards Jennifer McKenzie. In marked contrast, Speaks did not even mention McKenzie's name in his interview with Martindale or his two letters.

At hearing, Speaks testified that one of the Grill's initial hires was Marie Manson, the wife of the executive chef who was hired by Snow, and that Manson was seven months pregnant when she voluntarily left the Grill's employment. This was in direct contradiction to his interview statement to Martindale that Complainant has been his only pregnant employee.

His testimony was exaggerated on at least one occasion when he testified about Complainant's problem with coupons, stating on "numerous times [Complainant] would give the more expensive meal free and charge for the lesser and Susan would point that out." In his initial position statement submitted to the CRD, Speaks stated there was only one occasion when this happened.

In Speaks's second letter, he stated that Complainant started "asking other employees to close for her, or she would just leave claiming she was sick" after she became pregnant. This contrasts with the Grill's time records, which do not show any days that Complainant left work early, and the absence of any testimony by other employees that Complainant asked them to close for her. In the same letter, he also stated that Complainant "refused to work the schedule given." There is no evidence in

[15] *See* Exhibits A-1, R-2, R-3.

[16] The significance of this statement is Jason Winegar had not yet started work at the Grill at the time Speaks ran the ads on Craigslist.

the record and Speaks himself did not testify that Complainant refused to work her assigned schedule.

In conclusion, the forum has only credited Speaks's testimony when it was corroborated by other credible evidence.

68) Susan Speaks is a neonatal nurse with three children and is married to Gary Speaks. Like her husband, she also testified that the decision had been made to fire Complainant at the time the Craigslist ads were posted in April, before anyone knew Complainant was pregnant. For the reasons stated in Finding of Fact #66 – The Merits, the forum does not believe this testimony. She also testified that Complainant was demoted from her assistant manager position because Complainant complained she was too tired and didn't want to work after 8 p.m. This contrasts with more credible witness testimony to the contrary. Like Gary Speaks, the forum has only credited her testimony when it was corroborated by other credible evidence.

69) Complainant testified that she called in sick once after she became pregnant. The Grill's time records show there were two occasions -- May 11 and May 28. On direct examination, she testified that she visited the emergency room in May while she was still assistant manager and that her demotion and being taken off the schedule occurred "back to back." She subsequently corrected this statement and testified that she was no longer assistant manager as of May 23 and that she went to the emergency room on May 28. On cross-examination she testified that she only worked two days as a server after her demotion before she was fired, whereas the record shows she worked five days as a server after her demotion, including two days after her trip to the emergency room. Her contemporaneous written statement submitted to the CRD prior to filing her complaint is consistent with Respondent's time records. Because of the accuracy of her earlier statement and the fact that her inaccurate testimony about her work hours does not appear to have been calculated to enhance her case, the forum attributes this testimony to a faulty memory. The forum has credited the remainder of her testimony.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent CCI was an Oregon corporation that engaged or utilized the personal services of one or more persons, including Complainant, and owned and operated the Cybercenter Sports Grill (the "Grill") in Medford, Oregon. At all times material herein, Respondent Gary Speaks owned one-third of CCI's corporate shares and was vice president and chief executive officer of CCI. Chris Speaks, Gary Speaks's son, and Susan Speaks, Gary Speaks's wife, also owned one-third of CCI's corporate shares.

2) The Grill opened in March 2008. Several months later, Gary and Susan Speaks began actively managing the Grill after the general manager quit.

3) Complainant, a female who was an experienced server/bartender, was hired to work at the Grill in November 2008 at the wage rate of $8.40 per hour, plus tips.

4) Complainant worked as a server/bartender at the Grill through January 2009, working five to six shifts a week, 30 to 35 hours a week, and averaging $400 a week in tips. She usually worked evening shifts, which ended at 10 p.m., Sunday through Thursday, and midnight on Friday and Saturday.

5) Complainant's performance as a server/bartender was "exceptional" and Gary and Susan Speaks thought she "was a very, very good employee." As a server/bartender, Complainant was never counseled about her work or given any warnings about her work performance.

6) In January 2009, Gary and Susan Speaks decided to hire an assistant night shift manager so they did not have to work so many hours. Based on Complainant's exceptional work performance as a server/bartender and her availability to work nights, they offered the job to Complainant, along with a pay raise to $10 per hour. Complainant accepted the offer and began working as assistant night manager on February 1, 2009. She was happy about her promotion and the pay raise that came with it and understood the job involved closing the Grill the majority of her shifts.

7) As assistant night manager, Complainant worked all of her assigned shifts without complaining about the scheduling. Before she became pregnant, she also worked extra shifts for employees who called in sick. While she was assistant night manager, Complainant continued to average $400 a week in tips.

8) On one occasion prior to May 9, 2009, when Complainant was assistant night manager and before she learned she was pregnant, she sold a beer to a 20-year-old male who was an OLCC "decoy" after she examined his driver's license and failed to notice that he was not yet 21 years old. Gary Speaks talked to Complainant about her mistake and its possible consequences. Complainant understood the seriousness of her mistake and was afraid she would be fired. However, she was not disciplined and continued working as assistant night manager.

9) While Complainant was assistant night manager and prior to May 9, 2009, on two occasions she undercharged customers for meals who used discount coupons issued by the Grill. Complainant was not counseled or disciplined either time. Other employees also had problems charging customers correctly when the customers used the Grill's discount coupons.

10) In late April 2009, Complainant learned she was pregnant. In early May, she told her co-workers and Gary and Susan Speaks that she was pregnant.

11) Jason Winegar was hired as general manager for the Grill on May 1, 2009. He was scheduled to work day shift. His first day of work was May 9, 2009. Complainant continued to work as assistant night manager.

12) After Complainant became pregnant, she never asked for any accommodation in her schedule nor told the Speaks or Winegar she only wanted to

work days and no longer wanted to work nights. Between May 9 and May 22, 2009, Complainant worked May 9-10, 14, 18, and 20-22. She was scheduled to work on May 11, but was sick. She worked until closing on May 14, 18, and 21-22.

13) On May 22, 2009, Winegar made the decision to demote Complainant to her former position as a server and to cut her pay to minimum wage and told Complainant of his decision. When Complainant asked why this was happening, Winegar told her "I don't feel you are going to have the availability we are looking for in the future because you are pregnant." The next day, Complainant began working again as a server. That same day, Jennifer McKenzie was promoted to the position of assistant night manager.

14) As assistant night manager, Complainant wore black pants and a black shirt. After her demotion, she had to wear a red shirt, which made her feel degraded. Some of her long-time customers asked her why she was wearing a red shirt. Complainant responded by telling them she had been demoted and she was "pretty sure it was because she was pregnant."

15) Complainant worked an average of 33.3 hours per week between March 28 and May 8, 2009. In the same time period, Jennifer McKenzie worked an average of 34.4 hours per week. Between May 9 and May 22, 2009, Complainant worked an average of 16.25 hours per week[17] and McKenzie worked an average of 33.5 hours per week. In the week of May 23-29, 2009, Complainant worked 20.5 hours[18] and McKenzie worked 37 hours.

16) Complainant went to the emergency room on May 28 because of bleeding related to her pregnancy. She called Susan Speaks and told her she was going to the emergency room due to bleeding possibly related to her pregnancy and that she had arranged for Alisa, another server, to work her shift.

17) During Complainant's absence on May 28-29, Complainant was temporarily taken off the work schedule and other employees scheduled to work in the times she had originally been scheduled to work. When she returned to work, she was scheduled to work seven hours during the week of May 30-June 5. She worked from 4:45 p.m. to 10 p.m. on May 31 and from 6 p.m. to 8 p.m. on June 1.

18) On June 1, 2009, Gary Speaks, Susan Speaks, and Winegar met and made a joint decision to fire Complainant. Winegar called Complainant at home and left a message that she was fired because of her "attitude."

19) After Complainant announced her pregnancy and while she was still assistant night manager at the Grill, Gary Speaks and Winegar discussed

[17] Includes one sick day, May 11, on which Complainant was scheduled to work.
[18] Includes one sick day, May 28, on which Complainant was scheduled to work.

Complainant's pregnancy at work and stated that they would probably have to let Complainant go because she would be in the way. In another conversation at work when Winegar and Gary Speaks were discussing Complainant's pregnancy, Speaks said that Complainant "wouldn't be worth anything."

20) Complainant first began looking for work approximately a month after her termination. She looked unsuccessfully for work until about Halloween 2009, when she stopped due to her pregnancy. Her baby was born on December 29, 2009, and she began looking for work again about April 1, 2010. In mid-April 2010, she was hired at the Rogue River Lodge, as a server/bartender.

21) As a result of her demotion and termination, Complainant suffered lost wages in the amount of $12,216.40.

22) Complainant experienced substantial emotional and mental distress as a result of her demotion and termination and continued to experience some distress at the time of the hearing.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Cyber Center, Inc. ("CCI") was an "employer" as defined in ORS 659A.001(4).

2) At all times material herein, Respondent Gary Speaks was an individual and a "person" under ORS 659A.010(9) and ORS 659A.030(1)(g).

3) The actions, statements and motivations of Jason Winegar, Respondent CCI's general manager and Respondent Speaks are properly imputed to Respondent CCI.

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. ORS 659A.800 to ORS 659A.865.

5) Respondent CCI, acting through its general manager Jason Winegar, demoted Complainant from her assistant night manager position and cut her pay because of her sex/pregnancy, in violation of ORS 659.029, ORS 659A.030(1)(b), OAR 839-005-0021, and OAR 839-005-0026. Respondent Gary Speaks did not aid and abet Respondent CCI in this unlawful employment practice.

6) Respondents did not reduce the number of hours Complainant was scheduled to work after May 22, 2009, because of her sex/pregnancy and did not violate ORS 659.029, ORS 659A.030(1)(b), OAR 839-005-0021, or OAR 839-005-0026 by reducing her hours between May 23 and June 1, 2009.

7) Respondent CCI discharged Complainant from employment because of her sex/pregnancy. In doing so, Respondent CCI violated ORS 659A.029, ORS

659A.030(1)(a), OAR 839-005-0021, and OAR 839-005-0026. Respondent Gary Speaks aided and abetted Respondent CCI in its discharge of Complainant, thereby committing an unlawful employment practice in violation of ORS 659A.030(1)(g).

8) 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 back pay resulting from Respondent CCI's unlawful employment practices and Respondent Speaks's aiding and abetting of those practices and to award money damages for emotional and mental suffering sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondents in the Order below are an appropriate exercise of that authority.

OPINION

INTRODUCTION

The Agency alleges that Respondent CCI unlawfully discriminated against Complainant based on her sex/pregnancy in terms and conditions of employment by: (1) demoting Complainant from her assistant manager position and cutting her hourly wage rate; and (2) reducing the hours Complainant was scheduled to work after her demotion, including temporarily taking her completely off the schedule. The Agency further alleges that Respondent CCI unlawfully discriminated against Complainant based on her sex/pregnancy by discharging her and that Respondent Gary Speaks aided and abetted Respondent CCI in all of these actions.

TERMS AND CONDITIONS OF EMPLOYMENT

A. Complainant was demoted from her assistant manager position and her pay cut because of her sex/pregnancy.

ORS 659A.030(1)(b) prohibits an employer from discriminating against an individual "in compensation or in terms, conditions or privileges of employment" because of that individual's sex. In pertinent part, ORS 659A.029 provides that "[f]or purposes of ORS 659A.030, the phrase 'because of sex' includes, but is not limited to, because of pregnancy, childbirth and related medical conditions or occurrences." OAR 839-005-0021(1) & (2) and OAR 839-005-0026(1) & (2) echo those provisions.[19]

[19] OAR 839-005-0021(1) & (2) provide:

"(1) Employers are not required to treat all employees exactly the same, but are prohibited from using sex as the basis for employment decisions with regard to hiring, promotion or discharge; or in terms, conditions or privileges of employment such as benefits and compensation.

"(2) Discrimination because of sex includes sexual harassment, discrimination based on pregnancy, childbirth and medical conditions and occurrences related to pregnancy and childbirth."

OAR 839-005-0026(1) & (2) provide:

To prove that Respondent CCI violated ORS 659A.030(1)(b) by demoting Complainant from her assistant manager position and cutting her hourly wage rate because she was pregnant, the Agency must establish a prima facie case consisting of the following five elements: (1) Respondent CCI was an employer subject to ORS 659A.010 to 659.865; (2) Respondent CCI employed Complainant; (3) Complainant was a pregnant woman; (4) Respondent CCI demoted Complainant and cut her hourly wage; and (5) Respondent CCI took these actions against Complainant because of her pregnancy. *See, e.g., In the Matter of Bob G. Mitchell,* 19 BOLI 162, 185 (2000).

The first four elements of the Agency's prima facie case are undisputed. The fifth element – causal connection -- is hotly contested, with the Agency asserting that Complainant was demoted and her pay reduced because of her pregnancy and Respondents asserting with equal force that Complainant's pregnancy had nothing to do with her demotion and pay reduction. To resolve this issue, the forum first reviews Complainant's employment history at CCI.

Complainant was hired as a server/bartender at the Grill in November 2008. She was supervised by Gary and Susan Speaks. When the Speaks decided to hire an assistant night manager, Complainant was offered the job based on her exceptional work performance and her availability to work nights. She was given a raise to $10 per hour and supervised all the employees at the Grill when the Speaks were not on the premises. She worked as assistant night manager for almost four months. During that time, on two occasions she undercharged customers for meals who used discount coupons issued by the Grill. She was not counseled or disciplined either time, and other employees had the same problem. She also sold a beer to a 20-year-old male who was an OLCC "decoy" after she examined his driver's license and failed to notice that he was not yet 21 years old. After that incident, Gary Speaks talked to Complainant about her mistake and its possible consequences. At hearing, after testifying about the seriousness of Complainant's OLCC blunder, Gary Speaks then minimized it by concluding "[s]he made a mistake; big deal; I don't write people up."

About the end of April 2009, Jay Winegar was hired as general manager of the Grill and began work on May 9. Complainant continued working as assistant night manager through May 22, at which time Winegar made the decision to demote her back to her original server position, effective the next day and cut her pay to $8.40 per hour. The reason Winegar gave Complainant for her demotion was "I don't feel you are going to have the availability we are looking for in the future because you are pregnant." Earlier, after Complainant announced her pregnancy and while she was still assistant night manager at the Grill, a cook employed at the Grill overheard Gary Speaks and

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"(1) Pregnant women are protected from sex discrimination in employment.

"(2) In judging the physical ability of an individual to work, pregnant women must be treated the same as males, non-pregnant females and other employees with off-the-job illnesses or injuries."

Winegar discussing Complainant's pregnancy and say that they would probably have to let Complainant go because she would be in the way.[20]

Under the "specific intent" theory of discrimination, proof of a causal connection may be established through evidence that shows a respondent knowingly and purposefully discriminated against a complainant because of the complainant's membership in a protected class. OAR 839-005-0010(1)(a)(A). *See, e.g., In the Matter of WINCO Foods, Inc.,* 28 BOLI 259, 300 (2007); *In the Matter of Wal-Mart Stores, Inc.,* 24 BOLI 37, 61 (2002). While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. *In the Matter of WINCO Foods, Inc., 28 BOLI 259, 300 (2007), citing In the Matter of Sierra Vista Care Center,* 9 BOLI 281, 296-97 (1991), *aff'd, Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992). In this case, Winegar's statement, standing alone, constitutes direct evidence of a discriminatory motive with regard to Complainant's demotion. The comment made by Winegar and Speaks in their earlier conversation also establishes a discriminatory intent based on Complainant's sex/pregnancy.

Respondent CCI's proffered defenses to the Agency's direct evidence were that (1) Speaks and Winegar did not make the latter comment; (2) Winegar's statement to Complainant when demoting her contained no reference to her pregnancy, only to her availability; (3) Complainant was demoted because she did not want to work until closing and Winegar needed an assistant night manager who would work until closing; and (4) Complainant limited her own availability by telling Winegar she did not want to work until closing. For reasons set out in the credibility findings, the forum rejects (1) and (2). The forum rejects (3) and (4) because of Complainant's credible testimony to the contrary, which is supported by her work history of working until closing for Respondent and for her prior and present employers.[21]

Based on the above, the forum concludes that Respondent CCI, through Winegar, demoted Complainant because of her sex/pregnancy. Because the demotion was also the direct cause of the reduction in her hourly wage rate, the forum also concludes that Respondent CCI, through Winegar, cut Complainant's pay because of her sex/pregnancy.

B. <u>Complainant's hours were not cut because of her sex/pregnancy.</u>

The Grill's time records show that Complainant was scheduled to work and worked an average of 33.3 hours per week between March 28 and May 8, 2009. She worked 13.25 hours the week of May 9-15 and was scheduled to work May 11 but did not because of sickness. She was scheduled to work and worked 19.25 hours the week of May 16-22, 2009. In the week of May 23-29, 2009, the week immediately after her demotion, she worked 20.5 hours, not including May 28, an additional day on which she

[20] *See* Finding of Fact #41 – The Merits.
[21] *See* Findings of Fact ##11, 15, 26, 34 -- The Merits.

was scheduled to work but did not work because of sickness. Respondents contend that Complainant was also scheduled to work on May 29, as shown on R-1 which reflects that Complainant was "sick" on that day. For the following reasons, the forum does not believe that Complainant was scheduled to work on May 29. First, the set of time records originally provided by Respondents to the Agency on December 14, 2009, did not contain this notation.[22] Second, Susan Speaks testified that she made the change on R-1 based on a handwritten note she missed on the original time records. Third, Susan Speaks also testified that the original records were destroyed not long after they were created, making it impossible for her to have based a correction of the set of time records originally provided by Respondents to the Agency on the original time records. Despite this fact, the undisputed time records provided by Respondents December 14, 2009, show that Complainant's hours actually increased the week immediately following her demotion.

Although it is undisputed that Complainant was temporarily taken off the schedule after she went to the emergency room on May 28, then rescheduled for only 7.25 hours the following week, the evidence is muddy as to the circumstances surrounding the schedule change. Unlike her demotion, there are no statements demonstrating Respondent's intent to take Complainant off the schedule because of her sex/pregnancy. Likewise, there is no comparator evidence to show that her hours would not have been temporarily cut, had she been out sick and visited the emergency room and not been pregnant. The forum concludes that the Agency failed to prove by a preponderance of the evidence that Complainant's hours were cut because of her sex/pregnancy.

C. Complainant Was Discharged Because Of Her Sex/Pregnancy

On June 1, 2009, Gary Speaks, Susan Speaks, and Winegar met and decided to fire Complainant. Winegar called Complainant that night and left a message to that she was fired because of her attitude. This was four days after Complainant had gone to the emergency room for bleeding related to her pregnancy, and eight days after Complainant was demoted because of her pregnancy.

In their testimony, Respondents' witnesses gave two reasons for this decision – Complainant's negative attitude towards Jennifer McKenzie and customer complaints about Complainant. With regard to McKenzie, Winegar testified that Complainant resented McKenzie's promotion, was behaving in a hostile manner towards McKenzie, and that McKenzie told Winegar she couldn't work with Complainant because of her attitude. Winegar and Susan Speaks both testified that customers came to them after Complainant's demotion and complained that Complainant had complained to them that she had been demoted because of her pregnancy. Gary Speaks testified that customers had also complained to him that Complainant had told them that Respondents were being "assholes" and "mean to her," but the context of his testimony places these complaints as before her demotion. No one was able to name any

[22] Exhibit A-7.

customers who allegedly complained to them. In her testimony, Complainant acknowledged telling some of her regular customers, in response to their question about why she was now wearing a red shirt, that she "was pretty sure it was because she was pregnant." However, she credibly denied having problems working with McKenzie. McKenzie did not appear to testify and Respondents did not document any of the alleged problems, pursuant to Gary Speaks's testimony that it was not their policy to document anything.

For a number of reasons, the forum does not believe Respondents' stated reasons for firing Complainant. First, the general lack of credibility of the Speaks and Winegar, as described in Findings of Fact ##65-67 – The Merits. Second, Gary Speaks testified unequivocally that he had made a decision in April 2009 to fire Complainant because he would no longer need her when a general manager was hired, yet no action was taken against her when Winegar was hired because Winegar "offered to work with her and see if she was salvageable." Winegar conspicuously failed to mention any "offer[] to work with her and see if she was salvageable" in his testimony. Third, Gary Speaks did not mention any problems Complainant had with McKenzie in two letters initially responding to the complaint in which explained why she was demoted and fired. Fourth, in those letters Speaks summarized the circumstances of Complainant's termination in the following words:

> "She then started complaining to customers and other employees that we were being unfair to her because she was pregnant. She then refused to work the schedule given[23] and this was when we made the decision to terminate her."[24]

Summarized, Gary Speaks, a key player in the decision to fire Complainant, stated in his testimony and letters that the decision to fire Complainant was made on three different occasions – (1) in April; (2) when she was demoted; and (3) on June 1 -- each time for a different reason. Finally, considering the emphasis Respondents put on the problems between McKenzie and Complainant and Winegar's assessment of the situation, it is notable that, after Complainant's demotion, McKenzie and Complainant only worked part of one shift together on May 23, 15 minutes of a shift together on May 25, and did not work again together until the day Respondents decided to fire Complainant.[25] After Complainant's demotion, Winegar and Complainant only worked together on May 23 and 24. Interestingly, the Grill's time records also show that Winegar did not work on June 1, the day the decision was made to fire Complainant.

These facts, combined with the "specific intent" statements Winegar and Gary Speaks made concerning Complainant's pregnancy vis-à-vis her continuing employment status at the Grill, her demotion eight days earlier because of her pregnancy, and her pregnancy-related trip to the emergency room a few days earlier

[23] The forum infers this was prior to her demotion, as that is when Respondents contend that Complainant stated she did not want to close.
[24] *See* Exhibit R-4.
[25] *See* Finding of Fact #34 – The Merits.

that caused her to be temporarily taken off the schedule, lead the forum to conclude that Complainant was discharged because of her sex/pregnancy.

RESPONDENT GARY SPEAKS AIDED & ABETTED RESPONDENT CCI IN DISCHARGING COMPLAINANT

ORS 659A.030(1)(g) provides that it is an unlawful employment practice "[f]or any person, whether an employer or employee, aid, abet, incite, compel or coerce the doing of any of the acts of this chapter or to attempt to do so." This forum has previously held that aiding and abetting, in the context of an unlawful employment practice, means "to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission." *In the Matter of Sapp's Realty, Inc.,* 4 BOLI 232, 277 (1985).

In this case, Respondent Speaks was Respondent CCI's vice president and CEO and owned one third of CCI's corporate shares throughout Complainant's employment. A corporate officer and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice. *In the Matter of Executive Transport, Inc.,* 17 BOLI 81, 94 (1998). *See also In the Matter of Body Imaging, P.C.,* 17 BOLI 162, 183-84 (1998), *affirmed* in part, *reversed* in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000); *In the Matter of Katari, Inc*., 16 BOLI 149, 161 (1997), *affirmed without opinion, Katari, Inc. v. Bureau of Labor and Industries*, 154 Or App 192, 957 P2d 1231, *rev den*, 327 Or 583 (1998); *In the Matter of Vision Graphics and Publishing, Inc.,* 16 BOLI 124, 138 (1997); *In the Matter of A.L.P. Incorporated,* 15 BOLI 211, 219-22 (1997*), affirmed, A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

The forum has determined that Respondent CCI engaged in three distinct unlawful employment actions – demoting Complainant from her assistant night manager position, cutting her pay, and discharging her. The evidence shows that Winegar discussed Complainant's job status with Speaks shortly before Winegar demoted Complainant and cut her pay, and that Winegar had the authority to take those actions. There is no evidence that Winegar told Speaks he intended to demote Complainant, that Speaks took any part in Complainant's demotion and pay cut by either recommending those actions or making a joint decision with Winegar to take one or both actions, or that Winegar told Speaks that his concerns about Complainant's job status were based on his concerns about her pregnancy. Rather, the evidence shows that Winegar brought up Complainant's job status with Speaks, that Speaks gave a neutral recommendation that Winegar should take whatever action he thought best, and that Winegar made the decision to demote Complainant, cut her pay, and promote Jennifer McKenzie in her place. Based on this evidence, the forum concludes that the Agency failed to prove by a preponderance of the evidence that Respondent Speaks

played an active role in Complainant's demotion and resultant pay cut and that Speaks is not liable as an aider and abettor for that unlawful employment action.[26]

Complainant's unlawful discharge is another matter. The evidence is undisputed that Respondent Speaks, Susan Speaks, and Winegar made a joint decision to discharge Complainant. Based on *Sapp's*, Respondent Speaks's participation in this decision making process places him squarely in the frame as an aider and abettor. *See, e.g., In the Matter of Loyal Order of Moose,* 13 BOLI 1, 11, 13-14 (1994) (When female complainants were subjected to unwelcome sexual conduct by their employer's manager, the commissioner found that the manager aided and abetted the employer's unlawful practice and ordered financial remedy for each complainant against both the manager and the employer).

DAMAGES – BACK PAY

A. Complainant is entitled to back pay.

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *From the Wilderness,* 30 BOLI 227, 290 (2009), *appeal pending.* 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. Awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *In the Matter of Trees, Inc.,* 28 BOLI 218, 251 (2007). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *In the Matter of Rogue Valley Fire Protection*, 26 BOLI 172, 184 (2005). A respondent has the burden of proving that a complainant failed to mitigate his or her damages. *In the Matter of Wal-Mart Stores, Inc.,* 24 BOLI 37, 65 (2003). To meet that burden, a respondent must prove that a complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and which the complainant was qualified." *Id.*

While Complainant was assistant night manager, she was paid $10 per hour and averaged $400 a week in tips. She was demoted to server and her pay cut to $8.40 per hour, effective May 23, 2009. She was fired at the end of the day on June 1, 2009. After she was fired, she did not begin looking for another job until on or about July 1, 2009. From July 1 until October 31, 2009, she actively sought employment. Due to her pregnancy, she was unavailable for work from October 31 to December 29, 2009, when her baby was born. After her baby was born, she did not look for work again until April 1, 2010. She was hired at her current job on or about April 15, 2010, and the Agency does not seek back pay after that date.

[26] Had Winegar told Speaks that, in considering Complainant's job status, he had concerns about her pregnancy or that he had made a tentative decision to demote Complainant and cut her pay and wanted Speaks's approval for that decision, the result may have been different.

Before computing Complainant's back pay, the forum addresses Respondents' arguments regarding Complainant's entitlement to any back pay. First, Respondents contends that the Agency's failure to offer Complainant's 2000 and 2010 tax returns as evidence leads to an inference that her claim for back pay is excessive. The forum disagrees. The Agency was under no obligation to offer Complainant's tax returns to support of its claim for back pay, and its failure to do so, in the absence of a discovery order, does not require the forum to draw any inference whatsoever. If Respondent wanted Complainant's tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the Agency refused to provide them.

Respondent also disputed Complainant's testimony that she averaged $400 per week in tips. Respondent could have presented rebuttal testimony concerning Complainant's average tips but did not do so. For example, Respondent could have solicited testimony from the other servers who testified at hearing as to the amount of tips they received. In the absence of any contravening evidence, the forum relies on Complainant's credible, unrebutted testimony to determine her average tips.

Finally, Respondent argues that Complainant did not mitigate her damages. Complainant credibly testified she looked for work between July 1 and October 31, 2009, and from April 1 through April 15, 2010. Although her testimony was not overly specific as to specific jobs that she applied for, her testimony that she actively sought work was not impeached. In rebuttal, Respondents offered no evidence of any other job openings for which Complainant was qualified and did not apply.[27]

B. <u>Computation of back pay.</u>

The Agency seeks back pay for three periods of time: (1) May 23-June 1, 2009, computed at $1.60 per hour, the difference between $10 per hour, the amount Complainant earned as assistant night manager, and $8.40 per hour, the amount she earned after her demotion; (2) June 2 to October 31, 2009, computed at a wage rate of $10 per hour and $400 per week in tips; and (3) April 1 through April 15, 2010, computed at a wage rate of $10 per hour and $400 per week in tips.

May 23-June 1, 2009

Rather than speculate as to the number of hours Complainant might have worked, had she not been demoted, the forum awards Complainant back pay at the rate

[27] *See, e.g., In the Matter of ARG Enterprises, Inc.,* 19 BOLI 116, 139 (2000) (When complainant had been employed by respondent as a dishwasher and respondent proved, through the presence of numerous help wanted ads and expert testimony, that complainant should have been able to find work as a dishwasher within one week after his discharge, the forum limited complainant's back pay award to one week's lost wages even though complainant remained unemployed for a longer period of time).

of $1.60 per hour for the 27.75 hours[28] she actually worked during this period of time. 27.75 hours multiplied by $1.60 equals $44.40.

June 2 to October 31, 2009

Complainant did not look for work for the first month after her discharge. Even though her lack of initiative may have been largely due to the depression she felt after being fired, her failure to look for work disqualifies her from a back pay award between June 2 and June 30, 2009.[29] However, she is entitled to an award for back pay and lost tips for the period of time extending from July 1 to October 31, 2009. To compute Complainant's back pay, the forum has averaged the number of hours she worked in the eight weeks beginning March 28 and ending May 29, 2009 (31.6 hours), multiplied it by the 17 weeks in the period of time extending from July 1 to October 31, 2009 (17 weeks x 31.6 hours = 537.2 hours), then multiplied that figure by $10 per hour (537.2 hours x $10 per hour = $5,372). To calculate Complainant's lost tips, the forum has multiplied the 17 weeks by $400, Complainant's average weekly tips (17 weeks x $400 = $6,800). In total, Complainant suffered a loss of back pay and tips of $12,172 from July 1 to October 31, 2009.

April 1 through April 15, 2010

The Agency stakes its claim for a back pay award from April 1 through April 15, 2010, on the proposition that Complainant would have returned to work at the Grill, had she remained employed, after taking 12 weeks of family leave under the Oregon Family Leave Act ("OFLA").[30] The Agency's claim fails for two reasons.

First, because it failed to prove that Complainant would have been entitled to take OFLA leave. Under the OFLA, only "covered employers" are required to grant family leave to employees. ORS 659A.153(1) defines "covered employers" as follows:

> "The requirements of ORS 659A.150 to 659A.186 apply only to employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be

[28] *See* Findings of Fact ##32 & 39 – The Merits.

[29] *See In the Matter of Loyal Order of Moose,* 13 BOLI 1, 8, 13 (1994)(When complainant was constructively discharged and did not actively seek work until a month later, and nine weeks later removed herself from the job market when she began work as a volunteer caregiver, the commissioner awarded back pay for the nine week period that complainant actively sought work); *In the Matter of Russ Berrie & Co., Inc.,* 9 BOLI 49, 66 (1990)(When a complainant excludes herself from the job market, other than for the reason of accepting alternative employment, she fails to mitigate her loss for the period of that exclusion. Thus, complainant was not awarded back pay during a period of maternity leave with a subsequent employer that paid less than respondent or during a month when she did not seek employment); *In the Matter of Lee's Cafe,* 8 BOLI 1, 20-21 (1989)(When complainant did not seek alternative employment for two months after she was discharged from respondents' café, the commissioner held that she was not entitled to back pay for that period because she voluntarily excluded herself from the job market, thus failing to mitigate her damages).

[30] ORS 659A.150 through 659A.186.

taken or in the year immediately preceding the year in which the leave is to be taken."

In its answer, Respondent CCI admitted that it employed "one or more employees" and Respondent Speaks told Martindale, in a June 2, 2010, interview that CCI employed "15 or more persons" but there is evidence in the record to show that Respondent CCI employed as many as 25 persons at any time. As the Agency has failed to show that Complainant would have been entitled to take OFLA leave, its claim for back pay cannot rest on that premise.

Second, because there is no evidence in the record that any other CCI employees were allowed to take a continuous five month leave from work for any reason, then return, or that CCI had a policy allowing such a leave.

EMOTIONAL DISTRESS/MENTAL SUFFERING DAMAGES

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the complainant. 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. *From the Wilderness*, 30 BOLI 291-92 (2009), *appeal pending*.

Because this case involves two separate discriminatory acts – Complainant's demotion/pay cut and her discharge -- and Respondent Gary Speaks is only liable for the latter, the forum makes a separate award of damages for each act.

A. <u>Complainant's demotion and pay cut.</u>

Complainant was promoted to assistant night manager after working as a server for three months. She was happy about her promotion and her pay raise to $10 per hour, the highest hourly wage she has ever been paid. She continued to be "extremely happy" about working in that job. While she worked as assistant night manager, she was never counseled or disciplined about her work performance. In late April 2009, she was also happy to learn she was pregnant. On May 22, 2009, Winegar told Complainant that she was being demoted to her former position as a server and that her pay was being cut to minimum wage because he didn't feel she would be sufficiently available to work because of her pregnancy. Her immediate reaction was to become "very upset and cr[y]." She remained upset, and her demotion caused some "problems" at home with Christopher Jones, her boyfriend, and their finances.[31] As assistant night manager, Complainant wore black pants and a black shirt. After her demotion, she had to wear a red shirt like the Grill's other servers, which made her feel degraded, a feeling

[31] Complainant testified that her pay cut also caused a $70 overdraw that caused her bank to decline to provide a checking account to Complainant and Jones. Since Complainant only lost $44.40 in wages between May 22 and June 1, the forum declines to blame Complainant's demotion for the bank's action.

accentuated when long-time customers asked her why she was wearing a red shirt. She was discharged nine days after her demotion. The forum notes that there is no evidence in the record to show that the emotional and mental suffering Complainant experienced as a direct result of her demotion and pay cut continued after her discharge.

Based on these facts, the forum concludes that $20,000 is an appropriate amount to compensate Complainant for the emotional and mental suffering she experienced as a result of her demotion and pay cut.

B. Complainant's discharge.

Complainant testified credibly and at length as to the emotional and mental suffering she experienced as a result of her discharge and the forum bases its damage award primarily on her testimony, summarized in detail below.

Complainant is an independent person who has always been employed and has never had trouble finding a job. Being fired when she was pregnant, in her words, was the "most degrading, unhappy time probably in a long-time time that I've ever had * * * It went from a happy moment to an 'Oh my God, what am I going to do, I have to get on food stamps now, now I'm back on welfare * * *."

She was "beyond upset" for a couple of months after she was fired and was depressed and didn't want to go anywhere. She went from being excited about being pregnant to being depressed after she was fired and just wanted to be left alone. She cried a lot and was nervous about how she would support her baby and herself.

During her subsequent job search, she believed no one would hire her because she was obviously pregnant and found this degrading. At the time of hearing, she still felt frustrated that she was fired instead of being able to keep her job until she went on family leave. She thinks about her discharge frequently and it still bothers her.

Complainant felt "belittled" by her discharge. Complainant and Jones, who was unemployed at the time, "bickered" a lot more after she was fired because of the financial stress caused by the loss of her job and also because a baby was on the way. She experienced stress because she and Jones were both unemployed and concerned over the responsibility of having a child and how they would pay for the expenses associated with having a child.

Complainant considered, but did not seek counseling for her depression after she was fired because she had no money to pay for counseling services. Complainant and Jones talked about going to "couples counseling" after Complainant was fired but did not go because Jones did not want to go and they had no money to pay for counseling services.

To make ends meet, Complainant had to apply for food stamps after she was fired. This made her feel embarrassed and degraded. She also had to get financial help from her mother to pay for baby-related expenses.

Respondent argues that Complainant's emotional and mental suffering damages should be severely limited because she did not seek medical attention or psychological counseling. The forum has addressed this issue before and held that the lack of medical consultation of the failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence. *In the Matter of Katari, Inc.,* 16 BOLI 149, 161 (1997)*, affirmed without opinion*, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, *rev den*, 327 Or 583 (1998). *See also In the Matter of Portland General Electric Company,* 7 BOLI 253, 272 (1988), *affirmed, Portland General Electric Company v. Bureau of Labor and Industries,* 116 Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

Based on these facts, the forum concludes that $120,000 is an appropriate amount to compensate Complainant for the emotional and mental suffering she experienced as a result of her discharge.

MANDATORY TRAINING ON RECOGNIZING AND PREVENTING DISCRIMINATION IN THE WORKPLACE BASED ON SEX/PREGNANCY

The Agency requests that "Respondents and any employees they currently employ required to attend training on recognizing and preventing discrimination in the workplace based on protected class." The Commissioner of BOLI is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ORS 659A.850(4). Among other things, that may include requiring the respondent to:

> "(a) Perform an act or series of acts designated in the order that are reasonably calculated to:
>
> "(A) Carry out the purposes of this chapter;
>
> "(B) Eliminate the effects of the unlawful practice that the respondent is found to have engaged in, including but not limited to paying an award of actual damages suffered by the complainant and complying with injunctive or other equitable relief; and
>
> "(C) Protect the rights of the complainant and other persons similarly situated[.]"

Requiring Respondents to undergo training specifically tailored to prevent future similar unlawful practices, as the Agency seeks, falls within authority granted to the Commissioner in ORS 659A.850(4). However, since the unlawful employment practices only relate to the protected class of sex/pregnancy, requiring training related to all protected classes cuts an overly broad swath. Consequently, the forum has tailored the required training to Complainant's protected class.

32 BOLI ORDERS

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Cyber Center, Inc.'s violations of ORS 659A.030(1)(b), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Cyber Center, Inc.** to 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 Amanda Glover** in the amount of:

1) FORTY FOUR DOLLARS AND FORTY CENTS ($44.40), less lawful deductions, representing wages lost by Amanda Glover between May 23 and June 1, 2009, as a result of Respondent Cyber Center, Inc.'s unlawful employment practice found herein; plus,

2) TWENTY THOUSAND DOLLARS ($20,000.00), representing compensatory damages for emotional and mental suffering Amanda Glover experienced as a result of Respondent Cyber Center, Inc.'s unlawful employment practice of demoting her and cutting her pay; plus,

3) Interest at the legal rate on the sum of TWENTY THOUSAND FORTY FOUR DOLLARS AND FORTY CENTS ($20,044.40) until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Cyber Center, Inc.'s violations of ORS 659A.030(1)(a) and Respondent Gary Speaks's violation of ORS 659A.030(1)(g), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Cyber Center, Inc.** and **Gary Speaks** to 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 Amanda Glover** in the amount of:

1) TWELVE THOUSAND ONE HUNDRED AND SEVENTY TWO DOLLARS ($12,172.00), less lawful deductions, representing wages and tips lost by Amanda Glover between July 1 and October 31, 2009, as a result of Respondent Cyber Center, Inc.'s and Respondent Gary Speaks's unlawful employment practices found herein; plus,

2) ONE HUNDRED TWENTY THOUSAND DOLLARS ($120,000.00), representing compensatory damages for emotional and mental suffering Amanda Glover experienced as a result of Respondent Cyber Center, Inc.'s and Respondent Gary Speaks's unlawful employment practices found herein; plus,

3) Interest at the legal rate on the sum of $132,172.00 from the date of the Final Order until Respondents comply herein.

C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Cyber Center, Inc.'s violations of ORS 659A.030(1)(a) & (b) and Respondent Gary Speaks's violation of ORS 659A.030(1)(g), the Commissioner of the Bureau of Labor and Industries hereby orders and Cyber Center, Inc. to require its current employees, if any, including Gary Speaks, to attend training on recognizing and preventing discrimination in the workplace based on sex/pregnancy. Such training may be provided by the Bureau of Labor and Industries Technical Assistance for Employees unit or another trainer agreeable to the Agency.

In the Matter of

SUSAN C. STEVES

Case No. 75-11

Final Order of Commissioner Brad Avakian

Issued April 30, 2012

SYNOPSIS

Respondent employed Claimant as her assistant from March 5, 2009, through May 26, 2010, during which time Claimant worked 1,143 hours. In the absence of an agreed wage rate, Claimant was entitled to be paid Oregon's statutory minimum wage of $8.40 per hour for all hours worked. Claimant earned $9,601.20 and was only paid $2,000, leaving $7,601.20 in unpaid due and owing wages. Respondent's failure to pay Claimant was willful and Respondent was ordered to pay $2,016.00 in penalty wages. Respondent was ordered to pay an additional $2,016.00 as a civil penalty based on her failure to pay the minimum wage for all hours worked. ORS 652.140(2), ORS 652.150; ORS 653.055.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 23-24, 2012, at the DeArmond Room of Deschutes County's offices, located at 1300 N.W. Wall Street, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Kristene Crawford ("Claimant") was present throughout the hearing and was not represented by

counsel. Respondent Susan C. Steves represented herself and was present throughout the hearing.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Division compliance specialist Bernadette Yap-Sam (telephonic); and Cheryl Bruns (telephonic), a former client of Respondent.

Respondent called herself as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing); and X-11 through X-13 (ALJ interim orders issued after the hearing). Exhibit X-10, consisting of Respondent's case summary submitted at the time set for hearing, was not received into evidence.
b) Agency exhibits A-1 through A-11 (submitted prior to hearing), A-12, A-13, and A-15 (submitted at hearing);
c) Respondents' exhibits R-1 and R-2 (submitted at hearing); and
d) Exhibits ALJ-1 and ALJ-2, consisting of documents requested by the ALJ after the hearing.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about October 13, 2000, Claimant filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. Earlier, Claimant filed a wage claim form with the Agency that she signed on August 25, 2010.

2) On February 15, 2011, the Agency issued Order of Determination No. 10-2591 based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the Order alleged that:

- Respondents employed Claimant from March 5, 2009, through May 26, 2010 (the "wage claim period"), and was required to pay Claimant no less than $8.40 per hour for each hour worked;
- Claimant worked 1,114.49 hours;
- Respondent only paid Claimant $2,000.00, leaving a balance due and owing of $7,361.72 in unpaid wages, plus interest thereon at the legal rate per annum from July 1, 2010, until paid;

- Respondent willfully failed to pay these wages and owes Claimant $2,016.00 in penalty wages, with interest thereon at the legal rate per annum from August 1, 2010, until paid.
- Respondent owes Claimant $2,016.00 in civil penalties based on Respondent's failure to pay Claimant at the minimum wage for all hours worked.

3) On May 31, 2010, Respondent filed an answer and request for hearing in which she denied employing Claimant for 1,114.49 hours during the wage claim period, further denied that Claimant was ever her employee, and alleged that Claimant volunteered in her office because Respondent represented Claimant's boyfriend in a contested custody modification proceeding without charging him.

4) On August 12, 2011, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on February 23, 2012, at the Offices of Deschutes County, located in Bend, Oregon. The Notice of Hearing included a copy of the Notice of Intent to Assess Civil Penalties, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

5) On November 28, 2011, the ALJ 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 ALJ ordered the participants to submit case summaries by February 10, 2012, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency filed a case summary on February 10, 2012.

7) On February 16, 2012, Dirk D. Sharp, attorney at law, faxed a notice of representation to the forum stating that Respondent had retained him to represent her. At the same time, Sharp filed a motion for postponement based on the following grounds:

1. "Additional investigation is necessary on behalf of Respondent.
2. "Witnesses need to be informed of the hearing.
3. "Witnesses need to be interviewed.
4. "MS. Steves has undergone emergency oral surgery in the last week and is scheduled for additional treatment next week.
5. "Due to the above medical treatments MS. Steves experiences severe pain upon speaking.

6. The foregoing would impede and prevent adequate representation of MS. Steves."

On Friday, February 17, the ALJ telephoned Sharp and told him that he would need to provide a letter from Respondent's dentist confirming Respondent's medical status before the ALJ would rule on Respondent's motion for postponement. The ALJ also informed Sharp that, once Sharp provided a note from the dentist, he would call the Agency case presenter to see if the Agency had any objection to a postponement. Later that day, Sharp telephoned the ALJ, said that the dentist's office was not open, and asked that the ALJ grant the postponement without a note from Respondent's dentist. About 10 minutes later, the ALJ conducted a prehearing conference with Sharp and the Agency case presenter to discuss Respondent's motion for postponement. The Agency case presenter objected to a postponement on the grounds that the Agency was prepared for hearing. Sharp reiterated that Respondent might not be unable to participate in the hearing, depending on her medical condition the following week. The ALJ denied Respondent's motion for postponement based on the absence of any medical evidence other than Sharp's statement to support it, but said that he would reconsider Respondent's motion if Respondent filed a statement from her dentist that established Respondent was medically unable to participate in the hearing. At 9:25 a.m. on February 21, the ALJ telephoned Sharp to inform him that the Hearings Unit had received nothing from the dentist's office. In response, Sharp said he would no longer be representing Respondent at the hearing and was withdrawing as her counsel. Sharp added that Respondent would attend the hearing. Sharp faxed a letter of withdrawal of representation to the ALJ later that day.

8) At the start of hearing, the ALJ verbally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) Respondent did not file a case summary prior to the time set for hearing, but brought her case summary to the hearing. The Agency objected to Respondent's case summary on the grounds that it was untimely filed. In response to the ALJ's query, Respondent stated that she did not file a case summary earlier because the ALJ's interim order requiring case summaries had been misfiled at her office. The ALJ sustained the Agency's objection on the grounds that Respondent failed to offer a satisfactory reason for having failed to timely file her case summary and that excluding it would not violate that ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10).

10) On her case summary, Respondent listed Dirk Sharp as a witness. Based on the Agency's objection and Respondent's failure to timely file a case summary, the ALJ did not allow Sharp to testify but did allow Respondent to make an oral offer of proof regarding what Sharp's testimony would have been, had he been allowed to testify.

11) On February 28, 2012, the ALJ re-opened the record on his own motion to obtain a copy of Claimant's original 2009-2010 nail salon appointment books for

inspection. Claimant sent her original books directly to the ALJ, who received it on March 5, 2012. After inspecting the books, the ALJ copied two pages that appeared to contain inconsistencies with the Claimant's 2009-2010 calendars received at hearing as Exhibits A-8 and A-9, and marked and received them into the record as Exhibits ALJ-1 and ALJ-2. Copies were provided to both participants and the original books mailed back to the Claimant, with instructions to Claimant to retain them until such time as this case is completely resolved and all appeal rights have expired. The record closed on March 29, 2012.

12) The ALJ issued a proposed order on April 11, 2012, 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 during the wage claim period, Respondent was an Oregon attorney with an office in Bend, Oregon, that she shared with Dirk Sharp, another attorney, and operated a for-profit business. As part of her general practice, she did pro bono[1] work for military veterans.

2) At all times during the wage claim period, Claimant worked as a nail technician at Image Salon in Bend, Oregon, where she leased her own work station and worked as an independent contractor. Claimant did not work at the nail salon on Mondays and Wednesdays.

3) Respondent and Claimant met at Images Salon, where Respondent went every couple of weeks to have her nails done, and they became friends. Claimant learned that Respondent was an attorney and did pro bono work for military veterans. Claimant's live-in boyfriend, David Sutterfield, is a military veteran who needed legal assistance in his child custody case. Claimant told Respondent about Sutterfield's situation and Respondent agreed to take Sutterfield's case on a pro bono basis.

4) In 2009, Respondent performed a substantial amount of pro bono legal work on Sutterfield's behalf, including several all day court appearances. Her first consultation with Sutterfield was on February 20, 2009. Claimant assisted Respondent in some of her work on Sutterfield's behalf.

5) On one of Respondent's visits to Claimant's nail salon, Respondent told Claimant that she had been having trouble collecting debts from some of her clients. Claimant told Respondent that she had a background in collections and could assist Respondent.

6) On March 5, 2009, Claimant began performing work for Respondent at Respondent's office. Claimant continued to perform work for Respondent until May 26,

[1] Respondent testified that "pro bono" means "providing legal services for free -- no charge."

2010, working primarily on Mondays and Wednesdays, but also working some other days, including weekends and evenings. During this time, Claimant acted as Respondent's personal assistant. Besides collections, Claimant also performed reception work, filed documents for Respondent in her office, and delivered documents to the court and to other attorneys.

7) Respondent told Claimant to keep track of all the hours she worked on a calendar so that Respondent would be able to pay her for the time Claimant had worked, plus a bonus for her collections. Respondent and Claimant did not agree on a specific wage rate.

8) During her employment with Respondent, Claimant maintained a contemporaneous record of the hours she worked each day on a calendar, noting that times she started and stopped work each day.

9) Respondent did not keep a record of the hours that Claimant worked.

10) In 2009, Respondent had not filed tax returns for the prior four years. When Claimant learned this, she told Respondent that she had done her own taxes and could do Respondent's. With Respondent's acquiescence, Claimant organized Respondent's financial records for the previous four years and prepared tax returns for those years, a job she started doing on September 29, 2009. On March 1, 2010, Respondent signed a "POWER OF ATTORNEY FOR REPRESENTATION" form that authorized Claimant to "receive [Respondent's] confidential tax information and/or represent [Respondent] before the Oregon Department Revenue for all tax matters." Claimant subsequently spoke with Department of Revenue representatives a number of times on Respondent's behalf.

11) Between March 5, 2009, and May 26, 2010, Respondent and Claimant exchanged approximately 604 phone calls that Claimant made or received on her cell phone. A number of those calls were made on days that Claimant did not claim to have worked on her calendar of hours submitted to the Agency.

12) Claimant worked a total of 1,143 hours for Respondent, broken down as follows:

Month & Year	Hours Worked
March 2009	66.5
April 2009	56.75[2]
May 2009	53.75
June 2009	76.75

[2] The forum has not included hours Claimant noted on her calendar for April 8 and April 17 because her notes indicated she performed work related to "Jeff," an individual whom Respondent credibly testified was never her client.

July 2009	60.00
August 2009	76.00
September 2009	103.5
October 2009	54.5
November 2009	85.5
December 2009	75.25
January 2010	86.5
February 2010	87.5
March 2010	106.5
April 2010	100.75
May 2010	53.25

13) Respondent paid Claimant approximately $2,000.00 in cash for her work.

14) On one occasion between August 2009 and May 26, 2010, Respondent introduced Claimant to Cheryl Bruns, one of her clients, with the following words: "This is my assistant Kristy." When Bruns called Respondent's office, Claimant usually answered the phone. One day Respondent called Bruns and told Bruns that Claimant "was no longer working for her and that [Respondent] was going to have a new assistant."

15) Claimant quit on May 26, 2010, because Respondent would not pay her.

16) In July 2010, Respondent contacted the Bend Police Department and reported that Claimant had a $250 check in her possession made out Respondent's name. Respondent told an officer from the Bend Police Department that she "used to have an assistant in her legal office named Kristene Crawford. * * * Crawford began asking for advances of pay, and it got to the point that Steves told Crawford she could no longer giver [sic] advances."

17) Oregon's statutory minimum wage in 2009 and 2010 was $8.40 per hour.

18) Claimant filed two wage claim forms with BOLI's Wage and Hour Division, in response to Yap-Sam's request to Claimant to provide additional information that was not provided on her first wage claim form.

19) On November 22, 2010, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

> "You are hereby notified that KRISTENE MARIE CRAWFORD has filed a wage claim with the Bureau of Labor and Industries alleging:

> "Unpaid wages of $9,391.90 at the rate of $8.40 per hour from March 4, 2009 to May 26, 2010.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.
>
> "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.
>
> "If your response to the claim is not received on or before December 7, 2010, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

20) Respondent has not paid any money to Claimant since Claimant's last day of work and owes Claimant $7,601.20 in unpaid, due and owing wages.

21) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $8.40 per hour x 8 hours x 30 days = $2,016.00.

22) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: $8.40 per hour x 8 hours x 30 days = $2,016.00.

CREDIBILITY FINDINGS

23) Bernadette Yap-Sam and Cheryl Bruns were credible witnesses and the forum has credited their testimony in its entirety.

24) Claimant was a credible witness as to the number of hours she worked and the duties she performed. The forum has believed her testimony on those issues whenever it conflicted with Respondent's testimony.

25) Respondent's testimony concerning the number of hours worked by Claimant and as to Claimant's "volunteer" status was not credible.

ULTIMATE FINDINGS OF FACT

1) At all times during the wage claim period, Respondent was an Oregon attorney who maintained an office in Bend, Oregon, and employed Claimant.

2) Claimant worked as Respondent's assistant between March 5, 2009, and May 26, 2010. She filed documents, did collections and reception work, delivered documents to the court and to other attorneys, and prepared and filed Respondent's back returns. She quit on May 26, 2010.

3) Claimant worked a total of 1,143 hours for Respondent, earning $9,601.20, and has only been paid $2,000.00. Respondent owes Claimant $7,601.20 in unpaid, due and owing wages.

4) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $8.40 per hour x 8 hours x 30 days = $2,016.00.

5) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: $8.40 per hour x 8 hours x 30 days = $2,016.00.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer who suffered or permitted Claimant to work in Oregon and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS 653.010 to 653.055.

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

3) Respondent violated ORS 652.140(2) by failing to pay to Claimant all wages earned and unpaid not later than five days after May 26, 2010, excluding Saturdays, Sundays and holidays. Respondent owes Claimant $7,601.20 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing and owes $2,016.00 in penalty wages to Claimant. ORS 652.150.

5) Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 by failing to pay her Oregon's statutory minimum wage for all hours worked and is liable to pay $2,016.00 in civil penalties to Claimant. ORS 653.055(1)(b).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent Susan C. Steves to pay Claimant her earned, unpaid, due and payable wages, ORS 652.150 penalty wages, and ORS 653.055 civil penalties, plus interest, on all sums until paid. ORS 652.332.

OPINION

CLAIMANT'S WAGE CLAIM

To establish Claimant's wage claim, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondent; and 4)

Claimant performed work for which she was not properly compensated. *In the Matter of Letty Lee Sesher,* 31 BOLI 255, 261 (2011).

RESPONDENT EMPLOYED CLAIMANT

Respondent claims she that never employed Claimant and Claimant volunteered all her work for Respondent to repay Respondent for pro bono work that Respondent performed for Claimant's boyfriend, a military veteran. Respondent testified that she valued this work at $35,000+, based on Respondent's standard fee of $195 an hour. Respondent also alleges that Claimant cannot, as a matter of law, be her employee because there was no agreed rate of pay. The forum rejects both defenses for reasons stated below.

First, as Respondent testified, pro bono work means work performed without the expectation of compensation. Respondent's claim that she performed $35,000+ of pro bono work for Claimant's boyfriend and accepted 15 months of volunteer work by Claimant based on Claimant's gratitude for that work is a non-sequitur.

Second, there is credible evidence in the record that Respondent told two persons – Cheryl Bruns and a Bend police officer -- that Claimant was her assistant.

Third, Oregon law imposes specific conditions on the circumstances in an employment setting in which a person can be considered a volunteer. ORS 653.010(2) provides:

> "'Employ' includes to suffer or permit to work but 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 referred to in subsection (3) of this section, 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."

Respondent is a private attorney operating a for-profit business who fits in none of these categories. Consequently, Claimant could not work for her as a volunteer as a matter of law.[3]

[3] *See also In the Matter of Graciela Vargas,* 16 BOLI 246, 259 (1998)(the forum held that claimant did not perform work for respondent as a volunteer when claimant did not provide respondent with voluntary or donated services performed for no compensation or without expectation or contemplation of compensation and respondent ran a for-profit restaurant; was not a public employer or religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service; and acknowledged actually paying claimant for some work); *In the Matter of Arabian Riding and Recreation Corp.,* 16 BOI 79, 92 (1997)(minors were employees, not volunteers, when there was no evidence or attempt to show that respondent was a public employer or a religious, charitable, or educational institution as described or was involved in a federal or state public assistance program).

Fourth, Claimant credibly testified that Respondent paid her approximately $2,000.00 in cash during the wage claim period. Respondent's claim that she gave this amount of money to Claimant whenever she needed money because they were "friends" requires a stretch of the imagination the forum is unwilling to make.

Fifth, although Respondent and Claimant may have been friends before the wage claim was filed, the approximate 604 phone calls between Respondent and Claimant during the wage claim period support an inference that the relationship between Respondent and Claimant was something other than just a friendship.

Finally, although ORS 653.010 does not include an express definition of "employee," 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. *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration,* 25 BOLI 12, 38 (2003), *affirmed without opinion*, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004). When an employer suffers or permits a person to work, as in this case, the fact that the person is not paid or there is no agreement to pay the worker a fixed rate does not take her out of the definition of "employee" when a minimum wage law requires she be paid the minimum wage. *In the Matter of LaVerne Springer,* 15 BOLI 47, 67 (1996).

Based on all of the above, the forum concludes that the Agency has met its burden of proving that Respondent employed Claimant.

CLAIMANT WAS ENTITLED TO BE PAID OREGON'S MINIMUM WAGE

Testimony by both Respondent and Claimant concerning the specific circumstances under which Claimant began working for Respondent and their pay arrangement was sparse and murky. However, it is undisputed that there was no agreement that Claimant would be paid a specific wage. Claimant testified she expected to be paid a commission on the collections she successfully performed for Respondent, and Respondent points to this as evidence that Claimant was not entitled to an hourly rate. This argument fails. When there is no agreed upon rate of pay, an employer is required to pay at least the statutory minimum wage. *In the Matter of Jo-El, Inc.,* 22 BOLI 1, 7 (2001). Since Respondent and Claimant did not agree to a specific rate of pay, Claimant was entitled to be paid $8.40 per hour, Oregon's statutory minimum wage in 2009 and 2010.

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

When the employer produces no records of the hours that a wage claimant worked, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." *In the Matter of Letty Lee Sesher,* 31 BOLI 255, 262 (2011). *See also In the Matter of Mark A. Frizzell, 31 BOLI 178, 204 (2011).* A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. *Id.* In this case, Claimant's testimony, supported by her contemporaneously maintained calendar and cell phone records, is the only evidence of

the hours that Claimant worked, as Respondent testified that she did not keep records of Claimant's hours.[4] OAR 839-020-0040 sets out general parameters for how work hours are to be calculated. In pertinent part, it states:

> "(2) Work requested or required is considered work time. Work not requested, but suffered or permitted is considered work time.
>
> "(3) Work performed for the employer but away from the employer's premises or job site is considered work time. If the employer knows or has reason to believe that work is being performed, the time spent must be counted as hours worked.
>
> "(4) It is the duty of the employer to exercise control and see that the work is not performed if it does not want the work to be performed. The mere promulgation of a policy against such work is not enough."

Claimant credibly testified as to the hours she recorded in her 2009 and 2010 calendars as having worked for Respondent and testified as to her specific recollection of the duties she performed on a number of different days. Her testimony supports a conclusion that her recorded hours reflect work performed at Respondent's request of acquiescence. Although Respondent testified generally that Claimant did not work the hours she claimed, the only significant dispute over what Claimant did on a particular day concerned July 20, 2009, a date Claimant said she drove Respondent to Salem to the Supreme Court, and Respondent testified that Claimant drove Respondent to the Court of Appeals, then went on a shopping trip to Portland while Respondent presented her case to the Court. As Claimant only claimed one hour of work on that day, from 6-7 p.m., this disagreement is immaterial to the forum's determination concerning the number of hours Claimant worked.

In conclusion, the forum relies on Claimant's credible testimony and contemporaneous record of hours worked establish the number of hours she worked for Respondent. That total is 1,143 hours, as detailed in Finding of Fact # 12 -- The Merits.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant credibly testified that she was paid approximately $2,000.00 in cash. Respondent kept no receipts or other record of the payments she made to Claimant, but acknowledged she gave Claimant cash upon request. Lacking any other evidence of the amount paid by Respondent to Claimant, the forum relies on Claimant's credible testimony to conclude that she was paid $2,000.00 for her work. In contrast, she earned $9,601.20, leaving a balance due and owing of $7,601.20. Although this amount exceeds the amount of unpaid wages sought in the Order of Determination, the commissioner has the authority to award monetary damages, including penalty wages that exceed those sought in the Order of Determination when they are awarded as

[4] Specifically, Respondent testified that she did not keep records because she did not believe that Claimant was an employee.

compensation for statutory wage violations alleged in the charging document. *See, e.g., In the Matter of Letty Lee Sesher,* 31 BOLI 255, 263 (2011); *In the Matter of Petworks LLC,* 30 BOLI 35, 44 (2008). The commissioner exercises that authority in this case.

CLAIMANT IS OWED PENALTY WAGES

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, 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. *See, e.g., In the Matter of Computer Products Unlimited, Inc.,* 31 BOLI 209, 225 (2011).

In this case, Respondent knew that Claimant was performing work on Respondent's behalf and chose not to pay her all wages due and owing on the basis of her belief that Claimant was a volunteer and not entitled to any wages. An employer acts "willfully" when it knows what it is doing, intends to do what it is doing, and is a free agent. *In the Matter of Pavel Bulubenchi,* 29 BOLI 222, 227 (2007). There is no evidence that Respondent intended to pay Claimant an amount other than the amount Claimant was actually paid or that Respondent was not acting as a free agent in choosing not to pay Claimant the rest of her wages. The forum further notes that Respondent's failure to apprehend the correct application of the law and her actions based on this incorrect application do not exempt her from a determination that she willfully failed to pay wages earned and due. *See In the Matter of Scott Miller,* 23 BOLI 243, 262 (2002).

> ORS 652.150(1) and (2) provide, in pertinent part:
> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the 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.
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand for Claimant's wages contemplated in ORS 652.150(2) after Claimant filed her wage claim. The Agency's Order of Determination, issued on

February 15, 2011, repeated the demand.[5] Respondent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notice and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Using this formula, penalty wages for Claimant equal $2,016.00.

CLAIMANT IS OWED CIVIL PENALTIES UNDER ORS 653.055

The Agency also seeks civil penalties of $2,016.00 under ORS 653.055(1)(b). That statute provides that an employer who pays an employee less than the applicable minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001). A *per se* violation occurs when an employee's wage rate is the minimum wage, the employee is not paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies. *In the Matter of Allen Belcher,* 31 BOLI 1, 10 (2009). Claimant's wage rate was the minimum wage. She was not paid all wages earned, due, and owing after she quit, and there is no applicable statutory exception. Consequently, Claimant is entitled to an ORS 653.055 civil penalty in the amount of $2,016.00.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, ORS 653.055, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Susan C. Steves** to 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, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant in the amount of ELEVEN THOUSAND SIX HUNDRED AND THIRTY THREE DOLLARS AND TWENTY CENTS ($11,633.20), less appropriate lawful deductions, representing $7,601.20 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from July 1, 2010, until paid; $2,016.00 in penalty wages, plus interest at the legal rate on that sum from August 1, 2010, until paid; and a civil penalty of $2,016.00, plus interest at the legal rate on that sum from August 1, 2010, until paid.

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[5] *See In the Matter of Captain Hooks, LLC,* 27 BOLI 211, 224 (2006)(the Agency's Order of Determination constitutes a written notice of nonpayment of wages).

In the Matter of

E. H. GLAAB, GENERAL CONTRACTOR, INC.,

Case No. 82-10
Final Order of Commissioner Brad Avakian
Issued May 17, 2012

SYNOPSIS

Respondent employed Claimant from June 15 through August 12, 2009, at the agreed wage rate of $17 per hour. Claimant worked 328 hours and earned $5,576, but was only paid $4,550, leaving $1,026 in unpaid due and owing wages. Respondent's failure to pay Claimant was willful and Respondent was ordered to pay $4,080 in penalty wages. ORS 652.140(1), ORS 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 1, 2012, in the Lyon Room of Deschutes County's offices, located at 1300 N.W. Wall Street, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Rene Arellano Sanchez ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent did not make an appearance at the hearing and was held in default.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Division compliance specialist Dylan Morgan (telephonic); and Maximo Arellano, Claimant's brother and former co-worker. Alita Pavani and Adolfo Alonso, both Oregon court-certified Spanish language interpreters, interpreted the testimony of Claimant and Maximo Arellano and also interpreted the entire proceeding to Claimant.

The forum received into evidence:

a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing); and
b) Agency exhibits A-1 through A-16 (submitted prior to hearing), and A-17 through A-19 (submitted at hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following

32 BOLI ORDERS

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

FINDINGS OF FACT – PROCEDURAL

1) On October 13, 2009, Claimant filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. At the Agency's request, Claimant filed a second wage claim on November 9, 2009, that was identical to the first except that he added the amount of wages he believed Respondent owed to him.

2) On January 21, 2010, the Agency issued Order of Determination No. 09-3153 ("OOD") based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the OOD alleged that:

- Claimant was employed by Respondent and earned wages at the agreed wage rate of $17.00 per hour from June 14 through August 12, 2009.
- Respondent paid Claimant $4,550 and still owes Claimant $1,026 in unpaid, due and owing wages, with interest thereon at the legal rate per annum from September 1, 2009, until paid.
- Respondent willfully failed to pay these wages and owes Claimant $4,080 in penalty wages, with interest thereon at the legal rate per annum from September 1, 2009, until paid.

3) On February 18, 2010, Respondent, through its president and authorized representative Edward Glaab, filed an answer and request for hearing in which it denied the OOD's allegations and further alleged that Claimant was overpaid.

4) On September 23, 2011, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on May 1, 2012, at the Deschutes Services Building, Bend, Oregon.

5) At the start of hearing, the ALJ verbally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

6) At the hearing, the ALJ granted the Agency's motion to amend its OOD to allege that penalty wages were due from October 1, 2009, instead of September 1, 2009.

7) The ALJ issued a proposed order on May 4, 2012, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

32 BOLI ORDERS

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon domestic business corporation based in La Pine, Oregon, that engaged the personal services of one or more employees, and Edward Glaab was its president.

2) Claimant worked for Respondent from March 2007 through August 12, 2009. Between June 15 and August 12, 2009 (the "wage claim period"), Claimant worked for Respondent as a paver installer on Respondent's Oxford Hotel project at the agreed wage rate of $17 per hour. Claimant was laid off at the end of the project.

3) Claimant maintained a contemporaneous written record of the hours he worked on the Oxford Hotel project.

4) Claimant worked a total of 328 hours on the Oxford Hotel project, summarized as follows:

Week Ending	Hours Worked
6/20/09	40
6/27/09	40
7/4/09	40
7/11/09	40
7/18/09	24
7/25/09	40
8/1/09	40
8/8/09	40
8/15/09	24

5) Calculated at $17 per hour, Claimant earned $5,576 in gross wages for his work on the Oxford Hotel project.

6) Claimant was only paid $4,550 in wages for his work on the Oxford Hotel project.

7) On January 6, 2010, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent stating that Claimant had filed a wage claim for unpaid wages and demanding that Respondent pay Claimant $1,625.09 in unpaid, due and owing wages. This sum also included $599.09 in unpaid wages for a pre-wage claim period prevailing wage rate project.

8) Respondent's surety issued a check to the Agency for the $599.09 in unpaid prevailing wages and the Agency issued a check to Claimant in that amount, leaving $1,026.09 in unpaid, due and owing wages.

9) Respondent has not paid any additional wages to Claimant since the Agency mailed its demand letter.

10) All the witnesses were credible.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an Oregon corporation. Edward Glaab was Respondent's corporate president and his actions are imputed to Respondent.

2) Claimant was employed by Respondent at the agreed rate of $17 per hour as a paver installer during the wage claim period.

3) Claimant worked 328 hours for Respondent during the wage claim period and has only been paid $4,550 for his work, leaving $1,026 in unpaid, due and owing wages.

4) On January 6, 2010, the Agency mailed a notice to Respondent that notified Respondent of Claimant's wage claim and demanded that Respondent pay the unpaid, due, and owing wages. Respondent has not paid any additional wages to Claimant and still owes Claimant $1,026 in unpaid, due and owing wages.

5) Respondent's failure to pay Claimant his unpaid, due and owing wages was willful. Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $17 per hour x 8 hours x 30 days = $4,080.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer that engaged the personal services of one or more employees, including Claimant, and was subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

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

3) Respondent violated ORS 652.140(1) by failing to pay to Claimant all wages earned and unpaid not later than the end of Respondent's work day on August 12, 2009. Respondent owes Claimant $1,026 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing and owes $4,080 in penalty wages to Claimant. ORS 652.150.

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 order Respondent to pay Claimant his earned, unpaid, due and payable wages and penalty wages, plus interest, on all sums until paid. ORS 652.332.

OPINION

CLAIMANT'S WAGE CLAIMS

In a wage claim default case, the Agency needs only to establish a prima facie case supporting the allegations of its OOD in order to prevail. *In the Matter of Letty Lee Sesher,* 31 BOLI 255, 261 (2011). The elements of a prima facie case include the following: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which he was not properly compensated. *Id.*

RESPONDENT EMPLOYED CLAIMANT

In its OOD, the Agency alleged that Respondent employed Claimant. Respondent did not deny this in its answer and the Agency's allegation is therefore deemed admitted. OAR 839-050-0130(3).

THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED, IF OTHER THAN MINIMUM WAGE

In its answer, Respondent denied that it agreed to pay Claimant $17 per hour, alleging that "plaintive [sic] miss understood [sic] his hourly rate of pay, due to pay decreases of $2.00 per hour starting June first of 2009." In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in a respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of Village Café, Inc.,* 30 BOLI 80, 88 (2008). In this case, Claimant credibly testified that his agreed rate of pay was $17 per hour. The forum relies on this testimony to conclude that Claimant's correct rate of pay during the wage claim period was $17 per hour.

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

When the employer produces no records of the hours that a wage claimant worked, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." *Sesher* at 262. A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. *Id.* In this case, Claimant credibly testified that the 328 total hours on the handwritten calendar of hours he submitted to the Agency was copied from his contemporaneously maintained, accurate record of hours worked. His brother, Maximo, corroborated this by credibly testifying that he and Claimant worked eight hours a day, five days a week, on the Oxford Hotel project. Respondent did not provide a record of the hours worked by Claimant during the Agency's investigation or with its answer. The forum relies on Claimant's credible testimony to conclude that he worked 328 hours for Respondent during the wage claim period, earning $5,576.

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

The Agency's compliance specialist credibly testified that, based on records made available to him and his subsequent computations, he was able to determine that Claimant was paid only $4,550 for the work his work at the Oxford Hotel, leaving $1,026 in unpaid, due and owing wages.

CLAIMANT IS OWED PENALTY WAGES

The forum may award penalty wages when 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).

The Agency established that Claimant was entitled to be paid $17 per hour for his work on the Oxford Hotel project, that Respondent set Claimant's work hours and was aware of them, that Respondent laid off Claimant and did not pay him for all hours worked, and that the Agency made a written demand for Claimant's unpaid wages and Respondent made no payment in response. There is no evidence that Respondent acted other than voluntarily and as a free agent in underpaying Claimant and the forum concludes that Respondent acted willfully in failing to pay Claimant his wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the 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. However:
>
> "(a) In no case shall the penalty wages or compensation continued for more than 30 days from the due date; * * *
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimant's wages on January 6, 2010. The Agency's OOD, issued on January 21, 2010, repeated this

demand.[1] Respondent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Using this equation, penalty wages for Claimant equal $4,080 ($17 per hour x eight hours x 30 days).

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, and ORS 652.332, and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **E. H. GLAAB, GENERAL CONTRACTOR, INC.,** to 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, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant in the amount of FIVE THOUSAND ONE HUNDRED AND SIX DOLLARS ($5,106.00), less appropriate lawful deductions, representing $1,026.00 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from September 1, 2009, until paid, and $4,080.00 in penalty wages, plus interest at the legal rate on that sum from October 1, 2009, until paid.

In the Matter of

KENNETH D. WALLSTROM

Case No. 58-11
Final Order of Commissioner Brad Avakian
Issued August 30, 2012

SYNOPSIS

The Agency's Formal Charges alleged that Respondent (1) unlawfully denied Complainant, a renter in his duplex, the reasonable accommodation of a service dog; (2) coerced, intimidated, or threatened Complainant when denying her the reasonable accommodation; (3) expelled Complainant because of her disability; and (4) represented to Complainant that the duplex was not available for rental when it was available. The Charges also alleged that Complainant's minor daughter, who occupied the duplex with Complainant, was injured by the alleged practices. The forum held that

[1] *See In the Matter of Petworks LLC,* 30 BOLI 35, 47 (2008) (Agency's Order of Determination constitutes a written notice of nonpayment of wages under ORS 652.150).

Respondent unlawfully denied Complainant reasonable accommodation, but did not commit the other alleged unlawful practices. The forum also found that the Commissioner had no jurisdiction over the Charges involving Complainant's daughter because the daughter did not sign a complaint. The forum awarded $10,000 in damages for mental suffering to Complainant and assessed a civil penalty of $5,500. ORS 659A.145, ORS 659A.421, ORS 659A.820.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 19, 2012, at the Eugene office of the Bureau of Labor and Industries 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 Chet Nakada, an employee of the Agency. Complainant Teresa Provenzano was present throughout the hearing and was not represented by counsel. Aggrieved Person Jacelyn Provenzano was only present during her testimony. Respondent Kenneth Wallstrom ("Respondent") was present throughout the hearing and was represented by James Baldock, attorney at law.

The Agency called the following witnesses: Teresa Provenzano ("Complainant"); Jacelyn Provenzano ("J. Provenzano"); Kerry Johnson, senior investigator, BOLI Civil Rights Division (by telephone); Marcia Kennedy, Complainant's therapist (by telephone); and Kenneth Wallstrom, Respondent.

Respondent called the following witnesses: Kenneth Wallstrom, Respondent; Sabrina Dale Coop, Respondent's daughter; and Donald Ahlquist, Respondent's brother-in-law.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to hearing) and X-11 and X-12 (submitted at hearing);
b) Agency exhibits A-1 through A-18 (submitted prior to hearing) and A-19 (submitted at hearing); and
c) Respondent exhibits R-2 (submitted prior to hearing) and R-3 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On November 2, 2009, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful housing

practices of Respondent Kenneth Wallstrom. On November 9, 2009, Complainant amended her complaint. Complainant signed both complaints. On March 30, 2010, Complainant's amended her complaint a second time to add her daughter, J. Provenzano, as an "Aggrieved Person." Complainant signed her second amended complaint, but J. Provenzano did not sign it. After investigation, the Agency found substantial evidence of three unlawful housing practices and issued a Determination on or about April 20, 2010.

2) On March 22, 2012, the Agency issued Formal Charges alleging Respondent committed unlawful housing practices based on Complainant's disability in that:

(a) Complainant, who rented a dwelling ("subject property") from Respondent, had a disability for which she was prescribed "service" cats and a "service" dog. Respondent refused to allow her to have a service dog, thereby violating ORS 659A.145(2)(g) with respect to Complainant and Aggrieved Person by refusing to reasonably accommodate Complainant's disability.

(b) By denying Complainant's request to have a service dog, Respondent coerced, intimidated and threatened Complainant into not asserting a right to reasonable accommodation, thereby violating ORS 659A.145(8).

(c) Respondent told Complainant that she and Aggrieved Person would have to move because Respondent's daughter needed a place to live, but a "for rent" sign was posted in front of the subject property one week after Complainant and Aggrieved Person moved out, constituting a violation of ORS 659A.145(2)(e) based on Respondent's representation that the subject property was not available for rental or lease when it was in fact available.

(d) Respondent expelled Complaint and Aggrieved Person based on Complainant's disability "and/or" request for reasonable accommodation, thereby violating 659A.145(2)(b).

The Formal Charges sought the following damages:

(a) Damages, mental, and physical suffering of at least $20,000 each for Complainant and Aggrieved Person;

(b) Out-of-pocket costs at least $10,000 for being forced to move to Respondent's unlawful practices;

(c) Civil penalties at least $11,000.

3) On May 14, 2012, Respondent, through counsel, filed an answer to the Formal Charges.

4) On May 16, 2012, the forum ordered the Agency and Respondent each to submit case summaries no later than June 8, 2012, and notified them of the possible sanctions for failure to comply with the case summary order. The Agency and Respondent timely submitted case summaries.

5) On May 31, 2012, the Agency filed a motion for a Protective Order regarding medical information and records concerning Complainant were the subject of a discovery request by Respondent. The forum granted the Agency's motion and issued a Protective Order on May 31, 2012.

6) At the start of the hearing, the ALJ orally 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.

7) At the outset of the hearing, Respondent and the Agency stipulated to the following:

- BOLI has jurisdiction over this case
- Complainant moved out of Respondent's dwelling after receiving notice from Respondent; and
- Complainant had two service cats during her tenancy with Respondent.

8) At hearing, the Agency also offered Exhibits A-19 and A-20 as part of its case in chief. Respondent objected to their admission on the grounds that neither had been submitted with the Agency's case summary. The ALJ reserved ruling on the admissibility of A-19 until issuance of the Proposed Order.

A-20 consisted of three letters to Complainant from the Housing and Community Services Agency of Lane County ("HACSA") dated December 3, 2007, April 21, 2010, and October 31, 2011, describing the respective amounts of rent Complaint would pay and HACSA would pay. The ALJ did not receive the exhibit because the Agency failed to offer a satisfactory reason for not providing it with the Agency's case summary and because excluding it would not violate the ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10).

A-19 consisted of 10 pages of "Progress Note[s]" notes made by Agency telephone witness Marcia Kennedy, a Licensed Clinical Social Worker who has been Complainant's therapist since January 8, 2009. The chart notes were dated January through March 2009, and January 2010. Statements by Mr. Nakada and testimony by Kennedy established that: (1) The Agency served a subpoena on Kennedy for the records two weeks before the hearing; (2) Kennedy faxed the records in A-19 to Nakada on June 12; (3) Because of a malfunction in Kennedy's fax machine, the records were not transmitted to Nakada; (4) Nakada first acquired the documents late in the afternoon on June 18; and (5) Kennedy had little independent recollection of what was specifically discussed in her therapy sessions with Complainant in 2009. Under these circumstances, the forum finds that the Agency has provided a satisfactory reason for not submitting the records with its case summary and that excluding A-19 would violate the ALJ's duty to conduct a full and fair inquiry. A-19 is admitted into evidence. That ruling is confirmed.

9) On July 25, 2012, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed exceptions on July 31, 2012, and Respondent filed exceptions on August 3, 2012. The exceptions are considered in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) Since 1997, Complainant has suffered from the mental impairments of depression and anxiety. Because of these impairments, she is substantially limited in a number of major life activities, including caring for herself, sleeping, learning, concentrating, and remembering. She also is "obese" and her "knees are shot."

2) In 2004, Complainant became eligible for Section 8 Housing, which authorizes the payment of rental housing assistance to private landlords on behalf of approximately 3.1 million low-income households.[2]

3) On March 30, 2004, Patricia P. Buchanan, M.D., wrote a prescription for Complainant that stated: "Teresa should be allowed to have a cat for medical reasons."

4) On July 29, 2004, a medical provider[3] at the Eugene, Oregon Volunteers in Medicine Clinic wrote a prescription for Complainant that stated: "Ms. Provenzano has a mental health diagnosis that would be helped by a pet."

5) On March 2, 2006, a medical provider[4] at the Eugene, Oregon Options Counseling Services wrote a prescription for Complainant that stated: "To whom it concerns, I highly recommend that Teresa be allowed to have a companion pet for her medical well being."

6) On October 26, 2006, a medical provider[5] in Michigan wrote a prescription for Complainant that stated: "This patient needs to have a companion cat for medical reasons."

7) Sometime before August 2007, Complainant and her minor daughter, J. Provenzano, moved into and began renting one unit of a duplex located at 25045 Territorial Court, Veneta, Oregon (the "subject property"), entering into a rental agreement with the owner at that time. J. Provenzano lived with Complainant at all times while Complainant resided at the subject property. At the time Complainant moved into the subject property, she was receiving welfare benefits of approximately $300 per month.

8) In August 2007, Respondent and his wife, Barbara Wallstrom, bought the subject property. At the time of Respondent's purchase, Complainant and her daughter

[2] *See* Section 8 of the Housing Act of 1937 (42 U.S.C. § 1437f), as repeatedly amended.
[3] The provider's signature is illegible.
[4] *Id.*
[5] *Id.*

occupied the subject property and the duplex's other unit was vacant. The realtor who sold the property to Respondent told Respondent that Complainant and her daughter were Section 8 tenants. On August 7, 2007, Complainant and Respondent executed a "Residential Lease/Rental Agreement," the term of which extended until August 31, 2008. Under the Agreement, Complainant agreed to pay rent of $655 per month and a $600 damage deposit. The Agreement also contained the following handwritten provision "Okayed for two cats only @[6] service animals to Teresa," based on Complainant having given Respondent at least one of her prescriptions to have a cat as a service animal.

9) Complainant had two "service" cats throughout her tenancy at the subject property. Her cats "cheer her up" and "help her with her depression."

10) Shortly after he bought the subject property, Respondent leased the other half of the duplex to Donald Ahlquist, his brother–in-law, whose home had just been foreclosed on. Ahlquist, who does not have a disability, already had a dog when he moved in. Respondent allowed Ahlquist to keep his dog as an "outside" dog until the dog died, but required Ahlquist to pay a pet deposit. At the time of the hearing, Ahlquist was still leasing the same property from Respondent.

11) On October 9, 2007, Dr. Dukeminier, Complainant's primary care physician in Eugene, wrote a prescription for Complainant for "Service cats."

12) On November 1, 2007, Complainant submitted a new rental application to Respondent, along with the first page of her existing Lease/Rental Agreement and a letter that read as follows:

> "Ken,
>
> "I have enclosed a copy of the new doctors [sic] note for service cats.
>
> "Here is the first page of your rental agreement and a money order for the rent. Please mail me a copy of the other part of the rental agreement I already signed for you as I would like to read it and have a copy in my file.
>
> "Thank you,
>
> "Terry"

13) Sometime in the first half of 2008, Complainant qualified for and began to receive disability benefits in the amount of $1,677 based on her disabilities of depression, anxiety, memory problems, "shot" knees, and obesity that she has had since 1997. At of the time of the hearing, she took 20 mg of Prozac, four times a day, for her depression, and Xanax for anxiety and sleep.

[6] Complainant testified that "@" meant "as" in the Agreement.

14) On August 29, 2008, Complainant and Respondent executed a "Residential Lease/Rental Agreement," the term of which was "1 yr, beginning (*mo./day*) Sept 1 (*yr.*) 2008 and ending Noon, (*mo./day*) August 31 (*yr.*) 2008."[7] Under the Agreement, Complainant agreed to pay rent of $745 per month and a $600 damage deposit. Complainant's share of the rent was approximately $400, with Section 8 paying the balance. The Agreement also contained the following handwritten provision "Okayed for two cats only @[8] service animals to Teresa."

15) Respondent did not require Complainant to pay a pet deposit for either of her cats.

16) On October 8, 2008, Dr. Dukeminier wrote a prescription for Complainant stating "Teresa needs a service dog to help with treatment of her depression."

17) On October 9, 2008, Complainant asked Respondent if she could have a dog as a service animal, saying that her doctor had recommended it. Respondent told her "don't push me on it" and told her she could not have a dog. Complainant took that as a "threat." Respondent did not ask for a doctor's prescription and Complainant did not show Dr. Dukeminier's prescription to Respondent.

18) Complainant was "shaky," "confused" and "upset" after Respondent told her she could not have a dog and didn't sleep that night.

19) After October 9, 2008, Complainant never again talked to Respondent about getting a dog.

20) On January 12, 2009, Respondent gave Complainant a letter that he and his wife had signed. It stated:

> "Dear Ms. Teresa Provenzano,
>
> "This is to inform you that due to the need for an immediate family member, our daughter, needing housing, we must request that you find alternative living arrangements by Feb 28, 2009. We know that this is not easy for you, but our daughter has been in a bad situation. We feel we must do what we can to help her recover and move forward. We are trying to give you as much time as we can so that you can find another place.
>
> "God Bless,
>
> "Ken & Barbara Wallstrom"

21) When Complainant received this letter, she became "really shaky" and upset and "could hardly even stand." She tried to call her sister and mother. Her

[7] Since the term of the lease was for "1 yr.," the forum infers that it was intended to end on August 31, 2009, not August 31, 2008.
[8] *See* fn. 5.

daughter had to try to talk to try to Complainant to try to "calm her down and make her feel more comfortable" and became "shaky" herself. She became "very upset and very depressed, scared, didn't know where I was going to move." She "cried a lot and didn't sleep a lot." She felt like her "world was just ruined."

22) Complainant never spoke to Respondent after receiving his January 12, 2009, letter.

23) After receiving Respondent's letter, Complainant got a notice from Section 8 saying she had to move. Complainant drove around Veneta looking for "for rent" signs, looked on craigslist and the newspaper, and even drove into Eugene to look for apartments.[9] J. Provenzano helped her mother look for a new place to live, mostly by looking on craigslist and driving around Veneta, looking for apartments. Complainant located new housing sometime between January 22 and January 29, 2009.

24) At the time of Respondent's January 12, 2009, letter, Respondent's daughter Sabrina had been living in a motor home parked at Respondent's residence. She had moved, with her animals, from central Oregon in July 2008 because of domestic abuse against her over the prior two years from her male partner and his threats to destroy her personal property and kill her animals. She planned to move away from Respondent's residence in Veneta to the subject property so that her ex-partner would have a more difficult time finding her. On January 9, 2009, Sabrina wrote a check in the amount of $375 to Respondent postdated February 10, 2009, as a deposit for half the rent for March 2009. Before she could move into the subject property, she located and moved to a different rental property in Cottage Grove.

25) On February 8, 2009, Respondent gave Complainant a second letter that read as follows:

> "Dear Ms. Teresa Provenzano,
>
> "This is in response to the questions you on my phone on 2/2/2009. We have been out of state, and after returning this week, have been very sick in bed.
>
> "As stated in the letter from 1/12/2009 was sent to you, we request that you find 'alternative living arrangements by Feb 28, 2009'. The full rent for the month of Feb. is still due and is not allowed to come from the indemnification deposit, as per section 6 of the lease agreement. Please, be advised that you are 'past due' for the month of February at this time.
>
> "Sincerely
>
> "Kenneth D. Wallstrom"

26) On February 12, 2009, Complainant signed a lease agreement with Four Oaks, LLC, for a rental property on Cottage Court in Veneta, with the lease to run from

[9] The forum takes judicial notice that Eugene is approximately 15 miles from Veneta.

"3/1/2009 and ending on 2/28/2010" and rent to be $748 per month. Complainant actually moved into her new residence on or about February 19, 2009. This was a Section 8 duplex located several blocks away from the subject property. Complainant made a down payment on the cleaning deposit of $300 by check to hold the property and had to pawn some personal property to raise the money to make the $300 deposit. After she moved in, she had to pay another $500 for the remainder of the $800 cleaning deposit. Initially, Complainant's share of the rent was $510 and Section 8 paid the balance. At some point, her rent was raised to $800 and her share increased to $550.

27) Complainant had to borrow her neighbors' miniature pickup truck to move to her new rental on Cottage Court. It took a couple days to move, and some of her belongings fell out of the truck onto the street during the move. Complainant's knees were in "extreme pain" during the move. J. Provenzano had to miss a week of school to help with the packing and unpacking, and her school principal came to the subject property and asked a neighbor questions about J. Provenzano. Complainant then had to explain the reason for J. Provenzano's absence to the principal. This upset Complainant because of her concerns about "privacy."

28) After Complainant moved out, Respondent began to clean the subject property. While cleaning, he learned his daughter had found another place to rent and posted a "for rent" sign in front of the subject property.

29) In the summer of 2010, Complainant left her Cottage Court rental and went to Las Vegas for two months to help the parents of her deceased husband. She paid no rent during that time and her in-laws paid all the costs associated with her move. Complainant moved into her current residence on December 8, 2010. She has three service cats and a service dog. Her initial rent was $745 per month, with her share being $498. She had to pay a deposit of $1,000 that Sec. 8 did not pay.

30) Complainant noticed a "for rent" sign on the subject property a week or so after she moved out. This made her "highly upset" and made her "feel awful."

31) On January 8, 2009, Complainant began attending weekly 60 minute therapy sessions with Marcia Kennedy, LCSW, related to her history of depression and anxiety. Kennedy made a "progress note" after each visit that summarized the important points from each visit. In Kennedy's progress notes from January 8 through February 26, 2009, there is no mention of Complainant's request to Respondent for a dog.

32) On March 18, 2009, Anne Nama and Chris Wolf completed a rental application for the subject property and moved in the next day. They have an "outside" dog for which they paid a deposit.

33) Complainant has a service dog at her current residence that she acquired in May 2010. The dog makes her feel safe and requires her to go outside more and get more exercise. Her dog is very important to her emotional stability. In her own words,

"the dog gets me outside, he gets me exercise, and he makes me feel very safe * * *. The cats just make me feel comfortable when I hug on them and when I'm having a bad day. I pet them and they cuddle up to me. But the dog is very helpful in getting me to go outside * * *."

34) At the time of the hearing, Complainant had a "caregiver" for three times a week, 15 hours per week, whose services were provided through Senior Disabled Services. The caregiver's role is to help Complainant with housework and grocery shopping and to remind Complainant to take her medications and go to her appointments. Tamara Tucker, Complainant's caregiver, was present during a portion of the hearing.

CREDIBILITY FINDINGS

35) Donald Ahlquist, Kerry Johnson, and Marcia Kennedy were credible witnesses and the forum has credited the entirety of their testimony.

36) Sabrina Coop's recollection of specific dates was poor and she had a natural bias because Respondent is her father. However, the forum has credited her testimony concerning the reasons she moved to Respondent's property, the reason she planned to move to the subject property, and the reason she changed her mind about moving to the subject property because her explanations made sense and were not contradicted by more credible evidence.

37) Despite her youth and her natural bias as Complainant's daughter, J. Provenzano was a credible witness who demonstrated a better recollection of the events related to the alleged discrimination than any other witness. The forum has credited her testimony in its entirety.

38) Respondent's testimony was inconsistent with prior statements on to two key issues that he made to Johnson, the Agency's investigator, during a December 7, 2009, interview. First, he testified at the hearing that Complainant asked for a puppy for her daughter, and never asked for a "companion" or "service" dog. In contrast, he told Johnson that Complainant made a verbal request to him for a service dog to help her emotional state and said she could provide medical documentation. Second, he testified at hearing that Sabrina, his daughter, never moved into the subject property, whereas in his interview with Johnson he stated that Sabrina lived in the subject property for a month to six weeks before moving to Cottage Grove. The forum also finds his characterization of his January 12, 2009, letter to Complainant as a "request to leave" and not an "expulsion" to be disingenuous, since there is no evidence that Complainant had any choice but to leave. Based on these inconsistencies, the forum has disbelieved Wallstrom's testimony except when it was corroborated or uncontroverted by other credible evidence. Based on Coop's testimony, the forum has credited his testimony that he expelled Complainant so Coop could move in.

39) Complainant testified that one of her disabilities was her “memory.” This became apparent during testimony as she struggled to answer almost every question on direct and cross examination that had anything to do with time or dates. Her admission that sometimes she cannot recall details within “a couple minutes” after she becomes aware of them is illustrative and helps explains the ease with which she became confused during her testimony. For example, she testified she could not recall clearly whether she made her request to Respondent for a service dog during a telephone call or while Respondent was at her home. In addition, her daughter also confirmed that Complainant's memory is very poor.

In her first complaint and amended complaint, Complainant, under penalty of perjury, signed complaints stating that she “submitted medical certification to Respondent confirming her need for the assistance dog.” This allegation was deleted from her second amended complaint. No evidence was offered to explain this change.

The forum attributes Complainant's confusing and sometimes inconsistent testimony to her self-acknowledged problems with concentration and memory -- problems that were vividly demonstrated at the hearing -- rather than to a willful attempt to deceive. Based on these problems, the forum has only credited Complainant's testimony when it was corroborated by other credible evidence or uncontroverted by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) Since 1997, Complainant has suffered from the mental impairments of depression and anxiety. Because of these impairments, she is substantially limited in a number of major life activities, including caring for herself, sleeping, learning, concentrating, and remembering.

2) Beginning in 2004, a series of medical providers wrote prescriptions for Complainant for a “companion” or “service” cat related to mental health disabilities. She acquired two cats that cheer her up and help her with her depression.

3) Sometime before August 2007, Complainant and her daughter, J. Provenzano, along with Complainant’s two cats, moved into and began renting one unit of a duplex that constitutes the subject property. Respondent did not own the subject property at that time.

4) In August 2007, Respondent and his wife, Barbara Wallstrom, bought the subject property. Complainant and J. Provenzano occupied the subject property with Complainant’s two cats. Complainant and Respondent signed a lease agreement that extended until August 31, 2008. Complainant gave Respondent a copy of a prescription for a “companion” cat, and the lease agreement provided that Complainant was approved for two cats as “service animals.” Complainant kept two cats throughout her tenancy at the subject property.

5) On August 29, 2008, Complainant and Respondent renewed their lease agreement to extend through August 31, 2009.[10] This lease agreement also contained a provision approving two cats as "service animals."

6) On October 8, 2008, Dr. Dukeminier, Complainant's primary care physician, wrote a prescription for Complainant stating "Teresa needs a service dog to help with treatment of her depression."

7) On October 9, 2008, Complainant asked Respondent if she could have a dog as a service animal, saying that her doctor had recommended it. Respondent told her "don't push me on it" and told her she could not have a dog. Respondent did not ask for a doctor's prescription and Complainant did not show Dr. Dukeminier's prescription to Respondent.

8) Complainant was "shaky," "confused" and "upset" after Respondent told her she could not have a dog and didn't sleep that night. After October 9, 2008, Complainant never again talked to Respondent about getting a dog.

9) On January 12, 2009, Respondent gave Complainant a letter he and his wife had signed that asked Complainant to find "alternative living arrangements" by February 28, 2009, because of their daughter's "bad situation." At that time, Respondent's daughter Sabrina had been living in a motor home parked at Respondent's residence since July 2008 to escape an abusive relationship from her former male partner.

10) Complainant signed a lease agreement with Four Oaks, LLC, for a nearby rental property in Veneta, and moved into her new residence on or about February 19, 2009. Complainant experienced emotional distress over her expulsion and the troubles she experienced in finding replacement housing and moving. J. Provanzano had to miss school for a week to help her mother move.

11) After Complainant moved out, Respondent began to clean the subject property. While cleaning, he learned his daughter had found another place to rent and posted a "for rent" sign in front of the subject property.

12) Complainant moved into her current residence on December 8, 2010. She now has three service cats and a service dog that she acquired in May 2010. Her dog makes her feel safe and requires her to go outside more and get more exercise and is very important to her emotional stability.

13) Complainant observed a "for rent" sign on the subject property a week or so after she moved out. This caused her emotional distress.

[10] *See* fn. 6.

14) On March 18, 2009, Anne Nama and Chris Wolf completed a rental application for the subject property and moved in the next day. They have an “outside” dog for which they paid a deposit.

CONCLUSIONS OF LAW

1) At all times material herein, Complainant was a “purchaser” and the subject property was a “dwelling” as defined in ORS 659A.145(1)(a) & (b) and ORS 659A.421(a) & (b). At all times material herein, Complainant was an “aggrieved person” as defined in ORS 659A.820(1) and OAR 839-005-0200(1).

2) At all times material herein, Complainant was an individual with a disability as defined in ORS 659A.145 and OAR 839-005-0200(3).

3) At all times material herein, J. Provenzano was a “purchaser” and “aggrieved person" as set out in ORS 659A.145(1)(a) & (b), ORS 659A.421(1)(a) & (b), OAR 839-005-0200(1) & (12).

4) At all times material herein, Respondent was a “person” as defined in ORS 659A.001(9).

5) 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 unlawful discrimination in real property transactions. ORS 659A.800 to ORS 659A.865.

6) Respondent violated ORS 659A.145(2)(g) with respect to Complainant by denying Complainant's October 9, 2008, request to have a service dog.

7) Respondent did not violate ORS 659A.145(8) with respect to Complainant or J. Provenzano by telling Complainant not to “push” her request for a service dog.

8) Respondent did not represent that the subject property was available for rent when it was in fact available and did not violate ORS 659A.145(2)(e).

9) Respondent did not expel Complainant and J. Provenzano from the subject property based on Complainant's disability and/or request for reasonable accommodation and did not violate ORS 659A.145(2)(b).

10) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant damages resulting from Respondent’s unlawful discrimination in real property transactions; to award money damages for emotional and mental suffering sustained by Complainant; to protect the rights of Complainant and others similarly situated; and to assess a civil penalty. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

The Agency alleges that Respondent engaged in four separate acts of unlawful discrimination in real property transactions based on Complainant's disability. The Agency claims damages on behalf of Complainant, as a "purchaser," and J. Provenzano, her daughter, as a "purchaser" and "aggrieved person," of $20,000 each in damages for emotional, mental, and physical suffering, "at least" $10,000 for out-of-pocket costs related to Complainant's move from the subject property, and an $11,000 civil penalty. The forum addresses these issues separately.

RESPONDENT VIOLATED ORS 659A.145(2)(G) BY DENYING COMPLAINANT'S OCTOBER 9, 2008, REQUEST TO HAVE A SERVICE DOG

The Agency alleges that Complainant asked Respondent if she could have a "service dog" based on her doctor's recommendation that it would help her with her mental health issues, and that Respondent unlawfully denied her request. In pertinent part, ORS 659A.145(2)(g) provides:

> "(2) A person may not discriminate because of a disability of a purchaser * * * by doing any of the following:
>
> "* * * * *
>
> "(g) Refusing to make reasonable accommodation in rules, policies, practices or services when the accommodations may be necessary to afford the individual with a disability equal opportunity to use and enjoy a dwelling."

A service dog, when it "mitigates one or more of the person's disability-related needs," may be such a "reasonable accommodation." OAR 839-005-0220(2)(c)(C).

A. Respondent is a "person."

ORS 659A.001(9)(a) and OAR 839-005-0200(9) define "person" as "one or more individuals." Respondent, as an individual, is therefore a "person" who may not discriminate because of the disability of a purchaser under ORS 659A.145(2).

B. Complainant was a "purchaser" with "disability."

The Formal Charges allege that Complainant was a "purchaser" who "had mental impairments, specifically depression and anxiety, that substantially limited her in major life activities, including but not limited to concentrating, communicating, sleeping and interacting with others."

ORS 659A.145, read together with ORS 659A.421(1)(b), defines "purchaser" as "an occupant, prospective occupant, renter, prospective lessee, buyer or prospective buyer." Complainant, as an "occupant" of the subject property, was a "purchaser."

As relevant to this proceeding, "disability" is defined as "[a] * * * mental impairment that substantially limits one or more major life activities of the individual."

OAR 839-005-0200(3)(1). "Mental impairment" is defined as "any mental or psychological disorder, * * * emotional or mental illness, and specific learning disabilities." Testimony by Complainant and Kennedy established that Complainant has had anxiety and depression for 15 years and that those conditions substantially limit her sleeping, learning, concentrating, remembering, and ability to self-care. This evidence establishes that Complainant had a "disability" as set out in OAR 659A.145 at the time of the alleged discrimination.

C. The subject property is a "dwelling."

Under ORS 659A.145, a "dwelling" has the meaning given it in ORS 659A.421. As relevant to this proceeding, ORS 659A.421(1)(a)(A) defines "dwelling" as "[a] building or structure, or portion of a building or structure, that is occupied, or designed or intended for occupancy, as a residence by one or more families[.]" OAR 839-005-0195-0200(4) parrots that definition. The subject property is a duplex designed and intended for residential occupancy and its respective units were occupied by Complainant and Respondent's brother-in-law during the time of the alleged discrimination. As such, it qualifies as a "dwelling" under ORS 659A.145.

D. Complainant requested reasonable accommodation.

At the time Complainant became Respondent's tenant, she already had two "service" cats prescribed by her former and current physicians. Her cats and their function as "service animals" was memorialized in the original and renewed lease agreements between Complainant and Respondent.[11] On October 8, 2008, Dr. Dukeminier, her primary care physician, wrote a prescription for Complainant stating "Teresa needs a service dog to help with treatment of her depression." The Agency alleges that Complainant asked Respondent the next day if she could get a dog as a service animal, saying that her doctor had recommended it. Respondent admits telling Complainant she could not have a dog but contends this was in response to Complainant's request for a puppy for her daughter, not for a "companion" or "service" dog for herself. Under Respondent's version of the facts, Complainant would not be entitled to reasonable accommodation under the law, as the purpose of the request would not be to mitigate one or more of the Complainant's disability-related needs, but as company for J. Provenzano, her non-disabled daughter.

The forum accepts Complainant's version of the facts for several reasons. First, Complainant had received a prescription from her primary care physician the very day before making her request for a service dog. Second, although Complainant's memory was definitely an issue and she did not recall whether she made an in-person or a telephone request to Respondent for a service dog, her testimony as to the contents and time of her request was consistent with having received a prescription the day before making her request. Third, no testimony was elicited from Complainant, J. Provenzano, or any other witness that had any tendency to show that J. Provenzano

[11] *See* Findings of Fact ##8 & 14 –The Merits.

wanted a puppy or that Complainant wanted a puppy for her. Fourth, the statement Respondent made to Johnson that Sabrina Coop moved into the subject property for a least a month and Respondent's testimony at hearing that Coop never moved into the subject property are at extreme odds and can only be reconciled by the conclusion that Respondent did not tell Johnson the truth. These four reasons, taken together, lead the forum to disbelieve Respondent's story that Complainant asked for a "puppy."

E. Respondent denied Complainant's request for reasonable accommodation.

Under cross examination, Respondent admitted that he told Complainant she could not have a dog. In his testimony, Respondent put his denial in the context of refusing to allow Complaint to have a puppy for her daughter, but he told Johnson he would prefer she "not have a dog." It was unnecessary for Complainant to show Dr. Dukeminier's prescription to Respondent for her to be entitled to reasonable accommodation. In any event, Respondent did not ask Complainant to see it and no evidence was adduced to establish that Respondent would have been legally entitled to ask Complainant to provide a prescription.[12]

Conclusion.

OAR 839-005-0220(2)(c)(C) provides that it is unlawful "for a housing provider refused to permit a disabled person to live in a covered dwelling with an animal that mitigates one or more of the person's disability-related needs, except when a specific animal poses a direct threat to the health or safety of other individuals and the threat cannot be eliminated significantly reduced[.]" The forum does not consider the rule's "direct threat" exception because it is an affirmative defense that was waived by Respondent's failure to raise it in the answer. By denying Complainant's request to have a service dog, Respondent violated ORS 659A.145(2)(g) and OAR 839-005-0220(2)(c)(C) with respect to Complainant.

RESPONDENT DID NOT VIOLATE ORS 659A.145(8) BY TELLING COMPLAINANT NOT "TO PUSH" HER REQUEST FOR A SERVICE DOG.

ORS 659A.145(8) provides that "[a] person may not coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of * * * any right granted or protected by this section." *See also* OAR 839-005-0205(1)(g)(the Agency's administrative rule containing similar language). The Agency specifically alleges, in section 5, paragraph 25 of the Formal Charges, that Respondent "coerced, intimidated and threatened" Complainant, in violation of ORS 659A.145(8), by his five-word spoken response -- "don't push me on it" -- when Complainant asked if she could have a

[12] *See* OAR 839-005-0220(2)(c)(A), which provides that "[a] housing provider may not require verification of disability-related need for a requested accommodation if that need is readily apparent or otherwise known[.]

service dog.[13] The Formal Charges do not allege that Respondent "interfered" with exercise or enjoyment or her rights under ORS 659A.145(8).

As a person with disabilities who had been prescribed a service dog, Complainant had the legal right to a service dog while she lived in Respondent's covered dwelling. OAR 839-005-0220(2)(c)(C). That right necessarily includes the right to request a service dog. Under ORS 659A.145(8), a person may not be subject to coercion, threats, or intimidation related to such a request. Based on the credible testimony of Complainant and her daughter, the forum concludes that Respondent made the alleged statement, leaving the forum with the question of whether or not Respondent's statement violated ORS 659A.145(8). To determine that, the forum must ascertain the meaning of the terms "coerce, intimidate, threaten." In its exceptions, the Agency points out that the Proposed Order does not consider whether or not Respondent's statement constituted "interference" under ORS 659A.145(8). Whether or not Respondent's statement constituted "interference" under ORS 659A.145(8) is not a question before the forum because, as noted earlier, the Formal Charges do not allege that Respondent "interfered" with Complainant's exercise or enjoyment or her rights under ORS 659A.145(8). The forum lacks the authority to draw a legal conclusion on an allegation that is not set out in the Formal Charges.

In interpreting a statute, the forum follows the analytical framework set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P2d 1143 (1993) and modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). *See In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor,* 31 BOLI 267, 281-82 (2012)*, appeal pending.* Within that framework, the forum first examines the text and context of the statutes and also considers any pertinent legislative history proffered by the participants. In this case no legislative history was proffered, and the forum is not required to independently research that history unless the meaning of "coerce, intimidate, threaten," as used in 659A.145(8), cannot be determined from a text and context analysis. The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature's intent. Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. *In the Matter of Captain Hooks, LLP,* 27 BOLI 211, 229 (2006). In this case, the words "coerce, intimidate, threaten" are not defined in ORS 659A.145 or in OAR 839-005-0205, the Agency's administrative rule interpreting ORS 659A.145, and the forum has found no Oregon case law on point. In the past, the forum has found similar federal law to be instructive, though not binding. In this case, the Federal Fair Housing Act ("FHA"), at 42 U.S.C. §3617, contains language almost identical to ORS 659A.145(8).[14] However, the FHA does not define

[13] *See* Finding of Fact #17 – The Merits.

[14] 42 U.S.C. §3617 provides "It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on act of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 803, 804, 805, or 806 of this title."

"coerce," "intimidate," and "threaten" and the forum has not found any FHA cases that define those words other then by application.

Since the words "coerce, intimidate, threaten" are words of common usage, the forum ascribes to them their plain, natural and ordinary meaning contained in *Webster's Third New Int'l Dictionary* (unabridged edition), the dictionary in use at the time ORS 659A.145(8) was enacted.[15] Those meanings, as relevant to this case, are as follows:

> "**Coerce: 1:** to restrain, control, or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation) <religion has in the past tried to ~ the irreligious, by garish promises and terrifying threats —W.R.Inge> **2:** to compel to an act or choice by force, threat, or other pressure <a person might no longer be *coerced* into an agreement not to join a union — *American Guide Series: Massachusetts*> **3:** to effect, bring about, establish, or enforce by force, threat, or other pressure <struggles to ~ uniformity of sentiment — Felix Frankfurter> **syn** see FORCE" *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY,* at 439
>
> "**Intimidate**: to make timid or fearful **:** inspire or affect with fear **:** FRIGHTEN <despite his imposing presence and all the grandeur surrounding him, I was not *intimidated* — Polly Adler>; *esp* **:** to compel to action or inaction (as by threats) <charged with *intimidating* public officials to get the government to buy machine guns he was selling — *Time*> **syn** INTIMIDATE, COW, BULLDOZE, BULLY, BROWBEAT agree in meaning to frighten or coerce by frightening means into submission or obedience. INTIMIDATE suggests a display or application (as of force or learning) so as to cause fear or a sense of inferiority and a consequent submission <most of these officials have been badly *intimidated* by the specter of a summons to appear before a Congressional committee — New Republic> <many authors and publishers are not merely *intimidated* by the thought of footnotes; they are positively terrified — G.W.Sherburn>" *Webster's*, at 1184.
>
> "**Threaten: 1:** to utter threats against : promise punishment, reprisal, or other distress to <~trespassers with arrest> * * * **3:** to promise as a threat **:** hold out by way of menace or warning <~punishment to all trespassers> **4a:** to give signs of 4 a : to give signs of the approach of (something evil or unpleasant) **:** indicate as impending **:** PORTEND <the sky ~s a storm> **b:** to hang over as a threat **:** MENACE <famine ~s the city> **5:** to announce as intended or possible <threaten to buy a car> ***~ vi* 1:** to utter or use threats or menaces **2:** to have a menacing appearance **:** portend evil <though the seas ~ they are merciful — Shak.> **syn.**

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[15] ORS 659A.145(8) was originally enacted in 1989 as ORS 659.430(7), with the original language beginning with the words "[a] person shall not coerce * * *." In 2001, it was renumbered as ORS 659A.145(7). In 2007, it was renumbered as ORS 659A.145(8) and the word "may" substituted for "shall." In 2009, it was amended once more to substitute the word "individual" for the word "person" where it refers to someone who is the victim of discrimination.

> MENACE: THREATEN applies to the probable visitation of some evil or affliction; it may be used of attempts to dissuade by promising punishment or retribution <most of them lived on the margin of survival, constantly *threatened* by famine and disease — Arthur Geddes> <another form of lying, which is extremely bad for the young, is to *threaten* punishments you do not mean to inflict — Bertrand Russell> <discredit completely all other forms of Christianity, denying any efficacy to their rites, and *threatening* all their members with eternal damnation — W.R.Inge>" *Webster's*, at 2382.

All three definitions involve (a) an intentional act (b) designed to compel someone to act or refrain from acting in a certain way (c) that is premised on a potential negative consequence that the actor has the power to influence or bring about and (d) the apprehension of that negative consequence by the person sought to be compelled. Based on these definitions, the forum examines Respondent's intent in making his statement and Complainant's reaction to that statement to determine if it was an attempt to "coerce," "intimidate," or threaten" Complainant based on the exercise of her rights related to her disability and Oregon's housing laws.

Respondent's intent, based on his testimony that he told Complainant she could not have a dog, is clear – he did not want to let Complainant have a dog. Complainant reacted by becoming upset and having trouble sleeping for a night. Complainant testified that she took Respondent's statement "as a threat," but did not testify as to why she took it as a threat, as opposed to a mere denial of her request to have a dog, and there was no evidence concerning Respondent's body language or manner of speech when he uttered the words "don't push me on it" that could indicate the words were intended to coerce, intimidate, or threaten Complainant. There was no testimony that Respondent took any action related to his statement,[16] or that Complainant refrained from getting a dog because she feared repercussions from Respondent.[17] Although the fact that Complainant did not get a dog while she continued to live in the subject property leads to a possible inference that she did not do so because of Respondent's statement and her resultant fear, the forum declines to draw that inference because of the lack of other supporting evidence. In conclusion, the evidence is insufficient to show that Respondent's statement violated ORS 659A.145(8) and the Agency has failed to carry its burden of proof.[18]

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[16] *See* Conclusion of Law #7, in which the forum concludes that Complainant's expulsion was unrelated to her request for a service dog, and the discussion in the Opinion explaining the reasons for that conclusion.

[17] Although J. Provenzano testified "My mom just left it alone after that," there was no evidence that Complainant ever talked with her daughter or therapists, whom she saw on a regular basis, concerning any fear of retaliation if she asked again for a service dog, and she did not testify that she waited until after she vacated the subject property to get a dog because she feared expulsion or other retaliation from Respondent.

[18] *Compare Secretary of HUD v. Astralis Condominium Association,* HUDALJ 08-071-FH (issued September 10, 2009) (Respondent violated 42 U.S.C. §3617 when, in response to Complainants' request for exclusive use of handicapped accessible parking spaces: (a) Respondent placed and/or caused to be placed parking stickers for alleged misuse of the handicapped parking spaces on Complainants' cars, even on the driver's side window, when they parked in the handicapped parking spaces. The parking stickers covered large portions of the glass and prevented people inside the car from effectively seeing out; (b) Respondents filed a law suit against Complainants for the sole purpose of preventing them from

COMPLAINANT WAS NOT EXPELLED FROM THE SUBJECT PROPERTY BECAUSE OF HER DISABILITY

The Agency alleges that, on January 12, 2009, Respondent gave Complainant a written request to vacate the subject property by February 28, 2009, because of her disabilities and request for a service dog, thereby violating of ORS 659A.145(2)(b).[19] The Agency's prima facie case on this issue consists of the following elements:

(1) Complainant has a "disability" as defined in ORS 659A.421;

(2) Respondent is a "person" as defined in ORS 659A.001(9);

(3) Complainant was a "purchaser" as defined in ORS 659A.421(1)(b) who leased and occupied a "dwelling" as defined in ORS 659A.421(1)(a) that was owned by Respondent;

(4) Respondent expelled Complainant from her dwelling;

(5) Respondent expelled Complainant because of her disability.

The first three elements are undisputed. Respondent testified that his "request" that Complainant find "alternative living arrangements" was just that – a "request" – and not an expulsion. The forum disagrees and finds that Respondent's "request" satisfies the fourth element of the Agency's prima facie case.

The remaining element of the Agency's prima facie case is the causal link -- proof that Respondent expelled Complainant from her dwelling because of her disability.

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using the handicap parking spaces on an exclusive basis; (c) Respondents withdrew its lawsuit against and modified the handicap parking spaces by identifying them with a "big sign" which read "Visitors"; (d) Respondents' Board ignored advice to provide Complainants with the requested spaces in exchange for Complainants' Assigned Spaces, and Complainants were forced to appear before an hostile Assembly; and (e) Respondents' Board members made a series of public, disparaging remarks about Complainants); *Secretary of HUD v. Willie L. Williams,* HUDALJ 02-89-0459-1 (issued March 22, 1991) (Respondent telephoned Complainant, an AIDs victim, at 6 a.m., and awakened him to tell him he had heard Complainant had AIDS, thereby violating 42 U.S.C. §3617 for the reason that the "timing, circumstances and content of Respondent's phone call [had] the effect of threatening and intimidating Complainant and interfering with the quiet enjoyment of his home.")

[19] ORS 659A.145(2)(b) prohibits the expulsion of a person from a dwelling based on their disability, whereas ORS 659A.145(8) prohibits a person from "interfer[ing]" with an individual's "enjoyment of * * * any right granted or protected by this section." In the forum's view, retaliation by expulsion against Complainant because she requested a dog, a right granted and protected by ORS 659A.145, would constitute "interfere[nce]" prohibited by ORS 659A.145(8). *See In the Matter of Petworks LLC,* 30 BOLI 35, 46 (2008) (*citing Drayton v. Department of Transportation,* 186 Or App 1, 62 P3d 430 (2003) for the proposition that the Agency could not award overtime pay to a wage claimant because the Agency's charging document lacked a citation to the statute and rule allegedly violated). Since the Agency did not plead Complainant's expulsion as a violation of ORS 659A.145(8), the forum does not consider the Agency's allegation that Complainant was expelled because she requested a service dog.

The Agency has the burden of proof to establish this link[20] and the standard of proof is a preponderance of the evidence.[21]

The Agency's administrative rules set out three legal theories that can be used to prove unlawful discrimination in housing: specific intent, different or unequal treatment, and mixed motive. OAR 839-005-0206(2)(d). The rules instruct the forum to use "whichever of the following theories applies." Because the Formal Charges do not specify which of the three theories supports the Agency's allegation of discriminatory expulsion, the forum refers to the facts alleged in the Charges in support of the Agency's allegation to determine which theory should be applied. That section of the Formal Charges contains the following allegations:

> "VII. DISCRIMINATION: EXPELLING A PURCHASER BASED ON DISABILITY
>
> "The Agency re-alleges paragraphs 1-30 and further alleges:
>
> "31. At all material times, Complainant was an occupant, renter and/or lessee of the subject property and was therefore a 'purchaser' as defined by ORS 659A.421 and Aggrieved Person was an occupant and therefore a 'purchaser' as defined by ORS 659A.421.
>
> "32. On or about October 9, 2008, Complainant asked Respondent that she be allowed to have a companion[22] dog. Respondent denied the request.
>
> "33. On or about January 12, 2009, Respondent advised Complainant that she and Aggrieved Person would have to move by February 28, 2009, because Respondent's daughter needed a place to live.
>
> "34. Complainant and Aggrieved Person vacated the subject property on or about February 28, 2009.
>
> "35. Complainant observed a 'for rent' sign in the yard at the subject property about one week after she moved out.
>
> "36. By his actions, Respondent expelled Complainant and Aggrieved Person based on Complainant's disability and/or request for reasonable accommodation, in violation of ORS 659A.145(2)(b)."

The different or unequal treatment theory of discrimination requires comparators,[23] and the mixed motive theory of discrimination requires dual motives.[24]

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[20] *See* OAR 839-005-0206(2)(d)(B)(ii).

[21] *See, e.g., In the Matter of Sunnyside Inn,* 11 BOLI 151, 165 (1993).

[22] Although the Formal Charges use the term "companion dog" in two places, the forum uses the term "service dog" in its analysis because it is the term Dr. Dukeminier used when prescribing a dog for Complainant and because Complainant testified she asked Respondent if she could have a "service" dog.

[23] OAR 839-005-0206(1)(d)(B) provides: "Different or Unequal Treatment Theory: 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, non-discriminatory reasons, unlawful discrimination exists."

The pleadings allege neither. Consequently, the forum applies the specific intent theory, which provides that unlawful discrimination occurs when a respondent "knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class." OAR 839-005-0206(1)(d)(A).

Specific intent can be shown by direct or circumstantial evidence. *In the Matter of WINCO Foods, Inc.,* 28 BOLI 259, 300 (2007). Direct evidence is evidence that proves a fact in dispute directly, without any inferences or presumptions, and which in itself, if true, conclusively establishes the fact.[25] There is no direct evidence that Respondent expelled Complainant because of her disabilities. The Agency can also prove unlawful discrimination by showing that Respondent's reason for expelling Complainant – so that Coop, his daughter, could move in -- was a pretext for discrimination because it was untrue. The Agency argues that has proved pretext by showing that Coop did not move into the subject property and Respondent posted a "for rent" sign after Complainant moved out. In evaluating this argument, the forum is mindful that the burden of proof on this issue rests with the Agency.

The Agency relies on three primary pieces of evidence to show that Coop's failure to move into the subject property and the "for rent" sign establish pretext. First, Respondent's prior inconsistent statement to Johnson that Coop moved into the subject property. Second, Respondent's failure to produce any records except for Coop's check register to show that Coop in fact paid a rental deposit to show her intent to move into the subject property. Third, Respondent's failure to produce any records to show the date that Coop moved out of Respondent's motor home to her Cottage Grove rental or the date that new tenants moved into the subject property. The forum addresses each separately.

A. Respondent's prior inconsistent statement.

Johnson credibly testified that Respondent told him that Coop had moved into the subject property for a short time. At hearing, Respondent testified that Coop did not move into the subject property after Complainant vacated it because she located alternative lodging in Cottage Grove between January 12 and February 28, 2009, and moved there instead. However, this prior inconsistent statement only reflects on Respondent's credibility, as there is no dispute that Coop never moved into the subject property.

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[24] OAR 839-005-0206(1)(d)(B)(i)(II) provides: "Mixed Motive: If the respondent presents substantial evidence that a legitimate, non-discriminatory reason contributed to the respondent's action, but the division finds the individual's protected class membership was also a substantial factor in the respondent's action, the division will determine there is substantial evidence of unlawful discrimination."

[25] *See, e.g., In the Matter of Alpine Meadows Landscape, LLC*, 19 BOLI 191, 209, 211 (2000) (A note that respondents sent to complainant a note stating they did not hire him because they "were looking for someone younger, to possibly take over the business" was direct evidence that established respondent's specific intent to discriminate against complainant based on his age).

B. Did Respondent and Coop ever intend for Coop to move into the subject property?

The question then becomes whether Respondent and Coop ever intended that Coop would move into the subject property. Coop testified that she planned to move into the property to make it more difficult for her abusive partner to find her, as he knew where Respondent lived. She also testified that she wrote out check #136 to Respondent for $375 on January 9, 2009, as a deposit on the rent and Respondent provided a copy of Coop's check register as corroboration. Respondent did not provide a copy of the check and testified that he tore it up when Coop moved elsewhere. Respondent produced no records except for Coop's check register to show that Coop in fact paid a rental deposit to show her intent to move into the subject property. The Agency contends that Respondent's failure to produce a copy of the check and Coop's failure to note the payee of the check in her check register should lead the forum to conclude that no check was ever written, or if it was, it was not written to Respondent. The forum disagrees for several reasons. First, Respondent brought the original check register to the hearing and the Agency and the ALJ both inspected the two pages containing the handwritten entry for check #136 that constitute Exhibit R-2. The ALJ observed no anomalies and the Agency's case presenter, after inspecting the original check register, did not argue that the original document had been altered in any way. Second, check #136 is one of 14 entries on the same page in Coop's register. For check 136, the register reads "136 1/9/09 Half of March Rent Post Dated 2/10/09 375.00." Two other entries in Exhibit R-2 are also unaccompanied by a note as to their purpose. Check 133 has no notation at all after the check number, and the entry after "134," written on 12/10/08, only states "VOID." Third, because Coop is respondent's daughter and not a merely a tenant with whom he had only a fiduciary relationship, the forum believed Respondent's testimony that he did not cash check 136 and instead tore it up. Finally, as to check 136, Respondent cannot produce what no longer exists.

C. Significance of Respondent's failure to produce any records showing Coop's "move-out" date and the new tenants' "move-in" date.

Respondent produced no records at hearing to show the date that Coop moved out of Respondent's motor home to her Cottage Grove rental and the date that Anne Nama & Chris Wolf, Respondent's new tenants, moved into the subject property. Since those records were arguably within the power of Respondent to produce and would support Respondent's defense, the Agency argues that Respondent's failure to produce them creates an inference that Coop never intended to move. The forum disagrees for two reasons. First, because there was no evidence that Respondent "willfully suppressed" the records, no presumption exists under OEC 311(1)(a) that the records would have been adverse to Respondent.[26] Second, it was the Agency's burden to prove that Respondent's defense was pretextual. If the Agency believed that Respondent's defense was a pretext, it could have sought these records through

[26] *See, e.g., In the Matter of Storm King Construction, Inc.,* 27 BOLI 46, 53 (2005) (forum took guidance from presumption in Oregon Evidence Code to resolve the issue of whether a respondent had received a letter sent to it by the Employment Department).

discovery and offered them as impeachment or rebuttal evidence or called Wolf or Nama, the new tenants, as witnesses. Nothing in the record suggests that the Agency made any attempt to obtain the records and the Agency did not call Wolf or Nama as a witness.

In conclusion, the forum finds that the Agency has not shown, by a preponderance of the evidence, that Respondent expelled Complainant because of her disability.

RESPONDENT DID NOT REPRESENT THAT THE SUBJECT PROPERTY WAS NOT AVAILABLE FOR RENT WHEN IT WAS IN FACT AVAILABLE

The Agency alleges that Respondent violated ORS 659A.145(2)(e) by sending a letter to Complainant, dated January 12, 2009, that stated she needed to move because the subject property was no longer available due to his daughter's imminent move when the subject property was still available for Complainant's occupancy. In pertinent part, ORS 659A.145(2)(e) provides:

> "(2) A person may not discriminate because of a disability of a purchaser * * * by doing any of the following:
>
> "* * * * *
>
> "(e) Representing that a dwelling is not available for * * * rental or lease when the dwelling is in fact available for * * * rental or lease."

OAR 839-005-0205(1)(i), the Agency's administrative rule on this subject, merely duplicates the statutory language. Since neither the statute, rule, or Oregon case law define "representing" in the context of ORS 659A.145(2)(e) and it is a word of common usage, the forum again relies on *Webster's* for the meaning of "representing."

Webster's defines "representing" as the "*present part of* REPRESENT." *Webster's* at 1926. "Represent" has a number of meanings, but the meanings that most closely fit the context of the statute are:

> **1:** to bring clearly before the mind **:** cause to be known, felt, or apprehended **:** present especially by description * * * **10:** "to set forth or place before someone (as by statement, account, or discourse) **:** exhibit (a fact) to another mind in language **:** give one's own impressions and judgment of **:** state with advocacy or with the design of affecting action or judgment." *Id.*

There is no dispute that Respondent sent the letter or as to its contents or that it was correctly dated, and the letter itself was admitted as Exhibit A-10. The relevant sentence in the letter reads as follows: "This is to inform you that due to the need for an immediate family member, our daughter, needing housing, we must request that you find alternative living arrangements by Feb 28, 2009." Based on the *Webster's* definitions quoted above, the forum concludes that Respondent's statement "represent[ed]" that, as of February 28, 2009, the subject property was not available for * * * rental or lease."

The forum has determined that the subject property became available for rent after Complainant moved out in February 2009 due to Coop's failure to move in, and that Respondent did not obtain new tenants until March 18, 2009. However, because "representing" is the present part of "represent," the forum's focus must be on the prospective post-February 28, 2009, availability of the subject property on January 12, 2009, the date of Respondent's letter. The forum does this by examining Respondent's and Coop's intentions on January 12 related to Coop's prospective tenancy. This issue was already discussed at some length in the section of this opinion discussing Complainant's expulsion and resolved with the conclusion that both Respondent and Coop believed and intended that Coop would move to the subject property after Complainant moved out. Since Respondent believed on January 12, 2009, that the subject would not be available for "rental or lease" after February 28, 2009, his representation to Complainant did not violate ORS 659A.145(2)(e).

THE COMMISSIONER LACKS JURISDICTION OVER THE AGENCY'S ALLEGATIONS REGARDING J. PROVENZANO

The Agency alleges that J. Provenzano, as well as Complainant, was "injured by the actions and inaction of Respondent" and is thereby entitled to damages as a "purchaser" and "aggrieved person." J. Provenzano, as an "occupant" of the subject property, is a "purchaser" as defined by ORS 659A.421. As plead in the Formal Charges, she is also an "aggrieved person" because she was expelled from the subject property, allegedly due to Complainant's disability. ORS 659A.820(1). However, based on ORS 659A.820(2) and OAR 839-003-0200(5)(e), the Commissioner lacks jurisdiction to pursue the allegations in the Formal Charges because J. Provenzano never signed a complaint.

ORS 659A.820 defines "aggrieved person" in cases involving alleged unlawful discrimination in real property transactions and sets out the procedure by which an "aggrieved person" can have the Commissioner conduct an investigation or other proceeding to resolve the complaint. In pertinent part, ORS 659A.820 reads:

> "(1) As used in this section, for purposes of a complaint alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, 'aggrieved person' includes a person who believes that the person:
>
> "(a) Has been injured by an unlawful practice or discriminatory housing practice; or
>
> "(b) Will be injured by an unlawful practice or discriminatory housing practice that is about to occur.
>
> "(2) Any person claiming to be aggrieved by an alleged unlawful practice may file with the Commissioner of the Bureau of Labor and Industries a verified written complaint that states the name and address of the person alleged to have committed the unlawful practice. The complaint must be signed by the complainant. The complaint must set forth the acts or omissions alleged to be an

unlawful practice. The complainant may be required to set forth in the complaint such other information as the commissioner may require. Except as provided in ORS 654.062, a complaint under this section must be filed no later than one year after the alleged unlawful practice." (Underlined emphasis added)

OAR 839-003-0200 is an administrative rule adopted by the Agency that sets out the process for an aggrieved person to file a complaint of housing discrimination. In pertinent part, it provides:

"(2) A person claiming to be aggrieved by an alleged unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law or the person's attorney, or the commissioner may file a complaint, in person or by mail, with the division at any bureau office in the state of Oregon. Complaint means a written statement signed by the complainant that:

"(a) Gives the name and address of the complainant and the respondent;

"(b) Describes the acts or omissions alleged to be an unlawful practice, including those acts or omissions the person believes are about to occur and;

"(c) Describes how the person was harmed or will be harmed by such actions.

"* * * * *

"(5) The procedures for filing a complaint are as follows:

"(a) A person or the person's attorney makes an inquiry to the division;

"(b) The division may provide the person or the person's attorney with a letter of information and/or questionnaire;

"(c) If the division determines the person has a basis for filing a complaint, the division will draft a complaint based upon the information provided by the person and send or give the complaint to the person or the person's attorney for verification. The person or the person's attorney will request any necessary changes to the complaint.

"(d) The person will verify and sign the complaint. The complaint will then be submitted to the division.

"(e) If the person is an unemancipated minor the complaint must be signed by the minor and the parent or legal guardian of the minor.

(Underlined emphasis added)

To summarize, ORS 659A.820(1) provides that any person meeting the definition of an "aggrieved person" may file a verified written complaint with the Commissioner by (1) meeting the same requirements of ORS 659A.820(2) that any person alleging any other "unlawful practice" under the Commissioner's jurisdiction must meet, and (2) following the procedures set up by the Agency in OAR 839-003-0200(2) *&* (5). By doing so, that person becomes a "complainant." All aggrieved person, including an unemancipated minor in a complaint alleging unlawful discrimination in a real property transaction, must sign the complaint before the Commissioner can pursue it. Although the Formal Charges allege standing to pursue the Agency's allegations because J. Provenzano is

an "aggrieved person," there is no statutory language or Agency administrative rule that exempts an "aggrieved person" in a housing discrimination case from signing their complaint. There is also no evidence that J. Provenzano, who was at most 10 years old when Complainant filed her second amended complaint naming J. Provenzano as an "aggrieved person," was an emancipated minor at that time. The Agency, having adopted its rule requiring unemancipated minors to sign complaints, is bound to follow that rule.[27] Based on the plain language of ORS 659A.820(2) and the Agency's own rule, J. Provenzano's failure to sign her complaint foreclosed the Agency from proceeding on her behalf. Accordingly, the forum enters no findings regarding whether or not Respondent's denial of reasonable accommodation to Complainant "injured" J. Provenzano and awards her no damages.

DAMAGES

The Agency seeks out-of-pocket moving expenses of "at least $10,000" for Complainant and "at least $20,000" in emotional, mental, and physical suffering for Complainant. The forum awards no damages for Complainant's moving expenses based on its conclusion that Complainant's expulsion was not an unlawful practice. The award that is discussed below is predicated solely on Respondent's failure to reasonably accommodate Complainant's disabilities by allowing her to have a service dog in violation of ORS 659A.145(2)(g).

In determining an award for emotional, mental, and physical suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the complainant. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for damages. *In the Matter of From the Wilderness*, 30 BOLI 227, 291-92 (2009).

This forum has only issued four Final Orders that involved discrimination in real property transactions, most recently in 1990.[28] Because of their age, the forum does not consider them in evaluating the monetary value of Complainant's mental suffering.

There is considerable evidence in the record related to Complainant's emotional, mental, and physical suffering due to her expulsion, but scant evidence of her suffering related to Respondent's denial of her request to have a service dog. Her daughter testified that Complainant was "shaky," "confused" and "upset" after Respondent told her she could not have a dog and didn't sleep that night. Complainant, her daughter, and Kennedy, her therapist, testified that Complainant has had a service dog since May 2010, that the dog makes her feel safe, requires her to go outside more and get more

[27] *See Harsh Investment Corp. v. State Housing Division,* 88 Or App 151, 157, 744 P2d 588 (1987), *citing Bronson v. Moonen, 270 Or 469, 476-477, 528 P2d 82 (1974).*

[28] *In the Matter of Strategic Investments of Oregon, Inc.,* 8 BOLI 227 (1990); *In the Matter of Dan Stoller,* 7 BOLI 116 (1988); *In the Matter of Harold Schipporeit,* 6 BOLI 113 (1987), *aff'd, Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1988), *aff'd,* 308 Or 199, 778 P2d 953 (1989); *In the Matter of Harold Carlson,* 24 BOLI 168 (1975).

exercise, and is very important to her emotional stability. From this testimony, the forum infers that Complainant would have had the same benefits during her tenancy with Respondent, had she been allowed a service dog. The forum recognizes that it is impossible to determine the exact date Complainant would have acquired a service dog, had Respondent granted her request, but infers that it would have happened at some time during her remaining tenancy with Respondent.[29] Correspondingly, the forum also infers that Respondent's denial of her request caused her to be denied those benefits for some period of time.

Respondent contends that any mental suffering award to Complainant should be diluted by the concurrent mental suffering she experienced due to related to family problems. The forum disagrees, having consistently held in prior Final Orders when calculating mental suffering damage awards that respondents must take complainants "as they find them." The forum follows that precedent in making an award in this case.[30]

Based on the suffering Complainant experienced in the immediate aftermath of Respondent's denial of her service dog request and the corresponding benefit she was denied during at least part of her remaining tenancy, the forum finds that $10,000 is an appropriate award to compensate Complainant for her emotional and mental suffering.

CIVIL PENALTY

This is the first case to come before the Commissioner since the civil penalty provisions of ORS 659A.855 were enacted by the legislature. Under that statute, the Formal Charges ask the forum to assess an $11,000 civil penalty. In pertinent part, that statute provides:

> "(1)(a) If the Commissioner of the Bureau of Labor and Industries files a complaint under ORS 659A.825 alleging an unlawful practice other than an unlawful employment practice, and the commissioner finds that the respondent engaged in the unlawful practice, the commissioner may, in addition to other steps taken to eliminate the unlawful practice, impose a civil penalty upon each respondent found to have committed the unlawful practice.
>
> "* * * * *
>
> "(2)(a) Notwithstanding subsection (1)(b) of this section, if a complaint is filed under ORS 659A.820 or 659A.825 alleging an unlawful practice under ORS

[29] Complainant testified that she did not obtain a dog until May 2010 because of financial problems caused by the cash deposit she had to make to obtain replacement lodging after her expulsion, but there was no evidence that she was financially unable to obtain a dog in October 2008 or that there were any other circumstances that would have made it difficult for her to obtain a dog during her remaining tenancy with Respondent.

[30] *See, e.g., In the Matter of Charles Edward Minor,* 31 BOLI 88, 104 (2010); *In the Matter of Robb Wochnick,* 25 BOLI 265, 290 (2004); *In the Matter of Entrada Lodge, Inc., amended final order on remand*, 24 BOLI 126, 154 (2003); *In the Matter of Kenneth Williams,* 14 BOLI 16, 26 (1995); *In the Matter of Motel 6,* 13 BOLI 175, 186-87 (1995); *In the Matter of Loyal Order of Moose,* 13 BOLI 1, 12-13 (1994).

> 659A.145 or 659A.421 or discrimination under federal housing law and the commissioner finds that a respondent has engaged in an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, the commissioner may assess against the respondent, in addition to any other relief available, a civil penalty:
>
> "(A) In an amount not exceeding $11,000[.]
>
> "* * * * *
>
> "(3) Civil penalties under this section shall be imposed in the manner provided by ORS 183.745."

Here, the forum has found that Respondent committed an unlawful practice under ORS 659A.145. ORS 659A.855(2)(a)(A) provides for a maximum civil penalty of $11,000 in these circumstances.[31] However, there are no provisions in ORS 659A.855 or any other statute in ORS chapter 659A that offer guidance as to factors the forum should consider in deciding whether to assess the maximum civil penalty or a lesser amount. OAR 839-005-0195 *et seq*, the Agency's administrative rules interpreting the housing discrimination provisions of ORS chapter 659A, similarly lend no guidance.[32] Incongruously, ORS 183.745(7) provides "(7) This section does not apply to penalties: * * * (c) Imposed under the provisions of ORS chapter * * * 659A[.]"

The FHA, at 42 U.S.C. §3612(g)(3)(A), similarly provides for a civil penalty against a respondent "(A) in an amount not exceeding $11,000[33] if the respondent has not been adjudged to have committed any prior discriminatory housing practice." Unlike ORS 659A.855, the Code of Federal Regulations sets out specific guidelines for an ALJ to use when evaluating the appropriate amount of civil penalty. 24 CFR §180.671. In pertinent part, it states:

> "(c) *Factors for consideration by ALJ.* (1) In determining the amount of the civil penalty to be assessed against any respondent for each separate and distinct discriminatory housing practice the respondent committed, the ALJ shall consider the following six (6) factors:
>
> "(i) Whether that respondent has previously been adjudged to have committed unlawful housing discrimination;

[31] Subsequent paragraphs in ORS 659A.855(2) provide for a greater maximum civil penalty for repeat offenders.

[32] This contrasts with civil penalties assessed by the Commissioner in wage and hour cases alleging violations of working conditions, farm labor contractor cases, and prevailing wage rate cases, in which the Agency has promulgated rules requiring, allowing, or requiring and allowing the forum to consider "mitigating" and "aggravating" circumstances in determining an appropriate civil penalty. *See* OAR 839-015-0510 (farm labor contractor); OAR 839-020-1020 (wage and hour working conditions); OAR 839-025-0540 (prevailing wage rate).

[33] This amount has been amended in the Code of Federal Regulations to $17,000 based on 28 U.S.C. 2461 (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by 31 U.S.C. 3701 (Debt Collection Improvement Act), which requires each federal agency to make inflation adjustments to its maximum civil money penalties.

"(ii) That respondent's financial resources;

"(iii) The nature and circumstances of the violation;

"(iv) The degree of that respondent's culpability;

"(v) The goal of deterrence; and

"(vi) Other matters as justice may require."

In the absence of any direction from the Oregon legislature or the Agency through promulgation of an administrative rule, the forum takes guidance from the criteria above to determine the appropriate civil penalty, if any, to be assessed against Respondent for its violation of ORS 659A.145(2)(g).[34]

There is no evidence that Respondent has engaged in any previous housing discrimination and no evidence of Respondent's financial resources, other than that he owned only one rental property, the duplex Complainant lived in. The nature of the violation was an indirect, but effective oral denial of a service dog for a maximum period of four and one-half months to a complainant who was prescribed a dog for her depression issues. Respondent is the only culpable person. The maximum penalty may have a substantial deterrence effect on other landlords. However, based on (1) Respondent's limited property holdings; (2) the fact that he let Complainant keep two "service" cats that were prescribed for her "medical well being"; (3) the fact that he allowed Ahlquist and the renters who replaced Complainant to keep a dog; and (4) the absence of any evidence of a bias on his part toward disabled persons, the forum concludes that the maximum penalty is not likely to have a significant deterrent effect on Respondent. The forum considers the fact that Respondent obeyed the law in allowing Complainant to have two "service" cats as mitigating evidence.

Based on the above, the forum concludes that $5,500 is an appropriate civil penalty for Respondent's violation of ORS 659A.145(2)(g).

RESPONDENT'S EXCEPTIONS

Respondent's exceptions focus on two issues – the ALJ's credibility findings, and the amount of damages in the proposed award to Complainant. Respondent's

[34] The forum has previously taken guidance from analogous federal law in civil rights cases. *See, e.g., In the Matter of Barrett Business Services, Inc.,* 22 BOLI 77, 90-91 (2001) (forum relied on EEOC Guidelines interpreting provisions of the ADA that were similar to ORS 659.447 and 659.448); *In the Matter of Murrayhill Thriftway, Inc.,* 20 BOLI 130, 149 (2000), *affirmed without opinion, Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), *rev den* 333 Or 400 (2002) (although federal case law interpreting federal statutes and regulations similar to Oregon laws are not binding on this forum, federal decisions are instructive in construing and applying similar state law); *In the Matter of Kenneth Williams,* 14 BOLI 16, 25 (1995) (While federal case law interpreting federal statutes and regulations that are similar to Oregon laws is not binding on this forum, it is instructive and may be adopted as precedent in Oregon cases); *In the Matter of WS, Inc.,* 13 BOLI 64, 86 (1994) (because some of Oregon's civil rights laws are modeled after federal civil rights laws, the commissioner has often looked to federal case law for guidance in interpreting and administering Oregon's laws).

exceptions to the ALJ's credibility findings are denied because those findings are supported by substantial evidence in the record. Likewise, the proposed award of $10,000 in damages for emotional suffering is supported by the facts found by the ALJ and is within the Commissioner's authority. Related to Complainant's emotional suffering, the forum notes that the evidence is not clear as to when Complainant received her lump sum Social Security disability award, and that Complainant credibly testified that it cost her $130, plus food and flea medicine, to obtain her service dog from the pound.

ORDER

1. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent's violation of ORS 659A.145(2)(g) and OAR 839-005-0220(2)(c)(C), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Kenneth D. Wallstrom** to 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 Teresa Provenzano** in the amount of:

a) TEN THOUSAND DOLLARS ($10,000), representing compensatory damages for emotional, mental, and physical distress Teresa Provenzano suffered as a result of Respondent's unlawful practices found herein; plus,

b) Interest at the legal rate on the sum of $10,000 from the date of the Final Order until Respondent complies herein.

2. NOW, THEREFORE, as authorized by ORS 659A.855, the Commissioner of the Bureau of Labor and Industries hereby orders **Kenneth D. Wallstrom** to 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 the amount of FIVE THOUSAND FIVE HUNDRED DOLLARS ($5,500), representing a civil penalty assessed pursuant to ORS 659A.855(2)(a)(A), plus interest at the legal rate on the sum of $5,500 from the date of the Final Order until Respondent complies herein.

3. NOW, THEREFORE, as authorized by ORS 659A.855, the Commissioner of the Bureau of Labor and Industries hereby orders **Kenneth D. Wallstrom** to:

a) Cease and desist from discriminating against any person in any aspect of the rental, sale or enjoyment of a dwelling pursuant to ORS 659A.145; and

b) Create a written policy designed to prevent unlawful housing practices related to granting reasonable accommodation to any "purchaser" with a disability, as those terms are respectively defined in ORS 659A.421(1)(b) and OAR 839-005-0200, who requests a service or companion animal related to the purchaser's disability, with such policy to be approved by the Oregon Bureau of Labor and Industries, Civil Rights Division.

In the Matter of

ANDREW W. ENGEL, DMD, PC dba AWE DENTAL SPA and DR. ANDREW W. ENGEL individually as an Aider and Abettor

Case No. 38-11
Final Order of Commissioner Brad Avakian
Issued September 13, 2012

SYNOPSIS

Respondent Awe Dental Spa employed Complainant as a dental assistant and subjected her to harassment based on her religion, failed to reasonably accommodate her religious beliefs, and constructively discharged her based on her religion. Respondent Dr. Andrew W. Engel aided and abetted Respondent Awe Dental Spa in the commission of the unlawful employment practices. The forum awarded Complainant $12,000 in back pay, $10,654 in out-of-pocket expenses attributable to the unlawful employment practices, and $325,000 in damages for mental, emotional, and physical suffering, and found Respondents jointly and severally liable for these damages. The forum also required Respondent Dr. Engel and his staff to attend training on recognizing and preventing religious discrimination. ORS 659A.030(1)(a), ORS 659A.030(1)(b), ORS 659A.030(1)(g), ORS 659A.033, ORS 659A.850.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The evidentiary part of the hearing was held on December 13-15, 2011, in the Lyon Room of the Deschutes Services Building, 1300 NW Wall St., Bend, Oregon. Closing arguments were held on February 16, 2012, at the Portland offices of the Bureau of Labor and Industries.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenters Chet Nakada and Patrick A. Plaza, both employees of the Agency. Complainant Susan Muhleman was present throughout the hearing and was not represented by counsel. Respondent Andrew W. Engel, DMD, PC ("AWEPC") was represented by Jeffrey T. Eager, attorney at law. Respondent Andrew W. Engel, individually ("Dr. Engel"), was represented by Michael F. Gordon, attorney at law. Dr. Engel, Mr. Eager, and Mr. Gordon were present throughout the hearing. During closing arguments, Mr. Nakada, Mr. Plaza, and Mr. Gordon appeared in person, and Complainant, Mr. Eager, and Dr. Engel participated by telephone. Johanna Riemenschneider, Senior Assistant Attorney General, Oregon Department of Justice, was present and made legal argument on the Agency's behalf.

The Agency called the following witnesses: Complainant; Brandy Pirtle, senior investigator, BOLI Civil Rights Division (telephonic); Lynne Georgia, Respondent AWEPC's employee (telephonic); Pat Parkison, Complainant's mother; Kailey Middaugh, Complainant's friend and former co-worker (telephonic); Brent Dodrill, Complainant's childhood pastor (telephonic); and Respondent Dr. Andrew Engel.

Respondents called Dr. Andrew Engel and Brianne Summers, Respondent AWEPC's employee and Complainant's former co-worker, as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-22 (submitted or generated prior to hearing) and X-23 (created after the evidentiary portion of the hearing concluded);
b) Agency exhibits A-1 through A-27 (submitted prior to hearing); and
c) Respondents' exhibits R-1 (submitted or generated prior to hearing) and R-2 through R-4 (submitted at hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, 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, 2009, 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 AWEPC in that she was required to go to Scientology management training or resign and she chose to resign based on her religion. On or about March 31, 2010, Complainant amended her complaint to include allegations that she was treated differently, harassed, denied reasonable accommodation, and forced to resign because of intolerable working conditions imposed by Respondents and that she was retaliated against for her opposition to the discrimination on the basis of religion. The amended complaint named Dr. Engel as an aider and abettor. On June 25, 2010, Complainant amended her complaint a second time to specifically describe acts of alleged aiding and abetting by Dr. Engel. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued a Notice of Substantial Evidence Determination on October 4, 2010.

2) On September 14, 2011, the Agency issued Formal Charges alleging that:

(a) Respondents unlawfully discriminated against Complainant in terms and conditions of employment by harassing her based on her religion in that Respondents subjected her to a hostile work environment, in violation of ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a) and (b);

(b) Respondents failed to reasonably accommodate Complainant's religious beliefs by denying her request to not attend a symposium that Complainant believed was associated with the Church of Scientology, in violation of ORS 659A.030(1) and ORS 659A.033(1);

(c) Respondents retaliated against Complainant in terms and conditions of employment based on her opposition to attending the symposium, in violation of ORS 659A.030(1)(b), ORS 659A.030(1)(f) and OAR 839-005-0033;

(d) Respondents constructively discharged Complainant by intentionally creating or intentionally maintaining discriminatory working conditions related to Complainant's religion, thereby creating working conditions so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them and Respondents desired to Complainant to leave her employment as a result of the intolerable working conditions or knew or should have known that Complainant was certain or substantially certain to leave Respondents' employment as a result of the working conditions created by Respondents, in violation of ORS 659A.030(1)(a) and OAR 839-005-0011;

(e) Dr. Engel aided and abetted AWEPC in the commission of the alleged unlawful employment practices and is an aider/abettor under ORS 659A.030(1)(g);

(f) As a result of Respondents' alleged unlawful employment practices, Complainant is entitled to lost wages and out of pocket expenses of "at least $35,000" and damages for "emotional, mental, and physical suffering" in the amount of "at least $80,000."

3) On September 14, 2011, the forum served the Formal Charges on Respondents, accompanied by the following: a) a Notice of Hearing setting forth December 13, 2011, at 9:30 a.m., in Bend, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On September 21, 2011, Respondents, through counsel Jeffrey T. Eager, filed an answer and affirmative defenses to the Formal Charges. Respondents' affirmative defenses included the following:

- Respondents' requirement that Complainant attend the symposium was a bona fide occupational requirement;
- Complainant has failed to mitigate her alleged damages;
- Accommodating Complainant's alleged religious beliefs created an undue hardship for Respondents;
- Complainant has failed to state a claim;
- Complainant failed to cooperate with Respondents' accommodation process;
- The alleged discriminatory conduct was privileged because it was part of Respondents' efforts to engage with Complainant in the interactive process of accommodation;
- Respondents did grant Complainant the reasonable accommodation of not requiring her attendance at the symposium.

5) On October 251, 2011, the forum ordered the Agency and Respondents each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and a brief statement of the elements of the claim and any damage calculations (for the Agency only). The forum ordered the participants to submit case summaries by January 29, 2010, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On November 15, 2011, the Agency moved for a Protective Order regarding Complainant's medical information and records in response to Respondents' informal discovery request in which Respondents requested Complainant's medical records related to Complainant's claim for damages for emotional distress or mental or physical suffering. The Agency attached four pages of medical records for the ALJ's review and asked that the ALJ conduct an *in camera* review of all documents provided by the Agency prior to their release to Respondents to determine if the Agency was required to release them to Respondents. In response, the ALJ issued a Protective Order governing the use and disposition of Complaint's medical records and testimony at hearing related to those records. Based on the submitted records' immediate proximity in time to the alleged unlawful actions and a specific reference to Complainant's former employment with AWEPC, the ALJ found that the records likely contained information generally relevant to the issue of Complainant's entitlement to damages for emotional, mental, and physical suffering. However, because the Agency did not specifically ask that the ALJ release these records to Respondents and Respondents had not filed a motion for discovery order, the ALJ declined to release the records to Respondents, finding that any such release remained within the Agency's discretion.

7) On November 23, 2011, Respondents filed a motion for a Discovery Order seeking more complete responses to Respondents' interrogatories and production of documents. On November 30, 2011, the Agency filed objections to Respondents' motion.

8) On December 2, 2011, the ALJ issued an interim order ruling on Respondents' motion for a discovery order. In pertinent part, the ALJ's order stated:

> "**INTERROGATORIES**
>
> "Respondents sought a discovery order regarding Respondents' interrogatories numbered 4, 6-9, and 15-17. Respondents argue that the Agency's responses were inadequate and that the Agency should be required to respond more completely.
>
> "***Interrogatory 4*** asks for a description of 'Complainant's job duties while employed by Respondent, including but not limited to job duties of August 2009.' Whether or not Complainant's job duties included any managerial duties may be

relevant to this case and appears to be in dispute. **The Agency and Complainant are ordered to respond specifically to this interrogatory.**[1]

"***Interrogatory 6*** seeks the 'name, phone number, and mailing address of each person with whom Complainant has communicated with regard to the substance of her complaint against Respondents, and the nature, substance, and details of the communication with each such person.' This request appears reasonably likely to produce information generally relevant to the case. **The Agency and Complainant are ordered to identify, to the extent it is [sic] not already done so in its initial response, persons of whom Complainant is aware who fit in this category.**

*"**Interrogatory 7*** requests information concerning persons who have 'discoverable knowledge of the allegations contained in the Formal Charges or the Respondents' Affirmative Defenses.' **This request is unduly vague and the Agency and Complainant are not required to respond.**

"***Interrogatory 8*** asks for a description of 'the hours Complainant was scheduled to work the week following August 21, 2009, for an (sic) after her hours were "cut" for that week as alleged in paragraph 15 of the Formal charges.' **The Agency and Complainant are ordered to respond more specifically to this interrogatory if the Complainant has any more specific knowledge of the information sought than was provided in the Agency's initial response to this interrogatory.**

"***Interrogatory 9*** asks for a description of 'the nature and extent of Complainant's injuries resulting from Respondents' actions as alleged in paragraph 16 and 37 of the Formal Charges.' The Formal Charges seek 'at least $80,000' in damages for these alleged injuries. The Agency's initial response provides no specific information whatsoever except to state that Complainant 'lost her health insurance benefits and her physical and emotional health suffered after an unsuccessful job search where she and her family had to eventually relocate from Central Oregon.' **The Agency and Complainant are ordered to provide a statement of the specific nature and extent of Complainant's alleged injuries.**

"***Interrogatory 15*** asks for the identification of 'any medical or psychological professionals seen by Complainant for any injury or emotional, mental or physical suffering Complainant alleges she suffered as a result of Respondents' actions as alleged in paragraph 37 of the Charges.' The Agency provided no information in response to this interrogatory and the Agency's response to Respondents' motion was to state '[t]his information will be provided by the Forum when it releases Complainant's medical records to Respondents.' The forum is not responsible for releasing any medical records to Respondents, and made that clear in the Protective order I issued on November 15, 2011, at page 2, lines 21-22, and page 3 lines 1-4. **If there are any other medical or**

[1] All bolded and underlined language is identically emphasized in the original order.

psychological professionals who fit the category described in this interrogatory, the Agency and Complainant are ordered to identify them.

"***Interrogatory 16*** asks for 'the amount and method of calculating Complainant's lost wages and lost benefits allegedly suffered as a result of Respondent's actions, including but not limited to salary or wages assumed, benefits assumed, duration of wages and benefits lost.' In its response to Respondents' motion, the Agency set out specific calculations of lost wages, but did not refer to any benefits lost or assumed. The Formal Charges seek damages for 'loss benefits and out-of-pocket medical expenses and other out-of-pocket expenses.' **The Agency and Complainant are ordered to provide specific information regarding benefits assumed and benefits lost.**

"***Interrogatory 16*** asks for 'the recipient, amount, and source of all out-of-pocket medical and other expenses allegedly incurred by Complainant as a result of Respondents' actions, including the name, phone number and mailing address of each medical provider or other recipient of the payment, the amount incurred or charged by each provider or other recipient, whether the amounts charged or incurred have been paid, and, if so, by whom the amounts were paid.' The Agency responded by stating 'Complainant cannot recall the specific amount and source of all out-of-pocket medical expenses. The Agency and Complainant will provide this information if she is able to locate it.' **The Agency and Complainant are ordered to attempt to locate any such existing information and provide any to Respondents that can be located.**

"**The Agency and Complainant are to respond as directed to the above-referenced interrogatories as ordered no later than noon, December 9, 2011, and to provide responses directly to Respondents' attorney by that time.**

"**REQUESTS FOR DOCUMENTS**

A. "**Request for Production of Documents Nos. 1-6, 10-11, 13-15, 17-18, 22-23, and 25.**

"Respondents contend that the Agency's responses to Respondents' informal Request for Production of Documents Nos. 1-6, 10-11, and 13-15, are inadequate in that they 'contain variations on the following: "Responsive documents, if they exist, will be provided to Respondents if they can be found by Complainant."' The Agency and Complainant are only required to produce documents that exist. Requests 1-6, 10-11, 13-15, 17-18, 22-23, and 25 appear reasonably likely to produce information that is generally relevant to the case. **With one exception, the Agency is required to produce any documents responsive to these requests at its earliest opportunity, up to the time the hearing begins.** The exception is Request 14, in that the Agency is not required to produce any communications between the Complainant and the Agency case presenter.

"**B. Request for Production of Documents No. 16.**

"This request asks for Complainant's 2007-2010 tax returns. Based on the Agency's response to Respondents' motion, the forum presumes that the 2009 and 2010 tax returns have been provided. If not, the Agency and Complainant are ordered to provide them to Respondents' attorney no later than noon, December 9, 2011. The forum fails to see the potential relevance of Complainant's 2007 and 2008 tax returns and the Agency and Complainant need not provide them.

"*** * * * ***

"**D. Request for Production of Documents No. 24.**

"Respondents seek '[r]ecords of Complainant's treatment or diagnosis by any medical provider for any reason whatsoever from January 1, 2004 to present.' Respondents justify the broadness of the request based on 'the highly general nature of Complaint's allegations of injury, and the Agency's failure to specify the nature and extent of injuries in its response to Interrogatory 9[.]' The forum orders the Agency and Complainant to produce all medical records from January 1, 2007, to the present that reflect any treatment for any condition similar to or the same as the specific emotional, mental and physical distress Complainant alleges she experienced as a result of Respondents' alleged unlawful conduct. This order includes the medical records provided to the forum by the Agency for an *in camera* inspection pursuant to its motion for a Protective Order dated November 15, 2011. Any such medical records provided will be considered 'subject records' under the terms of the Protective Order I issued on November 15, 2011.

"The Agency is ordered to provide the forum with a copy of any additional medical records it provides to Respondents based on this Discovery Order.

"**If it has not already done so, the Agency is ordered to produce the medical records provided to the forum by the Agency for an *in camera* inspection to Respondents by 5:00 p.m. on December 5, 2011. To the extent of its ability to acquire these records, the Agency is required to produce any additional documents responsive to these requests at its earliest opportunity, up to the time the hearing begins.**"

9) On December 2, 2011 Respondents filed a motion to extend the case summary deadline to December 7, 2011. The Agency did not object and the ALJ granted Respondents' motion. The Agency and Respondents timely filed case summaries. The Agency filed an addendum to its case summary on December 9, 2011.

10) On December 8, 2011, the Agency moved to amend the Formal Charges to incorporate Complainant's amended civil rights complaint[2] on page 2, line 4 of those Charges. The ALJ granted the Agency's motion at hearing.

[2] Exhibit A-15.

11) On December 8, 2011, attorney Michael F. Gordon filed a Notice of Change of Counsel for Respondent Dr. Engel, stating that Gordon was now representing Respondent Dr. Engel.

12) At hearing, prior to opening statements, the Agency moved to amend the Formal Charges at page 6, line 18, to substitute "OAR 839-005-0010(4)(c)" for "OAR 839-005-0010(4)(a) & (b)." Respondents did not object and ALJ granted the Agency's motion.

13) At hearing, prior to opening statements, Respondents moved to amend paragraph 42 of their Answer to substitute "5" for "X." The Agency did not object and ALJ granted Respondents' motion.

14) At hearing, prior to opening statements, the Agency requested permission to file a post-hearing brief to address the legal arguments Respondents raised in their case summary. The ALJ deferred ruling on the Agency's motion until the conclusion of the evidentiary portion of the hearing. At the conclusion of the evidentiary portion of the hearing, the ALJ granted the Agency's motion and Respondents' request to file a reply brief. The ALJ also granted the Agency's and Respondents' requests that closing arguments be made after the briefs were filed.

15) During the hearing, the ALJ required Dr. Engel to read the ALJ's Protective Order and sign a statement agreeing to be bound by the terms of that Order as a prerequisite to being allowed to read any of Complainant's medical records proffered as evidence.

16) Exhibit A-23, pp. 1, 3, 5, and 7 in the Agency's case summary consisted of black and white copies of color photographs taken by the Complainant in Respondents' office. Those copies contained partially illegible text. In response to the ALJ's inquiry, the Agency provided the original color photographs on which the text could clearly be read. The ALJ ordered the Agency to either substitute the original photographs for the copies provided in its case summary or to provide equally legible color copies. The Agency chose the latter option and the ALJ substituted the color copies of Exhibit A-23, pp. 1, 3, 5, and 7 for the black and white copies provided in the Agency's case summary.

17) At the start of the hearing, 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.

18) On December 20, 2011,[3] the ALJ issued an interim order that required the Agency to file its written brief no later than January 20, 2012, and Respondents to file reply briefs no later than February 6, 2012.

[3] The actual order is misdated "December 2, 2011."

19) On January 5, 2012, the ALJ scheduled closing argument for February 16, 2012, at the W.W. Gregg Hearings Room at BOLI's Portland office located at 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon, with the Complainant, Mr. Eager, and Dr. Engel scheduled to participate by telephone. This arrangement was based on the mutual agreement of the participants.

20) On December 19, 2011, and January 4, 2012, Mr. Gordon and Mr. Nakada respectively requested a copy of the audio digital recording of the December 13-15, 2011, hearing. The ALJ mailed a compact disc containing a digital recording of the hearing to Mr. Gordon and Mr. Nakada on January 6, 2012.

21) Closing arguments were made by Agency and Respondents on February 16, 2012, and the record closed at their conclusion.

22) On June 20, 2012, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On June 27, 2012, Respondents filed a motion for an extension of time to file exceptions that was GRANTED. Respondents timely filed exceptions on August 20, 2012.

FINDINGS OF FACT – THE MERITS

1) At all times material, AWEPC was a domestic professional corporation that employed Complainant and Dr. Engel was the sole owner and president of AWEPC. AWEPC consisted of Dr. Engel's dental practice and a health spa located in the same building and adjacent to the dental practice.

2) At times material, Dr. Engel was a member of the Church of Scientology.

3) Scientology is a religion and its members are referred to as Scientologists.

4) In October 2005, Dr. Engel contracted with Hollander management group to obtain Hollander's business consulting services. The contract included a clause that stated:

> "Doctor understands and acknowledges that Hollander uses secular administrative technology developed by L. Ron Hubbard, author, educator, and founder of the religion of Scientology, in Hollander's program of business consulting and training. Hollander is, however, a privately owned company, separate from and not part of any Church of Scientology."

Dr. Engel used Hollander's services until Hollander changed its name to Silkin Management Group in October 2008. Hollander, then Silkin, provided a business consultant to help Dr. Engel with "some functions and decisions" in Engel's business, including helping him to look at statistics associated with his business, how to improve those statistics, and helping with the organization of the staff and efficiency. After Hollander changed its name to Silkin, Dr. Engel continued working with Silkin under the Hollander contract, consulting with the same persons Hollander used as consultants. The Silkin consultant who worked with Dr. Engel in August 2009 is a Scientologist.

5) Silkin is a nationwide company that "consults business objectives with Dentists, Chiropractors, Veterinarians, and Ophthalmologists practices." It uses the same tools and technology as the WISE[4] and Sterling management groups.

6) In early 2008, AWEPC had an opening for a dental assistant. Complainant, who had been working as a dental assistant since 1996, applied for and was hired as Dr. Engel's dental assistant in mid-February 2008.

7) Complainant was baptized as a Christian in 1993 and had Christian beliefs while employed by AWEPC. Based on her Christian beliefs, she was opposed to "Scientology itself" and believes that her Christian beliefs are "contradicted by the Church of Scientology."

8) Complainant's job duties as a dental assistant for Respondent involved assisting Dr. Engel in "chair side procedures." Her primary duties included maintaining dental equipment, sterilizing instruments, taking x-rays, making impressions, pouring up impressions, making bleach trays, giving post-op instructions, sending out lab work, answering the phone, bringing patients back to the dental chair, scheduling appointments, charting notes, and using the computer. Dr. Engel also expected her to obtain referrals to potential new patients from current patients.

9) In or around July 2009, Dr. Engel attended a Scientology conference. After his return, he held a staff meeting that Complainant attended in which he talked about his staff working together more effectively. At the end of the meeting, Dr. Engel asked the staff if they were all tolerant of each other's religious beliefs and said he had Scientology books in his office that were available for staff to check out. Dr. Engel and his wife Francie told the staff that they "didn't use the Scientology as a religion; they were only using it for knowledge reasons, so that these books would help us to be able to market ourself or the business better." Although Dr. Engel had used methodology developed by L. Ron Hubbard in his business practice since first contracting with Hollander, Complainant had previously been unaware that Engel's business practices were related in any way to Scientology.

10) In early August 2009 Dr. Engel asked AWEPC's staff, including Complainant, if they were available to attend a three-day symposium scheduled for October 8-10, 2009.[5] Complainant responded that she did not think she had any obligations on those dates. Soon afterwards, Dr. Engel gave Complainant and the rest of his staff an outline of the contents of the symposium. The outline included some terms Complainant was unfamiliar with, including "tone scale." The symposium cost AWEPC the flat fee of $3500, regardless of how many staff members attended.

[4] Dr. Engel testified that "WISE" is an acronym for "World Institute of Scientology Enterprises."
[5] The forum takes judicial notice that October 8-10, 2009, fell on a Thursday, Friday, and Saturday.

11) After receiving the outline, Complainant discussed the symposium with her co-workers Brianne, Kailey, and Kay. Kay said she had been to a symposium, but had no opinion about it. Kailey and Brianne said they had never attended one.

12) Prior to receiving the symposium outline, Complainant knew nothing about Scientology except that Tom Cruise and John Travolta "claimed to be members."

13) After receiving the outline, Complainant did internet research on some of the phrases it contained, including the "tone scale," and learned from the Church of Scientology's website that the "tone scale" is a "fundamental part of the Church of Scientology." After work on Tuesday, August 18, Complainant asked Dr. Engel if the conference was mandatory. He told her it was because he had already paid for it. Complainant told Dr. Engel she would not attend "due to ties to the Church of Scientology."

14) On Wednesday, August 19, 2009, two new posters were posted in Respondent's lunchroom.

15) One of the posters was captioned "The Illustrated Tone Scale in Full, And the Know to Mystery Scale, L. RON HUBBARD." It contained a list of numbers, each accompanied by a word or words describing an attitude or state of being, e.g. "1.8 pain," "-0.1 pity," and a corresponding illustration. The second poster was captioned "The Condition Formulas by L. RON HUBBARD" and contained eight "boxes" of text with the following respective headings: "The Formula for the Condition of Non-Existence," "The Formula for the Condition of Danger," "The Formula for the Condition of Normal," "The Formula for the Condition of Power," "The Junior Danger Formula," "The Formula for the Condition of Emergency," "The Formula for the Condition of Affluence," and "The Formula for the Condition of Power Change."

16) The "Tone Scale" was developed by L. Ron Hubbard, founder of the Church of Scientology. A summary of a book called "The Scientology Handbook" that is posted on the internet on the website http://www.scientologyhandbook.org/SH4_1.HTM includes, among other things, the following statements:

> "The Tone Scale—a vital tool for any aspect of life involving one's fellows—is a scale which shows the successive emotional tones a person can experience. By 'tone' is meant the momentary or continuing emotional state of a person. Emotions such as fear, anger, grief, enthusiasm and others which people experience are shown on this graduated scale.
>
> "Skillful use of this scale enables one to both predict and understand human behavior in all its manifestations.
>
> "This Tone Scale plots the descending spiral of life from full vitality and consciousness through half-vitality and half-consciousness down to death.
>
> "By various calculations about the energy of life, by observation and by test, this Tone Scale is able to give levels of behavior as life declines.

"These various levels are common to all men.

"* * * * *

"*Every person has a chronic or habitual tone. He or she moves up or down the Tone Scale as he experiences success or failure. These are temporary, or acute, tone levels. A primary goal of Scientology is to raise a person's chronic position on the Tone Scale.*

"* * * * *

"©1996 – 2010 Church of Scientology International. All Rights Reserved."

17) On August 18 or 19, acting on her mother's advice, Complainant called Brent Dodrill, the pastor who had baptized her, and expressed her discomfort about attending the conference because she felt it involved exposure to something that was contrary to her personal beliefs.

18) At the end of the workday on August 20, Dr. Engel and his wife Francie asked Complainant to meet with them in AWEPC's "relaxation room," where they gave Complainant three documents related to the symposium and Dr. Engel explained his need for Complainant to attend the symposium. The documents stated that the symposium would be held October 8-10, 2009, at the Resort at the Mountain in Welches, Oregon, located "near Mt. Hood about 40 miles east of the Portland International Airport." One of the three documents Dr. Engel gave to Complainant read as follows:

"**Silkin Management Group**

"Symposium Talks

"**Emotions in the Workplace:** Learn to understand and predict human behavior during this presentation of the Emotional Tone Scale. Improve communication throughout the office and manage staff effectively using this information.

"**Stability, the Key to Success:** All Office Managers will achieve greater management success by learning basic management tools and exactly how to use them on the job.

"**Marketing & Promotion:** Doctors and staff learn how to increase the flow of new patients into the practice. Increased income will follow!

"**Working as a Team:** Staff members learn efficiency techniques, making it possible for you to expand your business, production and income with a lot less stress.

"**Hiring:** A 'must' for all Office Managers or anyone involved in hiring. Discover the precise steps you can take to hire professional staff members that will fit into your practice and contribute to its expansion.

"**Leadership & Efficiency:** Learn what it takes to be a good leader and how doctors, staff and patients will benefit as a result.

"**Financial Expansion:** Vital information that can be used immediately to increase profits, productivity and efficiency in any organization will be discussed in this session."

All these topics were covered at Silkin's symposium. One of the topics included in the "Marketing & Promotion" training involved dental staff obtaining referrals for the dental practice that employed them. Prior to this time, Complainant did not routinely ask patients for referrals.

19) During the meeting, Francie asked Complainant how she acquired her information about Scientology. Complainant explained she had researched it on the Internet, including the tone scale, and talked to her mom and pastor. In response to Dr. Engel's question about her religious beliefs, Complainant told Dr. Engel that her religious belief "was none of his business" and that her objection to the symposium was based on its ties to the Church of Scientology and her personal "religious beliefs." During the conversation, Dr. Engel told Complainant he and his wife used Scientology tools to better them. Complainant told Dr. Engel that she felt she was being pressured and harassed to attend the symposium and she would not attend. When Complainant got up to leave, Dr. Engel told her that if she left the building he would consider that to be her resignation. Complainant left and went to the employee locker room, where Francie approached her and convinced her to finish the conversation with Dr. Engel. Complainant and Dr. Engel finished the conversation in AWEPC's "relaxation room" in Francie's presence. At the end of the meeting, Dr. Engel told Complainant to "think about it overnight and make up her mind that she was either attending the symposium or she was out the door." In direct response to Complainant's question, Dr. Engel told Complainant that she could either go to the symposium or resign.

20) That night, Complainant conducted more internet research on Silkin and found websites containing information that led her conclude that Silkin was affiliated with the Church of Scientology, including the following:

- http://stop-wise.biz/Hollander Consultants.html, which stated that "Hollander was a "licensed World Institute of Scientology Enterprises company." * * * WISE is an integral part of Scientology and WISE licensed consultants like Hollander Consultants get money for every new Scientology recruit they are urged to make."
- A business registry business name search with the Oregon Secretary of State that showed that Hollander Consultants, Inc. was the registrant for Silkin Management Group.
- A Wikipedia article on "Sterling Management Systems" that includes the following statement:

  "WISE consulting companies like Sterling Management Systems may introduce their client to the religious aspects of Scientology and refer clients to the church for training and/or other religious services. Estimates vary as to the number of people introduced to Scientology in this manner, officials of the WISE consulting company *Singer Consultants* estimate that 20% of their clients end up taking

courses in Scientology while Pat Lusey, co-founder of another WISE consulting group, *Uptrends*, has stated that 50% of the clients of WISE consulting groups end up in Scientology."

- A Wikipedia article on "World Institute of Scientology Enterprises" that includes the following statement:

"**World Institute of Scientology Enterprises** (WISE) is an organization affiliated with the Church of Scientology educates and assists businesses in the use of management methods and techniques developed by Scientology founder, L. Ron Hubbard, such methods and techniques being, like all of Hubbard's non-fiction writings, scripture of the Church of Scientology. The stated goal of WISE 'is an ethical, sane and prosperous civilization' and 'returning to business the values and ethical standards upon which it was founded: honesty, integrity, craftsmanship, rewards for productivity, commitment to the prosperity of entire communities and nations.' However critics of WISE say that its real purpose is dissemination of and recruitment into Scientology and they reference the incorporation papers of WISE which include the statement 'It is organized under the Nonprofit Religious Corporation Law primarily for religious purposes. Its purposes are to promote and foster the religious teachings of L. Ron Hubbard in society, and to have and exercise all rights and powers granted to nonprofit corporations by law.'"

21) That same night, Complainant wrote following letter to Dr. Engel that she gave to him the next morning:

"Dr. Andrew Engel,

"It's my understanding that Oregon law makes it unlawful for any Oregon employer to discriminate against any individual on the basis of religion unless the employer can articulate a bonafied [sic] occupational requirement reasonably necessary to the operation of the business. As I indicated to you several times, I have sincerely held religious beliefs that directly contradict the principles of the Church of Scientology. The brochure on the conference you are expecting me to attend clearly states the Tone Scale program which was originated by the Church of Scientology will be included in this program. It is impossible for me to know in advance how much of the program will be based on the Church of Scientology teachings. For these reasons I respectfully request a reasonable accommodation from you. I am willing to attend any non-secular program that you would require of me.

"I value my job with you and the office. I hope you can appreciate the difficult position you are putting me by telling me I must either resign my position or attend a conference that would put me at odds with my sincerely held religious beliefs. I hope you will reconsider your ultimatum.

"Sincerely,

Susan Muhleman"

22) Sometime during the morning on August 21 Dr. Engel asked Complainant to speak with his Silkin consultant about the symposium, noting that he could listen to "Saddam Hussein and no harm could come of it." Complainant initially agreed to speak to the consultant. Complainant then decided not to talk with a Silkin representative because she believed that representative would be biased because of Silkin's "known ties" to the Church of Scientology. About noon, Dr. Engel told Complainant that the consultant was on the phone. Complainant told Dr. Engel that she had decided not to speak to the consultant because she "felt pressured." She also told Dr. Engel that she would not attend the symposium.

23) At the end of the workday on August 21, Dr. Engel told Complainant that she would not be working the following week because he was taking the week off and Brianne Summer would be answering the phones instead of Complainant. He continued trying to convince Complainant to attend the symposium and told Complainant that if he made an exception for her, he would have to make an exception for everyone. At that point, Complainant told Dr. Engel she quit, gave him her office key, and left the office very upset and crying.

24) All the conduct that Complainant considered religious harassment by Dr. Engel started August 18 and ended August 21.

25) Brianne Summer worked for Respondent from early 2008 until in or around March 2010. She was initially hired as an aesthetician in AWEPC's "spa side," then was trained on "the dental side" due to lack of spa business, and eventually worked exclusively in AWEPC's dental office.[6] She was paid less than Complainant.

26) Dr. Engel had been absent before during Complainant's employment and this was the first time he had someone else cover her shift.

27) Dr. Engel never told Complainant that she did not have to attend the symposium.

28) Complainant quit because she could no longer handle being pressured to attend the Silkin symposium. Had she not been required to attend the symposium, she would have chosen to remain employed by AWEPC.

29) The workbook actually used at the Symposium includes a number of quotations attributed to L. Ron Hubbard. It contains sections on "Stability," the "Emotional Tone Scale," and "Marketing." Each section is prefaced by statements that it is published by the "SILKIN MANAGEMENT GROUP" and "Quoted material by L. Ron Hubbard * * * from the copyrighted works of L. Ron Hubbard." The section on the Emotional Tone Scale contains seven pages of Hubbard's writings that summarize the different levels on the Tone Scale and is prefaced by an outline that states the following:

[6] There was no evidence about the dates that these transitions occurred.

"EMOTIONAL TONE SCALE

4.0 Enthusiasm

3.5 Strong Interest

3.0 Conservatism

2.5 Boredom

2.0 Antagonism

1.5 Anger

1.1 Covert Hostility

1.0 Fear

0.5 Grief

0.05 Apathy"

Eight of the 10 elements listed above are also included in the Tone Scale poster that Dr. Engel posted in his office. One exception is "3.5 Strong Interest," which is "3.5 Cheerfulness" on the poster in Dr. Engel's office. "1.0" and its accompanying characteristic is cut off in the photograph of the poster in Dr. Engel's office that the Agency offered in evidence, so the forum has no way of determining if it matches "1.0 Fear" in the workbook. One of Hubbard's printed quotes in the workbook about the Tone Scale is:

> "The Tone Scale is a vast subject and for a more extensive study of the Tone Scale, a study of the book *Science of Survival* would be required. This book covers a complete description of all levels of the Tone Scale."

Hubbard is the author of *Science of Survival*.

30) Complainant was paid $20 per hour at the time of her resignation and worked an average of 34 hours per week.

31) AWEPC provided Complainant with medical insurance that terminated on August 31, 2009.

32) On the morning of August 25, 2009, Complainant visited Dr. Paul Johnson. Among the things she consulted him for was a "rash on her stomach," an "increase in anxiety, stress, upset stomach, and diarrhea for the past couple of weeks," an inability to sleep, and loss of weight. She also told Dr. Johnson that she was "an emotional wreck." Dr. Johnson found Complainant to be "very tearful, and obviously very anxious and emotional." He diagnosed Complainant's primary condition as "Anxiety," prescribed Zolpidem and Lorazepam, and recommended she try some Lamisil for her stomach rash. Complainant had experienced a similar rash on her legs in September 2008 and Dr. Johnson had treated it as an allergic reaction.

33) On the afternoon of August 25, 2009, Complainant had an annual medical exam with Dr. Mary Jane Davis. Complainant had previously scheduled the appointment for September 1, but rescheduled it because of the pending expiration of AWEPC's medical insurance coverage. Dr. Davis's chart notes include the following statement:

> "Constitutional: Huge stress, just resigned under duress from dental office after being extensively pressured to go to a scientology/hubbard based conference. saw Paul Johnson today, will be starting a new med for anxiety/depression, filing L and I complaint."

34) Complainant had a follow-up appointment with Dr. Johnson on September 14, 2009. She was billed $74 for that visit and paid the entire bill in a series of payments. Had she still been insured, her portion of the bill would have been only $20.

35) Complainant has wanted to see a doctor on a number of occasions since September 1, 2009, for medical conditions that include colds, sinus infections, irregular moles, spots on her chest, and a periodic "excruciating pain" that "runs from [her] back down [her] left leg. Except for the September 14, 2009, visit to Dr. Johnson, she has not seen a doctor because she has no medical insurance and cannot afford it.

36) Complainant experienced stress for months as a result of her termination and experienced stomach aches, sleep problems – including two weeks of insomnia that began the weekend before her termination, worry about her future, and worry over her lack of health insurance for herself and her children.

37) Complainant filed for and received unemployment benefits after leaving AWEPC's employment and began to look for another job on or about September 1, 2009. To look for work, she read the Bend Bulletin newspaper and Craigslist employment advertisements daily and sent a cover letter and resume to prospective employers. Complainant continued to look for work in Central Oregon until she accepted a dental position in League City, Texas, a city near Houston.

38) Complainant decided to look for a job in League City, Texas, because her sister lives there, she was having no luck finding a job in Central Oregon, and there were job opportunities in League City. She located three job openings through an internet job service for dental workers, scheduled three interviews for dental assistant positions in League City, and flew to Texas to be interviewed, using "air miles" to pay for her ticket. She was offered two jobs, accepted one with a dentist named Patterson that paid $18 per hour, but had no benefits, moved to Texas with her boyfriend and Addison, the younger of her two daughters, and began work shortly before Thanksgiving 2009.[7] Her move cost $10,600. Her moving expenses included renting a moving truck and car trailer, gasoline for the truck, hotel expenses, food expenses, and gasoline for the car

[7] Thanksgiving in 2009 occurred on November 26.

she drove to Texas separate from the moving truck. She and her daughter initially lived with her sister and her sister's two children in a 1200 square foot house.

39) When Complainant moved, her older daughter, Allie, who is still in school and was 13 years old at the time of the hearing, remained in Central Oregon. Since her move, Complainant has only been able to see Allie on school breaks. While Complainant worked for Dr. Engel, she saw Allie every day except when Allie stayed at her father's house in Redmond. Complainant feels "very sad" because she is "missing out on a lot of [Allie's] life" that she would have experienced, had she remained employed by AWEPC.

40) After leaving AWEPC's employment, Complainant met her financial obligations, including her job search and moving expenses, with her unemployment benefits, $5,000 that she borrowed from her mother and is still been unable to repay its entirety, and money that her boyfriend earned from his on-call work.

41) Complainant worked five months for Dr. Patterson, working an average of 36 hours per week and earning $648 per week gross wages. Complainant then went to work for another dentist named Wahbah, starting $17.50 per hour and getting a raise to $18 per hour after 90 days. Like Dr. Patterson, Dr. Wahbah provided no benefits. When Dr. Wahbah retired in October 2011, Complainant began work for Dr. Lynch, the dentist who bought Wahbah's practice. Complainant worked an average of 36 hours per week for Wahbah and Lynch. At the time of the hearing, Complainant still worked for Dr. Lynch and was paid $18 per hour.

42) On her 2009 IRS 1040 tax return, Complainant declared $10,600 in moving expenses. Complainant did not produce a copy of the Form 3903 she was required to file with her 1040, and testified that she had filed her taxes electronically and was unable to find the Form 3903.

43) The IRS's 2009 Form 3903 only requires a taxpayer to state the total of "Transportation and storage of household goods and personal effects" and "Travel (including lodging) from your old home to your new home * * *" and includes the admonition "**Do not** include the cost of meals."

44) Complainant spent $882.90 in airfare for herself, her boyfriend, and her daughter Addison to fly to Oregon for the hearing.

ULTIMATE FINDINGS OF FACT

1) At all times material, AWEPC was a domestic professional corporation that employed Complainant and Dr. Engel was the sole owner and president of AWEPC.

2) From October 2005 through the termination of Complainant's employment, AWEPC contracted with Hollander, then Silkin Management Group for business consulting services. These companies based their practice on "secular administrative

technology" developed by L. Ron Hubbard, author, educator, and founder of the religion of Scientology.

3) Scientology is a religion and its members are referred to as Scientologists. Scientologists consider all of L. Ron Hubbard's non-fiction writings to be the scripture of the Church of Scientology.

4) Complainant, who was baptized as a Christian in 1993 and had Christian beliefs while employed by AWEPC, was hired as Dr. Engel's dental assistant in mid-February 2008.

5) In or around July 2009, Dr. Engel attended a Scientology conference. At a subsequent staff meeting, he asked his staff, including Complainant, if they were all tolerant of each other's religious beliefs and said he had Scientology books in his office that were available for staff to check out.

6) In early August 2009 Dr. Engel asked AWEPC's staff, including Complainant, if they were available to attend a three-day symposium in October conducted by Silkin Management Group. Complainant said she was available. Dr. Engel gave Complainant an outline of the symposium, which included some terms Complainant was unfamiliar with, including "tone scale."

7) The symposium cost AWEPC the flat fee of $3500, regardless of how many staff members attended.

8) Prior to receiving the symposium outline, Complainant knew no specifics about the Church of Scientology except that Tom Cruise and John Travolta "claimed to be members." Although Dr. Engel had used methodology developed by L. Ron Hubbard in his business practice since first contracting with Hollander, Complainant had been unaware that it was related in any way to Scientology prior to July 2009.

9) After receiving the outline, Complainant did internet research on some of the phrases it contained, including the "tone scale," and learned from the Church of Scientology's website that the "tone scale" is a "fundamental part of the Church of Scientology." After work on Tuesday, August 18, Complainant asked Dr. Engel if the conference was mandatory and he told her it was because he had already paid for it. Complainant told Dr. Engel she would not attend because of ties to the Church of Scientology. Based on her Christian beliefs, Complainant opposes "Scientology itself" and believes that her Christian beliefs are "contradicted by the Church of Scientology."

10) On Wednesday, August 19, 2009, two new posters were posted in Respondent's lunchroom that contained the writings of L. Ron Hubbard, respectively captioned "The Illustrated Tone Scale in Full, And the Know to Mystery Scale, L. RON HUBBARD" and "The Condition Formulas by L. RON HUBBARD."

11) At the end of the workday on August 20, Dr. Engel and his wife asked Complainant to meet with them in Respondent's "relaxation room," where they gave Complainant three documents related to the symposium and Dr. Engel explained his need for Complainant to attend the symposium. One of the documents stated that one of the symposium talks was about the "Emotional Tone Scale." Another topic was "Marketing & Promotion" that included training on how to obtain referrals. Prior to this time, Complainant did not routinely ask patients for referrals.

12) During the meeting, Francie Engel asked Complainant how she acquired her information about Scientology. Complainant explained she had researched it on the Internet, including the tone scale, and talked to her mom and pastor. In response to Dr. Engel's question about her religious beliefs, Complainant told Dr. Engel that her religious belief "was none of his business" and that her objection to the symposium was based on its ties to the Church of Scientology and her personal religious beliefs. At the end of the meeting, Dr. Engel told Complainant that she could attend the symposium or resign.

13) That night, Complainant conducted more internet research on Silkin and found websites containing information that led her conclude that Silkin was affiliated with the Church of Scientology. Complainant also wrote a letter to Dr. Engel that she gave to him the next morning. In the letter, she stated her objection to attending the symposium because her "sincerely held religious beliefs * * * directly contradict[ed] the principles of the Church of Scientology," in particular the "Tone Scale" program, and asked that Dr. Engel reasonably accommodate her by not requiring her to attend the symposium or allow her to attend alternative, equivalent training.

14) On the morning on August 21, Dr. Engel asked Complainant to speak with his Silkin consultant about the symposium. Complainant initially agreed, then declined after Dr. Engel set up the call because she "felt pressured" and because she believed that representative would be biased because of Silkin's "known ties" to the Church of Scientology." Complainant told Dr. Engel again that she would not attend the conference.

15) At the end of the workday on August 21, Dr. Engel told Complainant that she would not be working the following week because he was taking the week off and Brianne Summer would be answering the phones instead of Complainant. He continued trying to convince Complainant to attend the symposium and told Complainant that if he made an exception for her, he would have to make an exception for everyone. In response, Complainant quit.

16) Complainant quit because she could no longer handle being pressured to attend the Silkin symposium. Had she not been required to attend the symposium, she would have chosen to remain employed by AWEPC.

17) The workbook actually used at the Symposium includes a number of quotations attributed to L. Ron Hubbard. It contains sections on "Stability," the

"Emotional Tone Scale," and "Marketing." Each section is prefaced by a statement that it is published by the "SILKIN MANAGEMENT GROUP" and "Quoted material by L. Ron Hubbard * * * from the copyrighted works of L. Ron Hubbard." The section on the Emotional Tone Scale contains seven pages of Hubbard's writings that summarize the different levels on the Tone Scale.

18) Complainant was paid $20 per hour at the time of her resignation and worked an average of 34 hours per week. AWEPC provided Complainant with medical insurance that terminated on August 31, 2009.

19) Complainant actively sought work starting one week after termination and continued to seek work until she was hired for a dental assistant job in Texas that started in Thanksgiving week 2009. She also paid $54 in out-of-pocket medical expenses for a medical exam that would have been paid by AWEPC's insurance carrier, had she not left AWEPEC's employment. It cost her $10,600 to move. As of the date of hearing, she had suffered $12,000 in lost wages, calculated as follows:

- September 1 - 3, 2009: **$480** (3 days x 8 hours x $20 per hour)
- September 6 - October 1, 2009: **$2,720** ($680 per week x 4 weeks)
- October 4 – 29, 2009: **$2,720** ($680 per week x 4 weeks)
- November 1 – 26, 2009: **$2,720** ($680 per week x 4 weeks)
- November 29 – December 31, 2009: **$160** ($680 per week - $648 week = $32 x 5 weeks)
- January 1 – December 31, 2010: **$1,664** ($680 per week - $648 week = $32 x 52 weeks)
- January 1 – December 9, 2011: **$1,536** ($680 per week - $648 week = $32 x 48 weeks)

20) Complainant experienced mental, emotional, and physical suffering as a result of the harassment, AWEPC's failure to accommodate her, and her termination.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent AWEPC was an employer that used the personal services of Complainant, its employee, reserving the right to control the means by which Complainant's services were performed. ORS 659A.001(4).

2) At all times material herein, Respondent Dr. Andrew W. Engel was AWEPC's sole owner and president. Dr. Engel's actions, statements and motivations of are properly imputed to Respondent AWEPC.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659A.800 to ORS 659A.865.

4) Respondent AWEPC, acting through Dr. Andrew W. Engel, subjected Complainant to harassment based on her religion in violation of ORS 659A.030(1)(b).

Respondent Dr. Andrew W. Engel aided and abetted AWEPC in this unlawful practice in violation of ORS 659A.030(1)(g).

5) Respondent AWEPC, acting through Dr. Andrew W. Engel, failed to reasonably accommodate Complainant's religious beliefs in violation of ORS 659A.030(1)(b). Respondent Dr. Andrew W. Engel aided and abetted AWEPC in this unlawful practice in violation of ORS 659A.030(1)(g).

6) Respondent AWEPC did not retaliate against Complainant because of her opposition to AWEPC's unlawful employment actions and did not commit a violation of ORS 659A.030(1)(f).

7) Respondent AWEPC, acting through Dr. Andrew W. Engel, constructively discharged Complainant based on her religion in violation of ORS 659A.030(1)(a). Respondent Dr. Andrew W. Engel aided and abetted AWEPC in this unlawful practice in violation of ORS 659A.030(1)(g).

8) 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 back pay and out-of-pocket expenses resulting from Respondents' unlawful employment practices and to award money damages for emotional, mental, and physical suffering sustained and to protect the right of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondents in the Order below are an appropriate exercise of that authority.

OPINION

The Agency's Formal Charges allege six separate theories of unlawful discrimination against Complainant – (1) harassment based on religion; (2) failure to reasonably accommodate based on religion; (3) discrimination in terms and conditions of employment based on Complainant's religious beliefs; (4) retaliation on account of Complainant's opposition to attending the symposium; (5) constructive discharge; and (6) Dr. Engel's aiding and abetting of AWEPC's unlawful employment practices.

HARASSMENT BASED ON RELIGION

The Formal Charges allege that AWEPC, through its proxy Dr. Engel, unlawfully harassed Complainant by engaging in verbal conduct related to her religion, and that the conduct violated ORS 659A.030(1)(b) and AWEPC was liable through OAR 839-005-0010(4)(c) based on the following theories: (a) the conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Complainant's work performance or creating an intimidating, hostile or offensive working environment; (b) Complainant's submission to the conduct was made either explicitly or implicitly a term or condition of her employment; and/or (c) Complainant's submission to or rejection of the conduct was used as the basis for employment decisions affecting Complainant.

In pertinent part, ORS 659A.030(1)(b) provides:
(1) It is an unlawful employment practice * * * (b) For an employer, because of an individual's * * * religion * * * to discriminate against the individual in compensation or in terms, conditions or privileges of employment."

OAR 839-005-0010(4)(a)-(d) provide:

"(4) Harassment: Harassment based on an individual's protected class is a type of intentional unlawful discrimination. * * *

"(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (1) of this rule, is shown and:

"(A) Such conduct is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment;

"(B) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

"(C) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.

"(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.

"(c) Employer Proxy: An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the employer's president, owner, partner or corporate officer.

"(d) Harassment by Supervisor plus Tangible Employment Action: An employer is liable for 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. A tangible employment action includes, but is not limited to, any of the following:

(A) Terminating employment, including constructive discharge;

"* * * * *

(D) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit."

In pertinent part, OAR 839-005-0010(1) provides:

"(1) Substantial evidence of intentional unlawful discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support the following elements:

"(a) The respondent is a respondent as defined by ORS 659A.001(10) and OAR 839-005-0003(12) of these rules;

"(b) The complainant is a member of a protected class;

"(c) The complainant was harmed by an action of the respondent; and

"(d) The complainant's protected class was the motivating factor for the respondent's action."

Based on the above, the Agency is required to prove the following elements to prevail on its harassment claim: (1) AWEPC was an employer subject to ORS 659A.001 to 659A.033; (2) AWEPC employed Complainant; (3) AWEPC, through its proxy, engaged in conduct directed at Complainant related to her religious beliefs or non-beliefs; (4) the conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Complainant's work performance or creating an intimidating, hostile or offensive working environment; Complainant's submission to the conduct was made either explicitly or implicitly a term or condition of her employment and/or Complainant's submission to or rejection of the conduct was used as the basis for employment decisions affecting Complainant; and (5) Complainant was harmed by the conduct. An employer may be held liable for religious harassment regardless of the motivation for committing a harassing act. *In the Matter of James Meltebeke, 10 BOLI 102, 122 (1992), r*eversed *and remanded*, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995) The forum must also consider the Oregon Supreme Court's holding in *Meltebeke* that, in a religious discrimination case, an employer's lack of knowledge that his conduct created an intimidating, hostile, or offensive work environment is an affirmative defense under sections 2 and 3 of Article I of the Oregon Constitution.[8] *Id.,* at 153.

A. AWEPC was an employer subject to ORS 659A.001 to 659A.033.

This element is undisputed.

B. AWEPC employed Complainant.

This element is also undisputed.

C. Dr. Engel's conduct directed at Complainant was related to her religious beliefs.

The third element requires an analysis of whether Dr. Engel's conduct that was directed at Complainant was related to her religious beliefs. The conduct directed at

[8] Under OAR 839-050-0130(3), the "failure of the party to raise an affirmative defense in the answer is a waiver of such a defense." In their answer, Respondents did not specifically raise Respondents' lack of knowledge that Dr. Engel's conduct created an intimidating, hostile, or offensive work environment as an affirmative defense. However, the forum need not decide whether Respondents waived this defense because the facts establish that Respondents knew that Complainant objected to Dr. Engel's conduct.

Complainant that she found objectionable all occurred between August 18 and 21[9] and is summarized below:

- After work on Tuesday, August 18, Complainant asked Dr. Engel if the Silkin symposium was mandatory and he told her it was because he had already paid for it. Complainant told Dr. Engel that she did not want to attend because of the symposium's ties to the Church of Scientology, her belief that "it was religious in nature," and because it was "against her religion."

- Between August 19 and 21, 2009, there were two newly-posted posters in Respondent's lunchroom containing writings attributed to L. Ron Hubbard entitled "The Illustrated Tone Scale in Full, And the Know to Mystery Scale" and "The Condition Formulas."[10]

- At the end of the workday on August 20, Dr. Engel and his wife required Complainant to meet with them to discuss the symposium and Dr. Engel's need for Complainant to attend that symposium. During the meeting, Dr. Engel's wife asked Complainant how she acquired her information about Scientology. Complainant explained she had researched it on the Internet, including the tone scale, and talked to her mom and pastor. In response to Dr. Engel's question about her religious beliefs, Complainant told Dr. Engel that her religious belief "was none of his business" and that her objection to the symposium was based on its ties to the Church of Scientology and her personal religious beliefs. During the meeting, Complainant got up to leave and Dr. Engel told her that if she left the building, he would consider that she had resigned. At the end of the meeting, Dr. Engel told Complainant that she could either go to the symposium or resign.

- Sometime during the morning on August 21 Dr. Engel asked Complainant to speak with his Silkin consultant over the phone about the symposium, noting that he could listen to "Saddam Hussein and no harm could come of it." Complainant initially agreed to speak to the consultant, then refused to when Dr. Engel made the consultant available to talk with her. Complainant decided not to talk with a Silkin representative because she believed that

[9] *See* Finding of Fact #24 – The Merits.

[10] Complainant's testimony that she would have continued to work despite the presence of the posters, had she not been required to attend the symposium, does not require a conclusion that she did not find the posters offensive in light of her testimony that she may have objected to them, had she continued in AWEPC's employ. Her specific testimony in this regard was: **Q**: "If you would not have quit, you would have continued to work at Dr. Engel's office with the posters, with the DVDs, with the tone scale, and with all the Scientology terms, right?" **A**: "I would have continued my employment there. I'm not saying that I would not have objected to those." *Cf. In the Matter of Central Oregon Building Supply, Inc.,* 17 BOLI 1, 12 (1998), *aff'd without opinion, Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries,* 160 Or App 700, 981 P2d 402 (1999) ("Viewing the record as a whole, it is not inconsistent to conclude that Respondent's work environment had been hostile and offensive to Complainant, but also to find that he wanted another job with Respondent.")

representative would be biased because of Silkin's "known ties" to the Church of Scientology and she felt pressured.

Except for the posters, the above events all involved Dr. Engel's attempts to convince Complainant to attend the Silkin symposium, which Complainant opposed because it involved exposure, in a sequestered setting at a mountain resort over a three-day period, to teachings that conflicted with her Christian beliefs.[11] Other than his mandate that Complainant attend the symposium, there is no evidence that Dr. Engel tried to actively proselytize Complainant to Scientology, his religion. Complainant and Dr. Engel agree that Complainant told Dr. Engel on August 18th that she did not want to attend the symposium due to its ties to the Church of Scientology, and made the same objection on August 20th, and 21st, adding her objections that "it was religious in nature" and because it was "against her religion." They also agree that, after she had stated her objections on August 18, he continued his attempts to persuade her to attend the symposium, as described above, arguing that the symposium was not religious in nature[12] because it involved a purely "secular" application of Scientology principles.[13] Finally, the forum has concluded that Dr. Engel required his entire staff to attend, not just Complainant. However, it is only Complainant who objected to attending based on her religious beliefs.

Based on these facts, the forum concludes that, after Complainant voiced her objections to attending the symposium based on her religious beliefs, Dr. Engel's conduct that was directed at convincing Complainant to attend the symposium was related to Complainant's religious beliefs.

D. The three theories of harassment.

The fourth element, as plead by the Agency in its Formal Charges, involves all three separate theories of harassment set out in OAR 839-005-0010(4)(A)(a-c). The first requires proof that Dr. Engel's conduct was sufficiently severe or pervasive to have

[11] There is no dispute that Scientology is a religion, that the training at the symposium involved study of L. Ron Hubbard's non-fiction writings -- as those writings are quoted extensively in the symposium training materials – and Respondent provided no evidence to contradict evidence in the record obtained by Complainant on August 20 that "all of Hubbard's non-fiction writings [are] scripture of the Church of Scientology." *See* Findings of Fact ##3, 20, 29 – The Merits.

[12] Dr. Engel's position can be summarized in his testimony: "The confusion for me was, is she was stating that it was religious in nature. And for me, it confuses me because the tone scale, marketing, hiring, topics that were involved here about the symposium, stability, financial success, working as a team, to me, there's nothing religious about that."

[13] In *Christofferson,* after a lengthy discussion of the history of and theories of Scientology, the Oregon Court of Appeals held that Scientology is a religion and that its teachings qualified for the protection of the Free Exercise Clause of the First Amendment of the Oregon and U.S. Constitutions, but found itself unable to separate the Church of Scientology's "theories" into secular and religious components. In its discussion, the Court stated: "Although certain of the theories espoused by Scientology appear to be more psychological than religious, we cannot dissect the body of beliefs into individual components. It seems clear that if defendants sought to teach Scientology in the public schools in this country, they would be prohibited from doing so by reason of the Establishment Clause of the First Amendment. * * * The theories of Hubbard are interrelated and involved a theory of the nature of the person and of the individual's relationship with the universe." (internal citations omitted)

the purpose or effect of unreasonably interfering with Complainant's work performance or creating an intimidating, hostile or offensive working environment. The second and third theories, plead cumulatively and in the alternative, require proof that Complainant's submission to the conduct was made either explicitly or implicitly a term or condition of her employment "and/or" Complainant's submission to or rejection of the conduct was used as the basis for employment decisions affecting Complainant. The forum examines each theory separately, as each requires different proof and provides a different basis for liability. If the Agency prevails on any of the three theories, AWEPC is strictly liable for its harassment of Complainant based on religion if the forum also concludes that Dr. Engel was AWEPC's "proxy." OAR 839-050-0010(4)(c)&(d).

1. <u>The First Theory – Dr. Engel's conduct created a hostile, intimidating or offensive working environment for Complainant.</u>

In determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment, the forum looks at the totality of the circumstances, i.e., the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *In the Matter of From the Wilderness, Inc.,* 30 BOLI 227, 287 (2009).

In this case, the conduct consisted of (1) Dr. Engel's initial attempt on August 18 to convince Complainant to attend the Silkin symposium, during which time Complainant stated her religious-based opposition; (2) the presence of two posters, for three days, in AWEPC's lunch room that contained L. Ron Hubbard's writings about the "Tone Scale" and "The Condition Formulas"; (3) Dr. Engel's repeated attempts on August 20 and 21 to convince Complainant to attend the Silkin symposium after she had already stated her religious-based opposition, including his request that she talk with his Silkin consultant; and (4) Dr. Engel's ultimatums that she attend or lose her job.

The context involves several primary components. First, the conduct all occurred at Complainant's workplace, either after work or the end of the workday, and was all initiated by Dr. Engel. Second, although Complainant did not testify that she found the posters offensive, they appeared in AWEPC's lunch room same week that Dr. Engel was trying to convince Complainant to attend the symposium. Third, Complainant's knowledge, based on research she conducted from August 18-20, that most or all of the symposium training was based on the writings of L. Ron Hubbard, the founder of Scientology, and Dr. Engel's unequivocal statements to Complainant that her job was on the line if she did not attend the symposium.

As to frequency, severity, and pervasiveness, the conduct occurred daily during a four-day period that culminated in Complainant's resignation. There was scant testimony about how it affected Complainant during her actual workdays on August 18, 19, and 20, except for the end of the day conversations she had with Dr. Engel in which

he and his wife tried to persuade Complainant to attend the symposium by explaining it involved a purely "secular" application of L. Ron Hubbard's writings. However, Complainant credibly testified that she was "very nervous and anxious about confronting Dr. Engel" on August 18 when she first told him that she "wished not to attend the symposium due to the ties to the Church of Scientology," that she "had increased anxiety and stress" from the time Dr. Engel asked the staff if they were available to attend the symposium and Complainant "started looking into Church of Scientology," and that she was "stressed and anxious about it, about telling Dr. Engel, * * * I guess confronting him with my opposition to [the symposium]." Regarding her resignation, she testified that "Quitting my job was not taken lightly. I know for my mental and physical well-being that I could not continue to work under such – such a hostile environment."

There is no evidence that the conduct interfered with Complainant's work performance, except for her testimony that it ultimately made her tender her resignation.

Considering all of the above, the forum must ultimately determine whether a reasonable person in the circumstances of the complaining individual would have perceived the conduct to be sufficiently severe or pervasive to create a hostile, intimidating, or offensive working environment. OAR 839-050-0010(4)(b). In making this determination, the forum looks at the "totality of the circumstances." *In the Matter of Servend International, Inc.,* 21 BOLI 1, 28 (2000), *citing In the Matter of Fred Meyer, Inc.,* 15 BOLI 77 (1996), *affirmed, Fred Meyer v. Bureau of Labor and Industries,* 152 Or App 302, 309, 954 P2d 804 (1998).

The forum has issued Final Orders in only three prior cases involving allegations of religious harassment. In two cases, the forum found that respondent's aggressive and constant attempts to proselytize a complainant who held different beliefs than respondent created an offensive environment and constituted unlawful harassment. *Meltebeke,* 10 BOLI at 113; *In the Matter of Sapp's Realty, Inc.,* 4 BOLI 232, 278-81 (1985). In the third case, the forum held that respondent had not harassed complainant when respondent employer and respondent's manager engaged in conversations with complainant regarding the merits of her religion because complainant's continued employment was not dependent upon listening to these discussions, the remarks were not of a continuous nature, and the remarks were not in the nature of preaching or proselytizing. *In the Matter of Deana Miller,* 6 BOLI 12, 27-28 (1986). This case does not involve explicit preaching or proselytizing, but insistence that the Complainant attend a symposium involving extensive exposure to religious writings she opposed based on her own religious beliefs. Consequently, these cases provide little guidance to assist the forum in evaluating the perspective of a reasonable person in Complainant's circumstances. Likewise, the forum has found no published court opinions involving a similar fact pattern.

A reasonable person in Complainant's circumstances would have been a baptized Christian with a sincerely-held religious belief, like Complainant. In the forum's opinion, that person would have taken similar steps as Complainant to educate him or herself about the nature of the symposium and would have also learned that attending

the workshops on "Stability," the "Emotional Tone Scale," and "Marketing" involved being exposed to and assimilating basic principles of Scientology over a three-day period in a sequestered setting at a mountain resort.[14] That reasonable person would likely have also learned that some websites link the Silkin group to the Church of Scientology and would have found some websites containing allegations that consulting groups like Silkin introduce their clients to the religious aspects of Scientology.[15] In addition, that person would have seen L. Ron Hubbard posters containing statements that were a fundamental part of the Church of Scientology appear in AWEPC's lunch room in the same time frame. Under those circumstances, although their duration was only four days, the forum concludes that the complained of conduct was sufficiently severe or pervasive to create a hostile, intimidating, or offensive working environment for a reasonable person in Complainant's circumstances and did so for Complainant. Dr. Engel, as AWEPC's sole owner and proxy, was AWEPC's "proxy" under OAR 839-005-0010(4)(c), making AWEPC strictly liable for Dr. Engel's conduct.

2. <u>The second theory – Complainant's submission to conduct was made a term or condition of employment</u>

Under this theory, the forum need not evaluate the frequency, severity, and pervasiveness of the conduct. With the first three elements of the harassment test satisfied, the only question is whether Dr. Engel made Complainant's submission to his conduct an explicit or implicit term or condition of Complainant's continued employment with AWEPC. Again, the conduct in question was Dr. Engel's attempts to persuade Complainant to attend the symposium. In the August 20 conversation in which Dr. Engel tried to convince Complainant to attend the symposium, he told Complainant that if she left the office and did not let him finish the conversation that he would take that as her resignation. This left Complainant no choice but to submit to the conduct if she wanted to keep her job.

3. <u>The third theory – Complainant's rejection of Dr. Engel's conduct was used as a basis for an employment decision affecting Complainant.</u>

As with the second theory, the forum need not evaluate the frequency, severity, and pervasiveness of the conduct. With the first three elements of the harassment test satisfied, the only question is whether Dr. Engel used Complainant's rejection of his conduct as a basis for an employment decision affecting Complainant. Two employment decisions were made that are relevant to this question – Dr. Engel's decision that Complainant would not work the week following August 21, and Complainant's resignation. The decision about Complainant's work schedule was not

[14] Respondents argue in their exceptions that the "Tone Scale" presented at the symposium was a different "tone scale" than the one used by the Church of Scientology, but presented no evidence that L. Ron Hubbard created more than one "tone scale" and the numbered elements of the "tone scale" in the symposium workbook are virtually identical to elements similarly numbered in the poster Dr. Engel posted in his office on August 19, 2009.

[15] There is no evidence that Complainant possesses more than average skills at internet research.

caused by Complainant's refusal to attend the symposium.[16] However, Complainant's resignation, which the forum finds to be a constructive discharge,[17] was a direct result of her refusal to attend the symposium and, as such, the forum finds that Complainant's refusal to submit to Dr. Engel's conduct was the basis for an employment decision affecting her.

E. Complainant was harmed by the conduct.

Complainant credibly testified that she experienced anxiety and stress prior to her resignation as a result of Dr. Engel's efforts to persuade her to attend the symposium. This satisfies the "harm" element of the Agency's harassment case.[18]

FAILURE TO REASONABLY ACCOMMODATE BASED ON RELIGION

The Agency's Formal Charges, paragraphs 27-30, allege that Respondent AWEPC failed to reasonably accommodate Complainant's religious beliefs by (1) failing to engage in an interactive process, (2) by refusing to grant Complainant's request to be excused from the symposium, and (3) by failing to reasonably accommodate Complainant's religious belief, observance or practice, and/or to accommodate her use paid or unpaid leave rather than attend the symposium. The first two allegations encompass one potential violation of ORS 659A.030(1)(b) because "interactive process" is a step in the analysis of whether a reasonable accommodation violation has occurred, not a separate, stand-alone violation.[19] The third allegation states a potential violation of ORS 659A.030, through ORS 659A.033(1).[20] In response, Respondents raised five affirmative defenses: (1) symposium attendance was a bona fide occupational requirement; (2) excusing Complainant from attendance was an undue hardship; (3) Complainant's religious beliefs did not prohibit her attendance at the symposium; (4) Complainant failed to cooperate in good faith with Respondents' attempt to

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[16] *See, infra,* the forum's discussion regarding the Agency's allegation that Dr. Engel cut Complainant's hours in retaliation for her refusal to attend the symposium.

[17] *See, infra,* the forum's discussion regarding constructive discharge.

[18] *Cf. In the Matter of Servend International, Inc., 21 BOLI 1, 27 (2000), In the Matter of Servend International, Inc., 21 BOLI 1, 27 (2000)*, *affirmed without opinion*, *Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002) (complainant's credible testimony that she was offended by behavior the forum found to be racial harassment satisfied the "harm" element of the agency's prima facie case).

[19] *Compare* OAR 839-006-0206(4), the rule promulgated by the Agency regarding reasonable accommodation related to disability that requires the employer to "initiate a meaningful interactive process with the employee or applicant to determine whether reasonable accommodation would allow the employee or applicant to perform the essential functions of a position held or sought." OAR 839-006-0206(4). There is no similar statutory provision or rule with respect to reasonable accommodation of religious beliefs. *C.f. EEOC Compliance Manual on Religious Discrimination,* issued 7/22/08, at 48 ("[A]n employer is not required by Title VII to conduct a discussion with an employee before denying the employee's accommodation request * * *.")

[20] ORS 659A.030 begins with the following statement: "(1) An employer violates ORS 659A.030 if: [followed by enumerated circumstances]."

accommodate Complainant; and (5) Respondents granted the accommodation requested but Complainant resigned before Respondents could implement it.

A. Sincerely held religious belief.

Through the credible testimony of Complainant, her baptizing pastor, and a copy of her baptismal certificate, the Agency established that Complainant was baptized as a Christian in 1993 at age 17, that she has maintained sincerely held Christian beliefs, and that she objected to attending the symposium because it contained teachings that conflicted with her Christian beliefs. Respondents do not argue with the sincerity of her beliefs, but contend that those beliefs did not prohibit Complainant from attending Silkin's "wholly secular" symposium that was "not in any way religious."

The evidence does not support Respondents' position. Respondents presented no evidence to dispute evidence provided by the Agency that L. Ron Hubbard is the founder of the Church of Scientology, that all of Hubbard's non-fiction writings are scripture of the Church of Scientology, and that most or all of the symposium training was based on the writings of Hubbard, including training on the Emotional Tone Scale, a fundamental part of the Church of Scientology.[21] Respondents' claim that Scientology is a religion but that Hubbard's non-fiction writings -- the undisputed "scripture" of Scientology -- lose all religious context when reproduced for instructional purposes as a "secular" business model has no more merit than an argument that reproduction of sections of the Quran, Bible, or Book of the Mormon, when used for instructional purposes as a business model, has no religious context and is purely "secular." In support of this proposition, the forum further notes the inability of Oregon Court of Appeals to separate the Church of Scientology's "theories" into secular and religious components.[22] In summary, the forum finds that Complainant, had she attended the symposium, would have been subjected to training based on and quoting specific "scripture" from the Church of Scientology, training that she opposed because she believed the teachings of the Church of Scientology were in conflict with her own sincerely held Christian beliefs.

B. Complainant's request for accommodation

Complainant's request was that she be excused from attending the symposium based on its religious content and that she be allowed to "attend any non-secular[23] program that you would require of me." Specifically, she told Dr. Engel she did not want to attend because of ties to the Church of Scientology, her belief that "it was religious in nature" and because it was "against her religion." Dr. Engel's initial response was to tell Complainant that attendance was mandatory because he had already paid for it. Subsequently, Dr. Engel and his wife asked Complainant to meet with them in

[21] *See* Finding of Fact #29 – The Merits.
[22] *See* fn. 14.
[23] Based on Complainant's objection to the Silkin symposium based on its religious content, the forum infers that the request in the note Complainant gave Dr. Engel on August 21 for a "non-secular" program was an error and that Complainant intended it to state "any secular program."

AWEPC's "relaxation room," where they gave Complainant documents related to the symposium, explained the need for Complainant's attendance, and asked Complainant how she acquired her information about Scientology. Complainant explained she had researched it on the Internet, including the tone scale, and talked to her mom and pastor. In response to Dr. Engel's question about her religious beliefs, Complainant told Dr. Engel that her religious belief "was none of his business" and that her objection to the symposium was based on its ties to the Church of Scientology and her personal religious beliefs. During the conversation, Dr. Engel told Complainant he and his wife used Scientology tools to better them. Complainant told Dr. Engel that she felt she was being pressured and harassed to attend the symposium and she would not attend, then got up to leave, at which point Dr. Engel told her that if she left the building, he would consider that to be her resignation. Complainant left the room, then returned and finished the conversation in the "relaxation room," where Dr. Engel's wife was also present. At the end of the meeting, Dr. Engel told Complainant to "think about it overnight and make up her mind that she was either attending the symposium or she was out the door." In direct response to Complainant's question, Dr. Engel told Complainant that she could either go to the symposium or resign. The next day, Dr. Engel asked Complainant to speak with his Silkin consultant about the symposium, noting that he could listen to "Saddam Hussein and no harm could come of it." Complainant initially agreed to speak to the consultant, then decided not to talk with a Silkin representative when Dr. Engel told her the consultant was on the phone to talk with her because she believed that representative would be biased because of Silkin's "known ties" to the Church of Scientology. Complainant told Dr. Engel that she had decided not to speak to the consultant because she "felt pressured" and repeated that that she would not attend the conference.

Respondent argues that Complainant's refusal to disclose her specific religious beliefs to Dr. Engel and to talk with a Silkin consultant constituted Complainant's refusal to engage in the very same interactive process that the Agency accuses Respondents of refusing to engage in. The forum rejects this argument. As part of a reasonable accommodation request, Complainant was not required to disclose her specific religious beliefs so that Dr. Engel could evaluate them to determine if they formed the basis for a reasonable accommodation AWEPC might be required to provide. The record as a whole also supports the conclusion that the Silkin consultant's talk would have focused on convincing Complainant that the symposium had no religious content. Given the forum's conclusion that the symposium was based on the theories and teachings of the Church of Scientology and Complainant's religious objection to attending, Dr. Engel's request that she talk with a Silkin consultant was not an act Complainant was required to engage to "cooperate in good faith with Respondents' attempt to accommodate Complainant."

In summary, Complainant's actions in the "interactive process" consisted of obtaining information from Dr. Engel about the symposium, doing independent research about the symposium and its contents, talking with her mom and pastor, telling Dr. Engel her conclusion that she would not attend because of the religious content of the symposium, listening to Dr. Engel's attempts to convince her that the symposium had

no religious content and was purely secular, and telling Dr. Engel she would attend an equivalent program that lacked religious content. Dr. Engel's actions consisted of giving information to Complainant about the symposium, trying to convince her it had nothing to do with the Church of Scientology, telling Complainant that attendance was mandatory and that if she left the building on August 20 after work before he finished talking with her about the symposium that he would consider that her resignation, asking her about her specific religious beliefs, and attempting to get her to talk with a Silkin consultant.

C. Was an accommodation available for Complainant?

Under the facts of this case, the forum finds that there were two possible accommodations, both of which were requested by Complainant. First, that Complainant be excused entirely from attending the symposium. Second, that Complainant be scheduled to attend an alternative, equivalent symposium that had no religious content that was objectionable to her. Both alternatives, particularly the first, as it was held on Thursday-Saturday, involved the possibility that Complainant might have to take leave.

D. Interplay of ORS 659A.030 and ORS 659A.033.

As an initial matter, Respondents argue that Complainant was actually granted the accommodation she requested – being excused from attending the symposium -- but she resigned before Respondents could implement it. The forum rejects this defense because it is not supported by the facts.

Prior to the enactment of ORS 659A.033, ORS 659A.030 and its predecessor, *former* ORS 659.030, prohibited discrimination in employment based on several protected classes that included religion. That prohibition included and still includes an affirmative duty on employers to make reasonable accommodation for an employee's religious beliefs to the extent the accommodation did not cause "undue hardship in the conduct of the employer's business." *See In the Matter of Albertson's, Inc.,* 7 BOLI 227, 239 (1988) (*citing In the Matter of Union Pacific Railroad Co.,* 2 BOLI 234, 237 (1982)). The standard for determining undue hardship was whether it imposed "more than *de minimus* costs." *Albertson's,* at 242, *citing Transworld Airlines, Inc. v. Hardison*, 432 US 63 (1977). In 2009, the legislature enacted ORS 659A.033, which contains provisions regarding the denial of religious leave or prohibition of specific observances or practices and establishes a more "employee-friendly" standard, set out below, for determining if the accommodation imposes "undue hardship" on the employer in the specific circumstances set out in ORS 659A.033. That standard, set out in ORS 659A.033(4), reads as follows:

> "(4) A reasonable accommodation imposes an **undue hardship on the operation of the business of the employer for the purposes of this section if the accommodation requires significant difficulty or expense**. For the purpose of determining whether an accommodation requires significant difficulty or expense, the following factors shall be considered:

"(a) The nature and the cost of the accommodation needed.

"(b) The overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility and the effect on expenses and resources or other impacts on the operation of the facility caused by the accommodation.

"(c) The overall financial resources of the employer, the overall size of the business of the employer with respect to the number of persons employed by the employer and the number, type and location of the employer's facilities.

"(d) The type of business operations conducted by the employer, including the composition, structure and functions of the workforce of the employer and the geographic separateness and administrative or fiscal relationship of the facility or facilities of the employer."

(Bolded emphasis added)

There is a significant difference between the ORS 659A.030 standard of "*de minimus* costs" and the ORS 659A.033 standard of "significant difficulty or expense." Consequently, the forum must make an initial determination as to which standard applies to the facts in this case before it can decide if the two potential accommodations were "reasonable."

In pertinent part, ORS 659A.033 provides:
"(1) An employer violates ORS 659A.030 if:

"(a) The employer does not allow an employee to use vacation leave, or other leave available to the employee, for the purpose of allowing the employee to engage in the religious observance or practices of the employee;

"(b) Reasonably accommodating use of the leave by the employee will not impose an undue hardship on the operation of the business of the employer as described in subsections (4) and (5) of this section.

"(2) Subsection (1) of this section applies only to leave that is not restricted as to the manner in which the leave may be used and that the employer allows the employee to take by adjusting or altering the work schedule or assignment of the employee.

"(3) An employer violates ORS 659A.030 if:

"(a) The employer imposes an occupational requirement that restricts the ability of an employee * * * to take time off for a holy day or to take time off to participate in a religious observance or practice;

"(b) Reasonably accommodating those activities does not impose an undue hardship on the operation of the business of the employer as described in subsections (4) and (5) of this section; and

"(c) The activities have only a temporary or tangential impact on the employee's ability to perform the essential functions of the employee's job."

Summarized, ORS 659A.033 requires an employer to grant available unrestricted leave to an employee to engage in the religious observance or practices of the employee and prohibits an employer from imposing an occupational requirement that restricts the ability of an employee to take time off for a holy day or to participate in a religious observance or practice, absent a showing of undue hardship. Only the first requirement potentially applies here, as there is no evidence that attendance at the symposium restricted Complainant's ability to take time off for a holy day or to participate in a religious observance or practice. Both provisions focus on an employee's need for time off based on the "religious observance or practices" of the employee. This focus on the employee indicates that the ORS 659A.033 was tailored to ensure that employees must be allowed time off to observe or participate in their own "religious observance or practices," absent undue hardship to the employer. In this case, Complainant, a Christian, sought the opposite – time off to not attend employer-required training that she believed was based on the teachings of the Church of Scientology and was contrary to her "personal religious beliefs." Accordingly, whether or not Complainant's leave request[24] was covered under ORS 659A.033(1)(a) depends on whether her request for leave involved her own "religious observance or practices." To determine that, the forum must first determine what the legislature meant when it used the terms "religious observance or practices."

In interpreting a statute, the forum follows the analytical framework set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P2d 1143 (1993) and modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). *See In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor,* 31 BOLI 267, 281-82 (2012)*, appeal pending.* Within that framework, the forum first examines the text and context of the statutes and also considers any pertinent legislative history proffered by the participants. In this case no legislative history was proffered, and the forum is not required to independently research that history unless the meaning of "religious observance or practices," as used in ORS 659A.033, cannot be determined from a text and context analysis. The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature's intent. Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. *In the Matter of Captain Hooks, LLP,* 27 BOLI 211, 229 (2006). In this case, the words "religious observance or practices" are not defined in ORS 659A.033 or in OAR 839-005-0140, the Agency's administrative rule interpreting ORS 659A.033. They are also not defined in Title VII, the federal law analogous to ORS 659A.033, or in EEOC Regulations or Guidelines on Religion, and the forum has found no case law on point. However, because the words "observances" and "practices" are words of common usage, the forum ascribes to them

[24] The forum considers Complainant's request not to attend the symposium as a "leave" request because it was held on Thursday through Saturday, Complainant would ordinarily have been working on Thursday and Friday, and there is no evidence that there would have been any work for her in the absence of Dr. Engel and the rest of his staff.

their plain, natural and ordinary meaning contained in Webster's Third New Int'l Dictionary. *Id.* Those meanings, as relevant to this case, are as follows:

> "**Practice:** * * * **1b:** actual performance or application of knowledge as distinguished from mere possession of knowledge **:** performance or application habitually engaged in * * *. *Webster's,* at 1780.
>
> "**Practices:** * * * **3a:** systematic exercise for instruction or discipline <troops called out for~> <~makes perfect> <daily piano~> * * *." *Webster's,* at 1780.
>
> **"Observance**: **1a:** something (as an act of religious or ceremonial nature) that is carried out in accord with prescribed forms **:** a customary practice, rite, or ceremony **b:** a rule or set of regulations governing members of a religious order * * *." *Webster's,* at 1558.

Accordingly, the forum concludes that "religious practices" are a form of behavior habitually engaged in based on the tenets of a person's sincerely held religious beliefs,[25] and "religious observances" are acts of a ceremonial religious nature carried out in a form prescribed by a person's sincerely held religious beliefs. Relying on *Webster's*, the forum also concludes that "religious practices" are not limited to affirmative acts that a person believes he or she is required to take based on the person's religious beliefs, *e.g.* praying at specific times every day, but can also include regular abstinence from commonly accepted practices proscribed by a person's sincerely held religious beliefs, for example, not eating certain foods or not saluting a nation's flag. Based on these definitions, Complainant's objection to attending the symposium because of its relationship to the Church of Scientology "and her personal religious beliefs" does not qualify as a "religious observance" or "religious practice" within the meaning of ORS 659A.033(1). Even if it did, under ORS 659A.033(2) AWEPC's failure to accommodate Complainant would have been unlawful only if Complainant was entitled to take leave during the symposium that was not restricted as to the manner in which the leave could be used and granting such leave did not create an undue hardship for AWEPC under ORS 659A.033(4). There is no evidence in the record whatsoever to show what AWEPC's leave policies were, that AWEPC even had a leave policy, or that Complainant was entitled to such leave.

In contrast, the focus of ORS 659A.030 is on employer accommodation of the employee's "religious beliefs." *Albertson's* at 239. In this case, the forum has concluded that Complainant's objection to attending the symposium was based on her religious beliefs. Under ORS 659A.030, AWEPC was required to provide reasonable accommodation to Complainant based on that objection.

[25] The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee. *See* 29 C.F.R. § 1605.1.

E. Under ORS 659A.030, was either excusing Complainant from attendance at the Silkin symposium or providing alternative, equivalent training a "reasonable accommodation?"

The primary accommodation requested by Complainant was that she be excused entirely from attending the symposium. She also expressed her willingness to attend an alternative, equivalent training that had no religious content. Both were potentially "reasonable" accommodations unless they created an undue hardship for Respondents. The standard of proving undue hardship under ORS 659A.030 for any violations not covered under ORS 659A.033 is whether the proposed accommodation imposed "more than *de minimus* costs." This is an affirmative defense that Respondents have the burden of proving.

The forum first examines the costs, if any, associated with Complainant's request not to attend the symposium. AWEPC was assessed the flat fee of $3500 for the symposium, regardless of how many staff members attended. Consequently, Complainant's absence from the symposium would not have cost AWEPC anything in added symposium costs. Respondents assert that Complainant's failure to attend would have caused AWEPC to lose potential income and office efficiencies because Complainant would not have assimilated Silkin's business technology used by Respondents, including Silkin's marketing and teambuilding techniques. Respondents presented evidence that the AWEPC used Silkin's business technology throughout Complainant's employment, but no evidence that Complainant's failure to attend any previous symposium affected her work performance in any way. Complainant acknowledged that she did not routinely ask Dr. Engel's patients for referrals, and it is undisputed that the symposium included seeking patient referrals as a major topic in its Marketing section. However, Respondents provided no quantifiable evidence that Complainant's failure to attend the symposium would have affected Respondents' income negatively or that she had problems working as part of the "team" using Respondents' Hollander/Silkin business technologies before her termination. Respondents presented no other evidence to assist the forum in determining the potential income loss claimed by Respondents, such as who was hired to replace Complainant as Dr. Engel's dental assistant, whether that assistant underwent Silkin training, whether that assistant actively sought referrals from patients, whether Respondent's income increased as a result of the assistant's referral activities after Complainant left AWEPC's employment, or that Complainant's work performance was unsatisfactory. In short, the only evidence Respondents presented was pure speculation.[26] Since there is no evidence that Respondents' accommodation of

[26] The following exchange during the Agency's cross examination of Dr. Engel is illustrative:
Q: "You testified that Silkin Management tools increased productivity in your office, and Ms. Muhleman was employed by you for 18 months, correct?"
A: "Correct."
Q: "And during those 18 months she had not attended a symposium, had she?"
A: "No, she has not."
Q: "And so you have no way to definitively say that had [Complainant] attended the symposium she would have been more productive based on attendance, do you? You have no way to look into the future and make a determination?"

Complainant's request to not attend the symposium would have cost Respondents anything, the forum concludes that Respondents failed to satisfy their burden of proof to show that the costs of excusing Complainant from attending the symposium would have been more than *de minimus*.

The second accommodation requested by Complainant was that she be allowed to attend alternative, equivalent training that had no religious content.[27] There is no evidence in the record that alternative, equivalent training existed. Given that Silkin's business technology was based specifically on the writings of L. Ron Hubbard, the possibility that alternative, equivalent training existed seems remote. Consequently, the forum declines to speculate on whether Complainant's attendance at an alternative, equivalent training that had no religious content would have involved more than *de minimus* costs for Respondents.

F. Was Respondents' requirement that all employees attend the Silkin symposium a "bona fide occupational requirement?"

In their answer, Respondents raised an affirmative defense that the requirement that all employees attend the Silkin symposium was a "bona fide occupational requirement. AWEPC's requirement that its employees attend the Silkin symposium was a "term" or "condition" of employment. ORS 659A.030A(1)(b) is the statute that makes it unlawful for employers to discriminate against an employee because of the employee's religion in "terms, conditions or privileges of employment." "Bona fide occupational requirement" is not available as an affirmative defense under that section of ORS 659A.030.[28] Consequently, the form rejects this defense.

DISCRIMINATION IN HOURS OF WORK AND PAY AND RETALIATION

In its Formal Charges, the Agency alleges that Respondents reduced Complainant's hours of work, effectively reducing her pay, after she opposed attending the symposium based on her religious beliefs, in violation of ORS 659A.030A(1)(b). Based on the same set of facts, the Agency also alleges that Respondents retaliated against Complainant in violation of ORS 659A.030(1)(f) and OAR 839-005-0033, the

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A: "No, I can't look into the future."

[27] *See* fn. 22.

[28] *Compare* 659A.030(1)(a), which prohibits discrimination in regard to hiring, employing, barring, or discharging an employee based on religion and other enumerated protected classes, and specifically provides that "discrimination is not an unlawful employment practice if the discrimination results from a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business." *See also* 659A.030(1)(d) and(e), which contain a similar provision, and OAR 839-005-0013, the Agency's administrative rule regarding the affirmative defense of "bona fide occupational qualification."

Agency's rule interpreting ORS 659A.030(1)(f).[29] At hearing, the Agency presented evidence from which it argued that the alleged cut in hours was set to take place during the one-week period immediately after Complainant's termination. Since the ORS 659A.030A(1)(b) claim is also founded on Complainant's opposition to attending the symposium, the forum concludes that it is properly a complaint of retaliation, and that the two charges are properly merged into a single charge of retaliation.

A violation of ORS 659A.030(1)(f) is established by evidence that shows a complainant opposed an unlawful practice, the respondent subjected the complainant to an adverse employment action, and that there is a causal connection between the complainant's opposition and the respondent's adverse action. *In the Matter of From the Wilderness*, 30 BOLI 227, 288 (2009); *In the Matter of Trees, Inc.,* 28 BOLI 218, 247 (2007); *In the Matter of Robb Wochnick,* 25 BOLI 265, 287 (2004); *In the Matter of Barbara Bridges,* 25 BOLI 107, 123 (2003). OAR 839-005-0125 provides, in pertinent part:

"* * * * *

"(2) An employer will be found to have unlawfully retaliated against an employee if:

"(a) The employee has engaged in protected activity by:

"(A) Explicitly or implicitly opposing an unlawful practice or what the employee reasonably believed to be an unlawful practice, or

"* * * * *

"(b) The employer has subjected the employee to any adverse treatment, in or out of the workplace, that is reasonably likely to deter protected activity, regardless of whether it materially affects the terms, conditions, or privileges of employment; and

"(c) There is a causal connection between the protected activity and the adverse treatment."

Summarized, the relevant facts related to these allegations are:

- On August 18, 20, and 21, Complainant told Dr. Engel that she would not attend the Silkin symposium because she reasonably believed it contained religious content she objected to because of her own religious beliefs. On August 21, she also refused to speak with a Silkin consultant.

- At the end of the workday on August 21, Dr. Engel told Complainant that she would not be working the following week because he was taking the week off to have a surgical procedure and that Brianne Summer would be answering the phones instead of Complainant.

- Dr. Engel had scheduled his surgical procedure months earlier.

[29] This rule was *renumbered* on 1/1/12 as OAR 839-005-0125.

- Dr. Engel had been absent before during Complainant's employment, and Complainant had covered the phones in his absence. This was the first time Dr. Engel had someone else cover her shift.

- Brianne Summer worked for Respondent from early 2008 until in or around March 2010. She was initially hired as an aesthetician in AWEPC's "spa side," then was trained on "the dental side" due to lack of spa business, and eventually worked exclusively in AWEPC's dental office. She was paid less than Complainant.

- No evidence was presented about the date that Summer began working exclusively in AWEPC's dental office.

By her refusal to attend the symposium on religious grounds, Complainant explicitly and implicitly opposed a practice that she reasonably believed to be an unlawful practice and that the forum has found to be an unlawful practice. On August 21, her last day, she was told that she would not be working during Dr. Engel's absence the following week, and that Brianne Summers would be answering the phone. This satisfies the first two elements of the Agency's prima facie case. The third element is whether there is a causal connection between Complainant's opposition and her scheduled temporary cut in hours.

The primary evidence supporting the Agency's charge of retaliation is the timing of Dr. Engel's announcement to Complainant that she would not be working the following week.[30] In support of the Agency's case, Complainant credibly testified that she had never been scheduled for time off during Dr. Engel's previous absences. However, she did not testify about the circumstances of those previous absences, and there was no other evidence about the duration or circumstances of those absences. Dr. Engel credibly testified that scheduling Summers to answer the phones was a business decision, in that Summers was paid less than Complainant and Complainant, whose primary job was assisting him in his dental work, was not needed during his absence. He also credibly testified that his absence had been scheduled months earlier. There was no evidence concerning whether Summers, who worked for AWEPC from 2008 to 2010, was even qualified to answer the phones in the dental office during his previous absences as a "replacement for Complainant," whereas there was no dispute that she was qualified to perform that function at the time of Complainant's termination. It was undisputed that schedules were not posted in AWEPC's office. Without this additional context, the forum cannot conclude that the timing of Dr. Engel's scheduling of Summers to answer the phones during his absence instead of Complainant proves that Dr. Engel's decision to schedule Summers was a retaliatory act based Complainant's opposition to attending the symposium.

[30] *See* Barbara Lindeman and Paul Grossman, *Employment Discrimination Law, Fourth Edition,* volume I, pp. 1030-1034 (4th Ed. 2007)(discussing the significance of temporal proximity in proving causation in Title VII retaliation cases).

CONSTRUCTIVE DISCHARGE

It is undisputed that Complainant quit her job at the end of the workday on August 21, 2009. The Agency contends that Complainant's resignation was a constructive discharge, in that a reasonable person in her circumstances would have found working conditions so intolerable that resignation was the only option. The elements of constructive discharge are set out in OAR 839-005-0011, which reads as follows:

> "Constructive discharge occurs when an individual leaves employment because of unlawful discrimination. The elements of a constructive discharge are:
>
> "(1) The employer intentionally created or intentionally maintained discriminatory working conditions related to the individual's protected class status;
>
> "(2) The working conditions were so intolerable that a reasonable person in the complaining individual's circumstances would have resigned because of them;
>
> "(3) The employer desired to cause the complaining individual to leave employment as a result of those working conditions, or knew or should have known that the individual was certain, or substantially certain, to leave employment as a result of the working conditions; and
>
> "(4) The complaining individual left employment as a result of the working conditions."

See In the Matter of Gordy's Truck Stop, 28 BOLI 200, 213 (2007).

A. Respondents intentionally created or intentionally maintained discriminatory working conditions related to Complainant's protected class status.

Complainant's protected class status was her religious beliefs. The discriminatory working conditions occurred over a four-day period and demonstrate an intentional pattern of behavior engaged in by Dr. Engel after Complainant stated her religious objections to attending the Silkin symposium. They began with Dr. Engel's mandate on August 18 that Complainant attend training symposium and her objections because she believed it had ties to the Church of Scientology, her reasonable belief that "it was religious in nature," and because it was "against her religion."

The next day, two posters appeared in AWEPC's lunchroom containing writings by L. Ron Hubbard that set out some fundamental tenets of the Church of Scientology, including the Tone Scale, one of the topics at the symposium.

On August 20, at the end of the workday, Dr. Engel and Francie Engel, his wife, asked Complainant to meet with them in AWEPC's "relaxation room," where they gave Complainant three documents related to the symposium, including one that covered the topics to be presented. The first one listed was the "Emotional Tone Scale," followed by this description:

> "**Emotions in the Workplace:** Learn to understand and predict human behavior during this presentation of the Emotional Tone Scale. Improve communication throughout the office and manage staff effectively using this information."

The documents also stated that the symposium would be held October 8-10, 2009, at the Resort at the Mountain in Welches, Oregon, located "near Mt. Hood about 40 miles east of the Portland International Airport." During the meeting, Francie Engel asked Complainant how she acquired her information about Scientology. Complainant explained she had researched it on the Internet, including the tone scale, and talked to her mom and pastor. In response to Dr. Engel's question about her religious beliefs, Complainant told Dr. Engel that her religious belief "was none of his business" and that her objection to the symposium was based on its ties to the Church of Scientology and her personal religious beliefs. During the conversation, Dr. Engel told Complainant he and his wife used Scientology tools to better them. Complainant told Dr. Engel that she felt she was being pressured and harassed to attend the symposium and she would not attend and got up to leave, at which point Dr. Engel told her that if she left the building, he would consider that to be her resignation. In direct response to Complainant's question, Dr. Engel told Complainant that she could either go to the symposium or resign.

On August 21, Complainant's last day of work, Complainant gave Dr. Engel a letter in which she stated:

> "As I indicated to you several times, I have sincerely held religious beliefs that directly contradict the principles of the Church of Scientology. The brochure on the conference you are expecting me to attend clearly states the Tone Scale program which was originated by the Church of Scientology will be included in this program. It is impossible for me to know in advance how much of the program will be based on the Church of Scientology teachings. For these reasons I respectfully request a reasonable accommodation from you. I am willing to attend any non-secular program that you would require of me."

In response, Dr. Engel asked Complainant to speak with his Silkin consultant about the content of the symposium in an attempt to persuade her that the symposium had no religious content. Complainant initially agreed, then changed her mind because she believed that the Silkin consultant would be biased based on information she found on the Internet indicating that Silkin was tied to Scientology. About noon, Dr. Engel asked Complainant to come to the telephone to talk to the Silkin consultant. Complainant declined, stating she changed her mind because she felt "pressured," and again told Dr. Engel that she would not attend the conference. Finally, at the end of the day, Dr. Engel told Complainant that she would not be working the following week because he was taking the week off and Brianne Summer would be answering the phones instead of Complainant. He continued trying to convince Complainant to attend the symposium and told Complainant that if he made an exception for her, he would have to make an exception for everyone. At that point, Complainant told Dr. Engel that she quit.

These facts satisfy the first element of the Agency's prima facie case.

B. The working conditions were so intolerable that a reasonable person in the Complainant's circumstances would have resigned because of them.

Respondents argue that Dr. Engel actually granted Complainant the accommodation she sought by telling her that she did not have to attend the symposium. The forum did not believe Dr. Engel's testimony that he withdrew his ultimatum. There are three reasons for the forum's disbelief. First, viewed in the context of the facts described in the previous section, the forum finds it highly unlikely that Dr. Engel, after pressuring Complainant to attend and threatening her with the loss of her job if she did not continue to listen to his arguments about why she should attend, should suddenly change his mind. Second, Dr. Engel offered no explanation for his sudden purported change of mind. Third, it seems equally improbable that Complainant, with a family to support and no alternative employment in sight, should quit on the spur of the moment when Dr. Engel had just offered to give her exact accommodation that she requested. Instead, the forum concludes that on August 21, based on Dr. Engel's actions over the prior four days, Complainant found herself in a position where she reasonably believed she would lose her job if she did not attend the symposium and that she would be pressured to attend the symposium or resign until the date of the symposium in October. If she changed her mind and attended the symposium, she would be subjected to training containing fundamental tenets of the Church of Scientology in a sequestered setting at a mountain resort. Under those circumstances, Complainant resigned. The forum finds that a reasonable person in those circumstances would have also resigned.

C. Respondents should have known that the individual was certain, or substantially certain, to leave employment as a result of the working conditions.

Once Complainant made it clear to Dr. Engel that she objected to attending the symposium based on the conflict between her religious beliefs and the contents of the symposium that were based on L. Ron Hubbard's writings, Dr. Engel should have anticipated that his continued insistence that she attend the symposium to keep her job and further attempts to convince her that the symposium contents were purely secular would result in her leaving her job. His opinion that the symposium contents were purely secular was not supported by the evidence.

D. Complainant quit as a result of the working conditions.

Complainant credibly testified that she quit as a direct result Dr. Engel's insistence that she attend the Silkin symposium. Specifically, she testified "[q]uitting my job was not taken lightly. I know for my mental and physical well-being that I could not continue to work under such – such a hostile environment."

E. Conclusion.

Complainant was constructively discharged and is entitled to the same damages she would have received, had she been fired.

AIDING AND ABETTING

ORS 659A.030(1)(g) provides that it is an unlawful employment practice "[f]or any person, whether an employer or employee, aid, abet, incite, compel or coerce the doing of any of the acts of this chapter or to attempt to do so." This forum has previously held that aiding and abetting, in the context of an unlawful employment practice, means "to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission." *In the Matter of Cyber Center, Inc.,* 32 BOLI __ (2012), *citing In the Matter of Sapp's Realty, Inc.,* 4 BOLI 232, 277 (1985).

In this case, Respondent Dr. Engel was Respondent AWEPC's sole owner and president, as well as Complainant's immediate supervisor. A corporate officer and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice. *Cyber Center,* at __. *See also In the Matter of Executive Transport, Inc.,* 17 BOLI 81, 94 (1998); *In the Matter of Body Imaging, P.C.,* 17 BOLI 162, 183-84 (1998), *affirmed* in part, *reversed* in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000); *In the Matter of Katari, Inc*., 16 BOLI 149, 161 (1997), *affirmed without opinion, Katari, Inc. v. Bureau of Labor and Industries*, 154 Or App 192, 957 P2d 1231, *rev den*, 327 Or 583 (1998); *In the Matter of Vision Graphics and Publishing, Inc.,* 16 BOLI 124, 138 (1997); *In the Matter of A.L.P. Incorporated,* 15 BOLI 211, 219-22 (1997*), affirmed, A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

The forum has determined that Respondent AWEPC engaged in three distinct unlawful employment actions – harassing Complainant based on her religious beliefs, failing to reasonably accommodate her, and constructively discharging her. Dr. Engel was the primary actor in all of these actions and, as such, is jointly and severally liable with AWEPC as an aider and abettor for all three actions.

DAMAGES

A. Complainant is entitled to back pay and reimbursement for out-of-pocket expenses related to her constructive discharge.

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *In the Matter of From the Wilderness,* 30 BOLI 227, 290 (2009). 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. Awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *In the Matter of Trees, Inc.,* 28 BOLI 218, 251 (2007). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *In the Matter of Rogue Valley Fire Protection*, 26 BOLI 172, 184 (2005). A respondent has the burden of proving that a complainant failed to mitigate his or her damages. *In the Matter of Wal-Mart Stores, Inc.,* 24 BOLI 37, 65 (2003). To meet that burden, a respondent must prove that a complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and which the complainant was qualified." *Id.* Economic loss that is directly attributable to an unlawful practice is recoverable from a respondent as a means to eliminate the effects of any unlawful practice found, including actual expenses. *Trees, Inc.,* at 251.

At the time Complainant was constructively discharged, she was paid $20 an hour and worked an average of 34 hours per week, for total gross wages of $680 per week. She also received medical insurance that was terminated on August 31, 2009, and had $54 in out-of-pocket medical expenses that would have been covered by AWEPC's medical insurance, had she remained employed by AWEPC.[31]

Complainant filed for and received unemployment benefits after leaving AWEPC's employment and began to look for another job on or about September 1, 2009. To look for work, she read the Bend Bulletin newspaper and Craigslist employment advertisements daily and sent a cover letter and resume to prospective employers. As her job search in central Oregon continued without success, Complainant decided to look for a job in League City, Texas because her sister lived there and job opportunities for dental professionals existed in League City. She located three job openings through an internet job service for dental workers, scheduled three interviews for dental assistant positions in League City, and flew to Texas on October 10, 2009, to be interviewed, using "air miles" to pay for her ticket. She was offered two jobs and accepted one with a Dr. Patterson that paid $18 per hour, but had no benefits. She moved to Texas with her boyfriend and the younger of her two daughters and began work shortly before Thanksgiving 2009.

Respondents plead in their answer and argue that Complainant failed to mitigate her damages. Complainants are required to mitigate their damages by seeking replacement employment, but it is a respondent's burden to disprove mitigation. Complainant, whose profession was dental assistant, credibly testified that she diligently and unsuccessfully sought employment in central Oregon before pursuing her option in Texas. Respondents provided no evidence that any dental jobs were available in central Oregon which, with reasonable diligence, Complainant could have discovered and for which she was qualified.[32] Respondents argue it was Complainant's choice to

[31] *See* Finding of Fact 34 – The Merits.

[32] *See, e.g., In the Matter of ARG Enterprises, Inc.,* 19 BOLI 116, 139 (2000) (When complainant had been employed by respondent as a dishwasher and respondent proved, through the presence of numerous help wanted ads and expert testimony, that complainant should have been able to find work as

take a job in Texas and Respondents should not bear the cost of this choice. By not working, Complainant was losing $2500+ in gross wages every month. Given Complainant's unsuccessful job search in central Oregon, her financial responsibilities, and the likelihood of employment in Texas and certainty of a temporary place to live in League City, Complainant's choice seems reasonable to the forum. Although her moving expenses were significant, those expenses only equaled four months of lost wages, and Complainant stood to lose far more with no employment prospects in central Oregon in her profession.

Complainant credibly testified that it cost her $10,600 to move to Texas, an amount that was allowed as a deduction by the IRS. Her moving expenses included renting a moving truck and car trailer, gasoline for the truck, hotel expenses, food expenses, and gasoline for the car she drove to Texas separate from the moving truck. The forum has awarded job search and moving expenses in the past and does so in this case.[33]

Complainant worked five months for Dr. Patterson, working an average of 36 hours per week and earning $648 per week gross wages ($18 per hour x 36 hours = $648). Complainant then went to work for a Dr. Wahbah and was paid $17.50 per hour to start, with a raise to $18 per hour after 90 days. Like Dr. Patterson, Dr. Wahbah provided no benefits. When Dr. Wahbah retired in October 2011, Complainant began work for the dentist who bought Dr. Wahbah's practice. Up to the time of the hearing, Complainant had worked an average of 36 hours per week for Wahbah and his successor. While employed by Dr. Wahbah, Complainant earned $630 per week in gross wages for the first 90 days ($17.50 per hour x 36 hours = $630), then $648 per week gross wages ($18 per hour x 36 hours = $648). The Agency presented no evidence to show the wages Complainant has been paid by Dr. Wahbah's successor since October 2011.

The Agency also seeks reimbursement for the $882.90 in airfare Complainant spent for herself, her boyfriend, and her daughter Addison to fly to Oregon for the hearing. The forum declines to award damages for that expense, as costs incurred by a complainant to attend a hearing are non-compensable in this forum.

In total, Complainant's back pay and out-of-pocket damages amount to **$22,654,** computed as follows:

> *Medical Expenses*: **$54** in out-of-pocket medical expenses for Complainant's September 14, 2009, visit with Dr. Johnson.

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a dishwasher within one week after his discharge, the forum limited complainant's back pay award to one week's lost wages even though complainant remained unemployed for a longer period of time).

[33] *See In the Matter of Barrett Business Services, Inc.,* 20 BOLI 189, 215 (2000), *affirmed, Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001); *In the Matter of Day Trucking, Inc.,* 2 BOLI 83, 87-88 (1981); *In the Matter of Bend Millworks Company,* 1 BOLI 214, 216 (1979).

Moving Expenses: **$10,600** in moving expenses for Complainant's move to Texas for replacement employment after her constructive discharge.

Back Pay: **$12,000** in back pay, computed as follows:

- September 1 - 3, 2009: **$480** (3 days x 8 hours x $20 per hour)
- September 6 - October 1, 2009: **$2,720** ($680 per week x 4 weeks)
- October 4 – 29, 2009: **$2,720** ($680 per week x 4 weeks)
- November 1 – 26, 2009: **$2,720** ($680 per week x 4 weeks)
- November 29 – December 31, 2009: **$160** ($680 per week - $648 week = $32 x 5 weeks)
- January 1 – December 31, 2010: **$1,664** ($680 per week - $648 week = $32 x 52 weeks)[34]
- January 1 – December 9, 2011: **$1,536** ($680 per week - $648 week = $32 x 48 weeks)

B. Damages for emotional, mental, and physical suffering.

In its Formal Charges, the Agency seeks "at least $80,000" in damages for Complainant's "emotional, mental, and physical suffering" resulting from Respondents' unlawful employment practices.

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the Complainant. 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. *From the Wilderness*, at 291-92 (internal citations omitted).

Through the credible testimony of Complainant and her mother, as well as physician notes, the Agency established that Complainant suffered an increase in anxiety, stress, upset stomach, diarrhea, sleep problems, and weight loss over her last week of work and had become an "emotional wreck" because of Respondents' unlawful employment practices. When she quit, she left the office very upset and crying. Complainant saw two doctors on August 25 who prescribed medication for her anxiety and sleeplessness and noted the medical conditions listed above. One of the doctors noted that Complainant had "just resigned under duress from dental office after being extensively pressured to go to a scientology/hubbard based conference." In addition, Complainant also credibly testified that she experienced stress for months after leaving AWEPC's employment because of significant financial issues caused by a lack of income and moving expenses, concern over her future, and worry over her lack of health insurance for herself and her children. She also had to borrow $5,000 from her

[34] The forum computes Complainant's 90 days at $17.50 per hour for Dr. Wahbah at $18 per hour because there was no evidence as to why Complainant left Dr. Patterson's employment, where she earned $18 per hour.

mother to make ends meet, then live with her sister and her sister's family in League City when she first moved to Texas.

Complainant has wanted to see a doctor on a number of occasions since September 1, 2009, for medical conditions that include colds, sinus infections, irregular moles, spots on her chest, and a periodic "excruciating pain" that "runs from [her] back down [her] left leg. She has not seen a doctor because she cannot afford it due to the fact that her Texas employers have not provided medical insurance.

She has suffered additional stress and sadness because Allie, her now-13-year-old daughter, remained in central Oregon when Complainant moved to Texas, and Complainant has only been able to see her on school breaks, whereas she saw Allie every day while she worked for Dr. Engel except when Allie stayed at Allie father's house in Redmond. As a result, she has missed experiencing much of Allie's life that she would have experienced, had she remained employed by AWEPC.

A week before the hearing, she received a call at work from a Silkin Management representative who asked to speak with Dr. Wahbah. Complainant's first reaction was "Oh, my goodness, how did they find me?" Her current employer, Dr. Lynch, told Complainant to tell Silkin she wanted nothing to do with them, but the representative had hung up before Complainant could pass on Dr. Lynch's message. A couple days later, the Silkin representative called back and Complainant gave Dr. Lynch's message to the representative. Both incidents upset Complainant. Although Respondents are not liable for these calls, they serve to illustrate the extent of Complainant's emotional response to the requirement that she attend the Silkin symposium.

Considering all these factors, the forum concludes that $325,000 is an appropriate sum to compensate Complainant for the emotional, mental, and physical suffering she experienced as a result of Respondents' unlawful employment practices.

C. Mandatory Training On Recognizing And Preventing Discrimination In The Workplace Based On Protected Class

The Agency asks that "Respondents be required to provide to its owners, managers and all employees, during paid working hours, training in recognizing and preventing discrimination in the workplace based on protected class, including but not limited to religion." The Commissioner of BOLI is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ORS 659A.850(4). Among other things, that may include requiring the respondent to:

> "(a) Perform an act or series of acts designated in the order that are reasonably calculated to:
>
> "(A) Carry out the purposes of this chapter;

> "(B) Eliminate the effects of the unlawful practice that the respondent is found to have engaged in, including but not limited to paying an award of actual damages suffered by the complainant and complying with injunctive or other equitable relief; and
>
> "(C) Protect the rights of the complainant and other persons similarly situated[.]"

Requiring Respondents to undergo training specifically tailored to prevent future similar unlawful practices, as the Agency seeks, falls within authority granted to the Commissioner in ORS 659A.850(4). *See Cyber Center* at ___. However, since the unlawful employment practices only relate to the protected class of religion, requiring training related to all protected classes cuts an overly broad swath. Consequently, the forum has required training but tailored it to Complainant's protected class.

RESPONDENTS' EXCEPTIONS

Respondents filed extensive exceptions to the Proposed Findings of Fact – The Merits, Proposed Ultimate Findings of Fact, Proposed Conclusions of Law, and Proposed Opinion. In response, the forum has made changes in Findings of Fact – The Merits ##4, 9, 12-13, and 18, and Ultimate Findings of Fact ##2, 8-9, and 11. The forum rejects Respondents' request that additional Findings of Fact be made, finding them either irrelevant or not supported by a preponderance of the evidence.

Respondents' exceptions to the Proposed Opinion are based on Respondents' suggested changes to the Findings of Fact and Respondents' interpretation of the law with respect to the version of the facts proffered by Respondents. In response, the forum has made several changes in the Opinion to clarify its reasoning, but rejects the substantive changes suggested by Respondents.

Respondents' exceptions to the damages for moving expenses and back pay are not supported by the facts or the law and the Proposed Order contains an adequate discussion of the reason for the proposed awards. In contrast to Respondents' exception, the forum finds the proposed award of $80,000 for emotional distress damages inadequate and has increased that award to $325,000, an amount commensurate with the evidence in the record of the emotional, mental, and physical distress suffered by the Complainant in this case.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent AWEPC's unlawful employment practices violating ORS 659A.030(1)(a)&(b) and Respondent Dr. Andrew W. Engel's unlawful employment practices under ORS 659A.030(1)(g), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Andrew W. Engel, DMD, PC dba AWE Dental Spa and Dr. Andrew W. Engel individually** to 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 Susan Muhleman** in the amount of:

1) TWELVE THOUSAND DOLLARS ($12,000.00), less lawful deductions, representing wages lost by Susan Muhleman between September 1, 2009, and December 9, 2011, as a result of Respondents' unlawful employment practices found herein; plus,

2) TEN THOUSAND SIX HUNDRED AND FIFTY-FOUR DOLLARS ($10,654.00), representing out-of-pocket expenses incurred by Susan Muhleman as a result of Respondents' unlawful employment practices found herein; plus,

3) THREE HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS ($325,000.00), representing compensatory damages for emotional, mental, and physical distress Susan Muhleman suffered as a result of Respondents' unlawful employment practices found herein; plus,

4) Interest at the legal rate on the sum of THREE HUNDRED FORTY-SEVEN SIX HUNDRED AND FIFTY-FOUR DOLLARS ($347,654.00) from the date of the Final Order until Respondents comply herein.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent AWEPC's unlawful employment practices violating ORS 659A.030(1)(a)&(b) and Respondent Dr. Andrew W. Engel's unlawful employment practices under ORS 659A.030(1)(g), the Commissioner of the Bureau of Labor and Industries hereby orders Respondents to require its current employees, if any, including Dr. Andrew W. Engel, to attend training on recognizing and preventing discrimination in the workplace based on religion. Such training may be provided by the Bureau of Labor and Industries Technical Assistance for Employees unit or another trainer agreeable to the Agency.

C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), the Commissioner of the Bureau of Labor and Industries hereby orders Respondents to cease and desist from discriminating against any employee based upon the employee's religion.

In the Matter of

**CRYSTAL SPRINGS LANDSCAPES, INC.,
and PAUL LINIGER individually
as an Aider and Abettor**

**Case No. 34-12
Final Order of Commissioner Brad Avakian
Issued December 14, 2012**

SYNOPSIS

In a default case, the Agency proved that Respondent Crystal Springs Landscapes, Inc. ("Crystal"), acting through Paul Liniger, its president, and Mark Skaggs, its general manager, subjected Complainant, a female, to unlawful sexual harassment. The Agency also proved that Crystal, acting through its president Paul Liniger, fired Complainant in retaliation for her complaint about the unlawful sexual harassment. The forum held that Liniger was Crystal's proxy because of Liniger's officer status in Crystal, making Crystal strictly liable for Complainant's harassment and discharge. The forum held that Crystal was liable for Skaggs's harassment because he was Complainant's immediate supervisor and Crystal knew or should have known of the harassment. The forum held that Liniger actively participated in the unlawful harassment and participated in the decision to fire Complainant, making him jointly and severally liable as an aider and abettor for the harassment and discharge. The forum awarded Complainant $13,880 in back pay, $3,200 in out-of-pocket expenses, and $150,000 in emotional, mental, and physical suffering damages. ORS 659A.030(1)(a) & (b), ORS 659A.030(1)(f), ORS 659A.030(1)(g); OAR 839-005-0021, OAR 839-005-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 6, 2012, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, 10th floor, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Complainant Elisa Apa was present throughout the hearing and was not represented by counsel. Respondents were held in default prior to the hearing and did not appear at the hearing.

The Agency called the following witnesses: Complainant; Donna Meredith, senior investigator, BOLI Civil Rights Division (telephonic); and Julie Daniel, Complainant's sister.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);
b) Agency exhibits A-1 through A-17 (submitted prior to hearing), and A-18 (submitted at hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, 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 8, 2010, 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 Crystal Springs Landscapes, Inc. ("Crystal"). On October 27, 2011, the Agency amended the complaint to name Paul Liniger ("P. Liniger") as a Respondent, alleging that he was an aider and abettor to Crystal's alleged unlawful acts. After investigation, the Agency issued a Notice of Substantial Evidence Determination on November 8, 2011, in which it found substantial evidence that Crystal had engaged in unlawful employment practices in violation of ORS 659A.030(1)(b)&(f) based on sex harassment and opposition to an unlawful employment practice and that Respondent Liniger had aided and abetted Crystal in the commission of the unlawful employment practices in violation of ORS 659A.030(1)(g).

2) On August 28, 2012, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Complainant stating the time and place of the hearing as November 5, 2012, beginning at 1:00 p.m., at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, 10th floor, Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal Charges, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

3) The Agency's Formal Charges alleged, among other things, that:

(a) Crystal employed Complainant and subjected her to unlawful sex harassment in violation of ORS 659A.030(1)(b), OAR 839-005-0030(1)(a) and OAR 839-005-0030(1)(b);

(b) Crystal terminated Complainant based on her sex, thereby violating ORS 659A.030(1)(a);

(c) Crystal terminated Complainant because she complained of sexual harassment by her supervisor, Mark Skaggs, thereby violating of OAR 839-005-0030(4);

(d) Crystal terminated Complainant because she complained of sexual harassment by Mark Skaggs and P. Liniger, thereby violating ORS 659A.030(1)(f);

(e) Crystal is strictly liable for the harassment under OAR 839-005-0030(3) because P. Liniger, as Crystal's corporate president, is Crystal's proxy;

(f) P. Liniger aided, abetted, incited, compelled or coerced Crystal's unlawful employment actions in violation of ORS 659A.030(1)(g) and is individually liable for those actions.

The Formal Charges "at least $14,000" in lost wages, out-of-pocket expenses of "at least $1,200," and damages for emotional, mental and physical suffering in the amount of "at least $100,000." The Formal Charges also asked that Respondents and its managers, professional staff and employees be required to participate "in training on understanding and avoiding workplace harassment and discrimination based on protected class."

4) On October 1, 2012, the ALJ issued an interim order resetting the hearing to begin at 9:00 a.m. on November 6, 2012.

5) On October 10, 2012, the Agency filed a motion for default based on Respondents' failure to file a timely answer.

6) On October 11, 2012, the ALJ issued an interim order granting the Agency's motion for default against both Respondents. The order read as follows:

"On October 10, 2012, the Agency filed a motion for default against both Respondents in this case based on their failure to file an answer to the Formal Charges. By affidavit and supporting documentation, the Agency made the following representations:

"1. Respondent Liniger's correct address is 2348 SW Dillow Drive, West Linn, OR 97068. He also has a mailing address of PO Box 820142, West Linn, OR 97282. The Formal Charges and Notice of Hearing were mailed to both addresses by regular and certified mail on August 28 and August 30, 2012. The mail sent certified was returned by the USPS stamped 'Unclaimed.' The mail sent regular first class has not been returned. Respondent Liniger has not filed an answer as of October 10, 2012.

"2. The Formal Charges and Hearing were mailed to Respondent Crystal Springs Landscapes, Inc. ('Crystal') by regular and certified mail on August 28, 2012, to 9318 SE Church Street, Clackamas, OR 97015, and 2348 SW Dillow Drive, West Linn, OR 97068. 9318 SE Church Street, Clackamas, OR 97015 is Crystal's correct address. The latter

address is the address of Paul Liniger, Crystal's registered agent. The Formal Charges and Hearing were mailed again to Crystal by regular and certified mail on August 28, 2012, at 9318 SE Church Street, Clackamas, OR 97015, as well as PO Box 820142, Portland, OR 97282. The mail sent certified to 9318 SE Church Street, Clackamas, OR 97015, was returned by the USPS stamped 'Not Deliverable as Addressed, Unable to Forward.' On September 19, 2012, the Agency accomplished alternative service on Crystal by serving the Secretary of State. Respondent Crystal has not filed an answer as of October 10, 2012.

"OAR 839-050-0330 provides that default may occur 'when * * * a party fails to file a required response, including * * * an answer, within the time specified in the charging document[.]' On the first page of the Notice of Hearing, immediately under the language setting out the date, time, and place of the hearing, the following language appears:

> "Respondent's Answer is due 20 days from service of this Notice. If Respondent does not file an answer within 20 days, it may be held in **DEFAULT**. If held in default, Respondent will not be allowed to participate in the contested case hearing, examine witnesses, or introduce evidence."

"This language accurately reflects the Agency's administrative rules establishing the timeline for filing an answer and criteria for determining when default occurs. OAR 839-050-0120(3) and OAR 839-050-0330(1)(a).

"OAR 839-050-0030(1) provides:

> "Except as otherwise provided in ORS 652.332(1)[inapplicable in this case] the charging document will be served on the party or the party's representative by personal service or by registered or certified mail. Service of the charging document is complete upon the earlier of:
>
> "(a) Receipt by the party or party's representative; or
>
> "(b) Mailing when sent by registered or certified mail to the correct address of the party or the party's representative."

"**Respondent Liniger**

"In this case, Respondent Liniger was served on August 28, 2012, when the Agency mailed the Notice of Hearing and Formal Charges to his correct address by certified mail. Respondent Liniger's failure to claim his certified mail does not negate service. Furthermore, OEC 40.135(1)(q) ['a letter directed and mailed was received in the regular course of the mail.'] creates a presumption that Respondent Liniger received actual notice of the Notice of Hearing and Formal Charges. Based on Respondent Liniger's failure to file an answer than 20 days of service, the forum **GRANTS** the Agency's motion with respect to Respondent Liniger and finds him in default. OAR 839-050-0330(1)(a).

"**Respondent Crystal Springs Landscapes, Inc.**

"Respondent Crystal was served on August 28 and 30, 2012, when the Agency mailed the Notice of Hearing and Formal Charges to the correct address of

Respondent Liniger, Crystal's registered agent, by certified mail. Liniger's failure to claim that certified mail does not negate service. Again, OEC 40.135(1)(q) creates a presumption that Liniger received actual notice of the Notice of Hearing and Formal Charges on behalf of Crystal. Finally, the Agency again accomplished effective service on Respondent Crystal on September 19, 2012, when it made alternative service on the Secretary of State. Based on Respondent Crystal's failure to file an answer than 20 days of service, the forum **GRANTS** the Agency's motion with respect to Respondent Crystal and finds Respondent Crystal in default. OAR 839-050-0330(1)(a).

"**Relief From Default**

"Relief from default may be granted where good cause is established within 10 days after the date of this order. The request for relief shall be in writing and shall be accompanied by a written statement, together with appropriate documentation, setting forth the facts supporting the claim of good cause. OAR 839-050-0340. As Respondent Crystal is a corporation, any request made by Respondent Crystal must be made by an attorney or an authorized representative who meets the requirements of OAR 839-050-0110.

"If Respondents are not granted relief from default, Respondents will not be allowed to participate in any manner in the hearing, including, but not limited to, presentation of witnesses or evidence on Respondents' 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)."

7) With its case summary, the Agency submitted a "Non-Military Affidavit" that was signed and sworn to by Chet Nakada, the Agency case presenter. In the affidavit, Nakada stated:

"On October 26, 2012, I searched the United States Department of Defense Manpower Data Center data base to determine whether Respondent Paul Liniger is a member of the military service. The attached Military Status report shows that Respondent Paul Liniger is not a member of the military service of the United States at this time."

Attached to the affidavit was a status report from the Department of Defense Manpower Data Center indicating that Respondent Liniger is not on "Active Duty Status" and has not received "early notification to report for active duty."

8) At the start of the hearing, 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.

9) At hearing, the Agency moved to amend the Charges to reduce the lost wages sought from $14,000 to $11,250. The ALJ granted the motion.

10) On December 30, 2012, 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, Crystal was an Oregon domestic business corporation that engaged or utilized the personal services of one or more persons, including Complainant, and conducted business out of an office in Clackamas, Oregon. Crystal's business consisted of commercial and residential landscaping and maintenance.

2) At all times material herein, P. Liniger was Crystal's owner and corporate president and Mark Skaggs was Crystal's general manager. Both men supervised Complainant.

3) Skaggs is a male in his 50s, about 6'2" tall and moderately husky. Liniger is a male in his late 30s, short and overweight.

4) Complainant is a female who was 29 years old at the time of the hearing.

5) In late April 2010, Complainant worked for Express Employment Professionals as a job developer. As part of her job, she visited Crystal's office and spoke with P. Liniger, who was looking for an administrative assistant. Later that day, P. Liniger sent Complainant an e-mail proposing to hire her and asking how much it would cost. After a meeting and some negotiation, P. Liniger offered Complainant a job as Crystal's marketing director at the salary of $45,000 a year, the approximate salary she earned at Express. Complainant accepted and started work for Crystal on or about May 3, 2012.

6) Throughout her employment, Complainant worked in Crystal's business office in Clackamas with Skaggs, Paul Liniger (hereafter "Liniger"), Liniger's mother, and another employee. Crystal's office was located in a house that had been converted to office space with a large rectangular open space and three offices. Complainant sat at a desk in the open space. Liniger's desk was located in an office approximately 10-15 feet away from Complainant so that he directly faced Complainant when his door was open and he sat at his desk. Skaggs's office was located farther away at the other end of the open space.

7) On May 7, 2010, in Liniger's presence, Skaggs asked Complainant if she was single or married. Complainant told him she was divorced. Skaggs said her husband probably cheated on her, that Complainant "probably didn't do her homework" and "wasn't having sex with her husband, and that's why her husband went somewhere else." Skaggs's comment was "really embarrassing" to Complainant. She felt it was inappropriate and told him she didn't want to talk about it.

8) Complainant has a Facebook account. During her employment with Crystal, Complainant "friended" Skaggs and Liniger on Facebook. One day in the office, Skaggs started talking about relationships and recommended that Complainant watch the movie "9½ Weeks." Skaggs described the movie and Complainant replied that it was the not the kind of movie she would watch. Skaggs then told Complainant to "take tips" from the movie and that she should "watch it" and "apply it to her life." Complainant did not watch the movie. Later, on June 1, 2010, Skaggs posted the following comment on Complainant's Facebook wallpost:

> "bffs……hahaahahha O>>>>M>>>G just remember…1983….. 9 ½ weeks came out when you where [sic] 3…. good luck with the insite [sic]……."

Complainant found this "super embarrassing" because she would not want her "friends or family to think I would watch a movie like that" and would "never [have] brought up that movie on a public forum." At that time, Complainant had approximately 200 friends on her Facebook, all of whom could see Skaggs's comment when they accessed Complainant's Facebook page.

9) A synopsis of "9 ½ Weeks" follows:

> "The title refers to the duration of the relationship between self-absorbed Wall Street Shark Mickey Rourke and divorced art gallery owner Kim Basinger. Kim is looking for true love, while Mickey is searching for…gosh knows what. His notions of lovemaking include blindfolds, ice cubes, chocolate syrup, and rolling around on spent peanut shells. When the allotted 9 ½ weeks are up, Kim has finally come to realize that Rourke has been using her. We could have told her that twenty minutes into the film. One of the definitive works in the Mickey Rourke *oeuvre,* 9 ½ Weeks is deliciously awful, and as such will probably endure as a Camp Classic for the next hundred years. The film is available in both R-rated and unrated versions; either way, it's a hoot.
>
> "**Characteristics**
>
> -Self-Destructive Romance
>
> -Seduction
>
> -Seductress
>
> -Carnal Knowledge
>
> -Sexual-awakening
>
> -Sadomasochist
>
> -Sadomasochism
>
> -Masochist
>
> -Dangerous Attraction
>
> -Masochism
>
> -Erotica

-Eroticism”

10) On or about June 1, 2010, Liniger gave Complainant a book entitled "The Five Love Languages (singles edition)” by Gary Chapman. The same day, he sent an e-mail to her home e-mail address with the subject heading “**the 5 love languages**.” The e-mail read as follows:

- **“Words of Affirmation**
  “Actions don't always speak louder than words. If this is your language, unsolicited compliments mean the world to you. Hearing the words, ‘I love you,’ are important -- hearing the reasons behind that love sends your spirits skyward. Insults can leave you shattered and are not easily forgotten.
- **“Quality Time**
  “In the vernacular of Quality Time, nothing says, ‘I love you,’ like full, undivided attention. Being there for this type of person is critical, but really being there -- with the TV off, fork and knife down and all chores and tasks on standby -- makes your significant other feel truly special and loved. Distractions, postponed dates, or the failure to listen can be especially hurtful.
- **“Receiving Gifts**

  “Don't mistake this love language for materialism; the receiver of gifts thrives on the love, helpfulness, and effort behind the gift. If you speak this language, the perfect gift or gesture shows that you are cared for, and you are prized above whatever was sacrificed to bring the gift to you. A missed birthday, anniversary, or a hasty, thoughtless gift would be disastrous -- so would the absence of everyday gestures.
- **“Acts of Service**

  “Can vacuuming the floors really be an expression of love? Absolutely! Anything you do to ease the burden of responsibilities weighing on an ‘Acts of Service’ person will speak volumes. The words he or she most want to hear: ‘Let me do that for you.’ Laziness, broken commitments, and making more work for them tell speakers of this language their feelings don't matter.
- **“Physical Touch**

  “This language isn’t all about the bedroom. A person whose primary language is Physical Touch is, not surprisingly, very touchy. Hugs, pats on the back, holding hands, and thoughtful touches on the arm, shoulder, or face -- they can all be ways to show excitement, concern, care, and love. Physical presence and accessibility are crucial, while neglect or abuse can be unforgivable and instructive.

  “Paul Liniger - Crystal Springs Landscapes, Inc.”

Complainant speculated that Liniger gave her the book so he could figure out which love language she was “so he could get me to like him” or because one of the languages of love was receiving gifts like the book Liniger had just given her.

11) Skaggs sometimes used Complainant's computer. When Complainant arrived at work on June 11, 2010, she found that her computer had been turned on and that Skaggs had left the following e-mail exchange between himself and Liniger displayed on her monitor:

> "**On 6/7/2010 10:19 AM, Mark Skaggs wrote:**
>
> "she's needy…..do one good dickin...and you would never get rid of"
>
> "**On 6/7/2010 10:19 AM, Paul Liniger wrote:**
>
> "Yup...exactly! LMFAO"
>
> "**Subject Re: STAGE 1 CLINGER**
>
> "**Sender** Mark Skaggs
>
> "**Recipient** paul@crystalscapes.com
>
> "**Date** Mon 19:21
>
> "Dude, please tell me she is not this DITZZZY please tell me we have not pinned our hopes and dreams on a clinger, LOL the Jack Nicholson < few good men > line . . . woman we live in world where there are men who's gonna do those men you elisa? Your friends??? Why however grotesque the mens looks are you want them you need them . . I would rather you just came in and said Thank you . . . ether [sic] way I dont [sic] give a dam [sic] what you think your in tittle d [sic] to."
>
> "**Sender** Mark Skaggs
>
> "**Recipient** paul@crystalscapes.com
>
> "**Date** Wed 18:11
>
> "Dude I am fuckin rollin……..haahahhaahh…. was funny when I told her she was'nt [sic] doing her home work and her old man sought out lickin the cat elsewhere…… Dude sad part is make's you wonder if the problem is she is strickly [sic] missionary…. hahahhaha"

Finding these emails left displayed on her computer "really upset" Complainant. She printed them, then took a break, went out to her car, and called a good friend for advice. Her friend advised her not to say anything since she had just started work for Crystal and might be fired. Complainant returned to work and continued "the best that I could." She followed her friend's advice and did not complain to Liniger or Skaggs at that time.

12) On June 11, 2010, Liniger emailed the following message to Complainant's Facebook page:

> "Re: Rose Parade
>
> "I emailed you info - I think I'm going to plan on going down there so you should stop by if you don't have anything else going. I think my brother will have mimosas and bloody marry's [sic] as well..YUM!:)"

This made Complainant feel awkward and uncomfortable because she did not care to mingle with her boss on a social basis. She did not go to Liniger's party.

13) On June 14, 2010, Liniger came into the office talking about "He's Just Not That Into You," a movie he had watched over the weekend, and how he had thought about Complainant. Liniger said he wondered which girl Complainant was "vs. the characters in the movie." Liniger added that Complainant was "probably the main character and he was like the main character guy in the movie and funny how those two ended up together in the end." Complainant felt these were inappropriate remarks.

14) On one occasion, Complainant commented that she was meeting a friend in Sellwood on a Friday night. Liniger responded that he was going to be in that neighborhood and would text her so they could meet up. Complainant decided not to visit her friend because she was afraid Liniger would show up.

15) In late June or early July 2010, Skaggs told Complainant that "it's a very common thing for husbands to bail after their wives have a baby because then the woman becomes responsible and can no longer be a whore. It's called the Madonna theory." Liniger, nearby, added that "all guys want their cake and eat it too."

16) In early July 2010, in Complainant's and Skaggs's presence, Liniger began talking about his new girlfriend, describing her as a stripper he had met at a strip club. Skaggs commented that Complainant would have to work as a stripper if she did not have a job.

17) On July 10, a new female employee started work in Crystal's office. In Complainant's presence, when the new employee was out of the room, Skaggs stated that she was "cooler" than Complainant, that Complainant was "really uptight and she [the new employee] will be okay with [our] loose talk." Liniger called the new employee "sizzle chest" and Skaggs and Liniger began laughing.

18) On July 26, 2010, Liniger was joking In the office about dating. Complainant said she would never date anyone she "worked with or for." In a "creep[y]"[1] voice, Liniger remarked "never say never."

19) All of Liniger's and Skaggs's many comments related to sex, dating, and male/female relationships were offensive to Complainant and she objected to them on multiple occasions. Liniger and Skaggs responded by telling Complainant things like "loosen up," "we're just joking," "we're just messing with you," and "calm down."

20) By July, Liniger's and Skaggs's comments had begun "to escalate" and it was becoming more apparent that Liniger wanted to date Complainant, something she did not want. Complainant stopped wearing makeup and began wearing different clothes to work. Complainant had been frequently talking to Becky, one of her sisters, about Liniger and Skaggs's behavior. In late July, Becky convinced Complainant to

[1] At hearing, this was Complainant's description of Liniger's voice.

confront Liniger and Skaggs about their behavior, saying Complainant could not continue to work in that environment and that she was concerned about Complainant.

21) On July 28, 2010, at 8:30 a.m., Complainant "worked up the nerve" and sent an e-mail to Liniger stating: "Hey Paul - I know you're extremely busy but I would like to have a meeting with you this morning when you get in if you have time[.] Thank you[,] Elisa." Complainant's intention in sending the e-mail was to talk with Liniger about the e-mails he and Skaggs had left on her monitor on June 11, 2010, and about their offensive sexual conduct in the office. At 8:48 a.m., Liniger responded via e-mail: "I'll be in later around 1030. If you want you can also meet with Mark. Thanks[.]"

22) Complainant did not meet with Liniger on July 28. At 8 a.m. on July 29, 2010, Complainant sent another e-mail to Liniger in which she stated:

> "Paul,
>
> "This is embarrassing for me but I would like to have a meeting with you in regards to the e-mails that you and mark were sending back and fourth [sic] about me. They were completely inappropriate, disturbing and hurtful. Please set aside some time today to meet with me to discuss this situation.
>
> "Thank you
>
> "Elisa"

23) Liniger did not respond to Complainant's e-mail, instead avoiding her. The next day, Skaggs took Complainant aside and handed her a final paycheck, saying "there we go." Complainant began crying. Skaggs grinned as he told Complainant she was being let go because "we just don't have the money to pay you." Complainant left the office in tears.

24) Complainant had never received any warnings about her job performance[2] and had just heard Liniger and Skaggs "bragging" about how much money Crystal would be making in the following month.

25) By July 2010, Complainant had stopped seeing her friends because of the stress Skaggs's and Liniger's behavior was causing her.

26) Working at Crystal while being subjected to Liniger's and Skaggs's sexual comments was a "horrible" experience for Complainant, and she found it "incredibly difficult emotionally" to do the work that comprised her job. She went home each day "just feeling completely emotionally exhausted." At other jobs in the past, she has been

[2] Exhibit A-5 is a November 30, 2010, position statement, with attachments, submitted by Respondent after receiving notification of Complainant's initial complaint. Two of the attachments, dated June 8 and June 22, 2010, purport to be written warnings issued to and discussed with Complainant. Based on Complainant's otherwise uncontroverted testimony that she never received any warnings or oral counseling, the forum concludes that these warnings are fabrications and gives them no weight whatsoever.

able to work from 9 a.m. to 6 or 7 p.m. and "still have a lot of energy" and "keep up with friends." Her daughter, McKenna, was six years old and living with Complainant while she worked for Crystal. Because of Complainant's fatigue, she had less energy to spend quality time with McKenna. She became "super sensitive" after she found the emails on her computer, was more easily offended, and was unsure if it was because Liniger's and Skaggs's behaviors were something that should actually have offended her or if it was because she had become overly sensitized.

27) After Complainant was fired, she talked extensively to her sister, Julie Daniel, about how she had been unfairly fired, repeatedly questioning whether she should have sent the July 28 and 29 emails to Liniger.

28) Complainant had never been subjected to unwelcome sexual conduct in any other previous employment, despite working mainly in environments where most of the employees were men.

29) Complainant diligently sought work after she was fired. During some of her job interviews, she was uncomfortable when she had to describe why she left Crystal after working such a short period of time.

30) Complainant, who had never been fired before, could not pay all her bills after she was fired. As an adult, she had always been employed at a good paying job, and it was very hard for her to transition from earning a good salary to being "very poor" and "not having any money." She lost weight and her "face broke out" after she was fired; she believed this made her look unhealthy. Complainant's only income between July 30 and October 30 was $200 a week in unemployment benefits. She had to call her ex-husband and ask to borrow $900 to pay for her rent and another $300 for daycare and soccer expenses for McKenna. It was "really embarrassing" for her to have to borrow money from her ex-husband, and she had to pay the money back. She also had to borrow $200 from her parents. All these things made her lose self-esteem.

31) Before Complainant was fired, she had slept 8-9 hours per night. After she was fired, she couldn't sleep at first, then began sleeping 11-12 hours per night. At Crystal, Skaggs had talked about keeping a gun in his car, and Complainant began having nightmares that Skaggs was shooting her with his gun. She experienced fear and anxiety and had several "panic attacks" after those nightmares. During those attacks, she experienced shortness of breath, "feeling like she [couldn't] breathe," and "a very nervous feeling." Complainant also had a "sudden onset of nerves where she had a shortness of breath" several times during her job search when she was concerned about obtaining employment. Most recently, she had a panic attack in September 2012 at the Pendleton Roundup when she was standing in line to get her ticket and mistakenly thought she saw Liniger standing next to her. Complainant had to walk away and sit down until she was able to collect herself. Complainant had never had a panic attack before her employment with Crystal.

32 BOLI ORDERS

32) At the recommendation of her sister Becky, Complainant considered seeking counseling, but had no insurance and could not afford it.

33) Complainant has always been socially outgoing. After her discharge, she stopped going to social events because she could no longer afford it and she felt that she just didn't want to see anyone. She did not attend a good friend's wedding because she could not afford to buy an appropriate dress. She did not do "play dates" with her daughter because she could no longer afford them. Her friends, many of whom had been friends with since her early teen years, did not understand.

34) As a result of being fired, Complainant was unable to make timely monthly payments on several credit accounts. She had to pay $200 in late fees and extra interest, and her credit rating dropped from 700+ to "500 something" as a direct result of her inability to make timely payments on those accounts. At one point while she was unemployed, she overdrew her checking account by $189 and the bank closed her account. As a result, she had to get the money to pay her bills from a cash machine until she was able to open another checking account.

35) Complainant purchased a car for $11,000 in September 2012. She had financed her previous two cars, both Volkswagens, through Volkswagen Credit. Volkswagen Credit would not finance her September 2012 purchase because of the marked decline in her credit score, which her salesperson said was a direct result of her late payments on her credit accounts after July 30, 2010. As a result, Complainant had to find a different lender who charged a higher interest rate and will pay at least $3,000 more in interest payments over the life of her loan than if she had financed the vehicle through Volkswagen Credit.

36) Complainant got a new job at Oregon Athletic Clubs ("OAC") on November 1, 2010, that started at $30,000 a year. After one month, she was given a raise to $35,000 a year. She was paid an additional $450 in commissions in December 2010. Beginning January 1, 2011, she has earned the equivalent of $45,000 a year.

37) At OAC, Complainant wondered what the male employees were saying about her behind her back. After her experience at Crystal, she decided not to "friend" any of her co-workers on Facebook. Many of her co-workers found this strange because Facebook is a very common social thing among Complainant's age group. When a male co-worker wanted to be friends with her, her immediate reaction was to decide she would not be friends with him, feeling "terrified that he was going to like me or fall in love with me or start to give me things" because of her experience with Liniger. Complainant's first supervisor was a woman. When that woman was replaced by a male, Complainant found the transition difficult because of her recent experience with Liniger and Skaggs.

38) Complainant's testimony demonstrated a specific recollection of objectionable remarks made by Liniger and Skaggs. From memory, she was able to describe with particularity each remark, as well as the location in Crystal's office where

she, Liniger, and Skaggs were at the time each remark was made. Her testimony regarding the different aspects of emotional, physical, and mental suffering she experienced as a result of Respondent's unlawful employment practices was succinct and not exaggerated.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Crystal was an Oregon domestic business corporation that engaged or utilized the personal services of one or more persons, including Complainant, and conducted business out of an office in Clackamas, Oregon.

2) At all times material herein, Paul Liniger was Crystal's owner and corporate president and Mark Skaggs was Crystal's general manager.

3) Complainant is a female who was hired by Crystal on or about May 3, 2012.

4) During Complainant's employment with Crystal, Skaggs engaged in the following activities in Crystal's office:

- In Liniger's presence, asking Complainant if she was single or married, then advising her, when she said she was divorced, that her husband probably cheated on her, that she "probably didn't do her homework" and "wasn't having sex with her husband, and that's why her husband went somewhere else."
- In the context of talking about relationship, recommending that Complainant watch a sexually explicit, erotic movie entitled "9½ Weeks" and advising her to "take tips" from it and "apply it to her life."
- Subsequently posting a comment on Complainant's Facebook referring to "9½ Weeks" and wishing her luck with the insight.
- Using Complainant's computer to view his email and leaving a series of e-mails between himself and Liniger displayed on Complainant's computer when she arrived at work. In the e-mails, Skaggs and Liniger discussed what they thought Complainant's sexual habits might be, Skaggs's earlier comment to Complainant that her husband had left her because she wasn't having sex with him, that Complainant needed men, no matter "how grotesque," and that she was a "clinger" a man "would never get rid of" after "one good dickin."

5) During Complainant's employment with Crystal, Skaggs and Liniger together engaged in the following activities in Crystal's office in Complainant's presence:

- Skaggs told Complainant that "it's a very common thing for husbands to bail after their wives have a baby because then the woman becomes responsible and can no longer be a whore. It's called the Madonna

theory." Liniger, nearby, added that "all guys want their cake and eat it too."

- Skaggs stated that a new female employee was "cooler" than Complainant, that Complainant was "really uptight" and the new employee would "be okay with [our] loose talk." Liniger called the new employee a "sizzle chest" and Skaggs and Liniger laughed about it.
- Liniger talked about his new girlfriend, a stripper he had met at a strip club, and Skaggs commented that Complainant would have to work as a stripper if she did not have a job.

6) During Complainant's employment with Crystal, Liniger engaged in the following activities in Crystal's office:

- Giving Complainant a book entitled "The Five Love Languages (singles edition)," and sending her an e-mail that summarized the five love languages and was signed "Paul Liniger - Crystal Springs Landscapes, Inc."
- E-mailing a message to Complainant's Facebook that invited Complainant to a Rose Parade picnic to have drinks with him and his brother.
- Telling Complainant about "He's Just Not That Into You," a movie he had watched over the weekend, and speculating that he and Complainant were like the two main characters who ended up together in the end.
- When Complainant said that she was meeting a friend in Sellwood on a Friday night, telling her he was going to be in that neighborhood and would text her so they could meet up.
- Joking in the office about dating and telling Complainant, in a "creep[y]" voice "never say never" when Complainant said she would never date anyone she "worked with or for."

7) All of Liniger's and Skaggs's activities described in Ultimate Findings of Fact #4-6 were offensive and unwelcome to Complainant and she objected to them on multiple occasions.

8) On July 28, 2010, at 8:30 a.m., Complainant sent an e-mail to Liniger requesting a meeting with him. Her intention in sending the e-mail was to talk with Liniger about the e-mails he and Skaggs had exchanged discussing her and about their offensive sexual conduct in the office.

9) Complainant did not meet with Liniger on July 28, and at 8 a.m. on July 29, 2010, Complainant sent a second e-mail to Liniger in which she stated:

"Paul,

"This is embarrassing for me but I would like to have a meeting with you in regards to the e-mails that you and mark were sending back and fourth [sic]

about me. They were completely inappropriate, disturbing and hurtful. Please set aside some time today to meet with me to discuss this situation.

"Thank you

"Elisa"

10) Liniger did not respond to Complainant's e-mail, instead avoiding her. The next day, Skaggs gave Complainant her final paycheck and told her she was being let go because "we just don't have the money to pay you."

11) Respondent had never warned Complainant about her job performance and she had just heard Liniger and Skaggs been talking about how much money Crystal would be making in the following month.

12) Complainant diligently sought work after she was fired, but did not find another job until November 1, 2010. As of January 1, 2011, she began earning the same amount of money that she had earned while employed at Crystal. In total, she lost $13,880 in back pay, calculated as follows:

- $45,000 per year ÷ 12 = $3,750 per month. $3,750 x 3 months = **$11,250**
- $30,000 per year ÷ 12 = $2,500 per month. $3,750 - $2,500 = **$1,250**
- $35,000 per year ÷ 12 = $2,920 per month. $3,750 – ($2,920 + $450) = **$380**
- $11,250 + $1,250 + $380 = **$13,880**

13) As a result of her discharge, Complainant suffered and will suffer the following out-of-pocket expenses:

- $200 in late fees and extra interest on credit accounts that she was unable to pay in a timely manner after her discharge because of temporary lack of income
- $3,000 more in interest payments over the life of an auto loan because of her lower credit rating caused by her inability to pay her credit accounts in a timely manner in 2010 after her discharge

14) Complainant experienced substantial emotional, mental, and physical suffering as a direct result of Skaggs's and Liniger's unwelcome sexual conduct and her discharge, continuing until September 2012.

CONCLUSIONS OF LAW

1) At all times material herein, Crystal was an "employer" as defined in ORS 659A.001(4).

2) At all times material herein, Paul Liniger was an individual and a "person" under ORS 659A.001(9)(a) and ORS 659A.030(1)(g).

3) The actions, statements and motivations of Liniger and Skaggs are properly imputed to Crystal.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein. ORS 659A.800 to ORS 659A.865.

5) Crystal, acting through its president Liniger and general manager Skaggs, subjected Complainant to sexual harassment in violation of ORS 659A.030(1)(b), OAR 839-005-0021, OAR 839-005-0030(1)(a)(B), and OAR 839-005-0030(1)(b). Liniger aided and abetted Crystal in this unlawful employment practice in violation of ORS 659A.030(1)(g).

6) Liniger, as Crystal's corporate president, is Crystal's proxy. As such, Crystal is strictly liable for Liniger's acts that constitute unlawful sexual harassment. OAR 839-005-0030(3).

7) Crystal discharged Complainant from employment in retaliation for her complaint about Liniger and Skaggs's unlawful sexual harassment in violation of ORS 659A.030(1)(f). Liniger aided and abetted Crystal in its discharge of Complainant, thereby committing an unlawful employment practice in violation of ORS 659A.030(1)(g).

8) Crystal did not discharge Complainant based on her sex in violation of ORS 659A.030(1)(a).

9) 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 back pay and out of pocket expenses resulting from Crystal's unlawful employment practices and Liniger's aiding and abetting of those practices and to award money damages for emotional, mental, and physical suffering sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondents in the Order below are an appropriate exercise of that authority.

OPINION

INTRODUCTION

The Agency alleges that Crystal committed two unlawful employment practices. First, by sexually harassing Complainant, through the actions of Liniger and Skaggs, in violation of ORS 659A.030(1)(b), OAR 839-005-0030(1)(a), and OAR 839-005-0030(1)(b). Second, by discharging Complainant in retaliation for opposing the sexual harassment, in violation of ORS 659A.030(1)(f). The Agency further alleges that Liniger committed an unlawful employment practice in violation of ORS 659A.030(1)(g) by aiding and abetting Crystal in the commission of all unlawful employment practices found herein. As for liability, the Agency alleges that Crystal is strictly liable for the harassment because Liniger is its proxy under OAR 839-005-0030(3), and that Liniger and Crystal should be held jointly and severally liable for all damages awarded.

Because Respondents defaulted by not filing an answer, the forum's task is to determine if the Agency presented a prima facie case on the record to support these allegations.[3]

SEXUAL HARASSMENT

The Agency's Formal Charges allege that Crystal, through the actions of Liniger and Skaggs, subjected Complainant to "hostile environment"[4] and "quid pro quo"[5] sexual harassment during her employment.

A. Sexual Harassment – Hostile Environment

OAR 839-005-0030(1)(b) defines this form of sexual harassment as:

> "Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment."

The conduct must be sex-based. OAR 839-005-0030(1). The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." OAR 839-005-0030(2).

Based on the above, the Agency's prima facie case in a hostile environment case consists of the following elements: (1) Crystal was an employer subject to ORS 659A.001 to 659A.030; (2) Crystal employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Liniger and Skaggs engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Complainant's work performance or creating a hostile, intimidating or offensive work environment for Complainant; and (6) Complainant was harmed by the unwelcome conduct. *See, e.g., In the Matter of Charles Edward Minor,* 31 BOLI 88, 100 (2010).

1. Crystal was an employer and employed Complainant, a female.

There is no dispute that Crystal is an Oregon corporation subject to ORS 659A.001 to 659A.030 that employed Complainant, a female, during all times material.

[3] *See, e.g., In the Matter of Horizon Technologies, LLC,* 31 BOLI 229, 239 (2011) (When a respondent defaults, the agency must present a prima facie case on the record to support the allegations of its charging document in order to prevail).
[4] *See* OAR 839-005-0030(1)(b).
[5] *See* OAR 839-005-0030(1)(a).

2. Liniger and Skaggs, Crystal's owner/president and general manager, engaged in unwelcome verbal conduct directed at Complainant because of her sex.

Complainant credibly testified that Liniger and Skaggs engaged in numerous instances of unwelcome verbal conduct, both oral and written, that was directed at her because of her sex. Their specific conduct is set out in detail in Findings of Fact ##7-18 – The Merits. The forum concludes that the conduct was unwelcome to Complainant based on her convincing testimony that it offended and embarrassed her; her multiple objections to it; her complaints to her sister about it; and her change in apparel and cessation of using makeup at work in an attempt to deter the behavior. The forum concludes that the unwelcome conduct was due to Complainant's sex because of Liniger and Skagg's direct references to: (1) their perception of Complainant's sexual behavior and needs; (2) a movie with erotic sex as its main theme; (3) the breasts of another female employee; (4) strippers; along with Liniger's attempt to date Complainant.

3. Liniger's and Skaggs's unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Complainant's work performance or creating a hostile, intimidating or offensive working environment.

The standard for determining 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 Complainant's particular circumstances. *See, e.g., In the Matter of Spud Cellar Deli, Inc.,* 31 BOLI 106, 133 (2010).

In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *In the Matter of Gordy's Truck Stop, LLC,* 28 BOLI 200, 211 (2007).

Nature of the conduct and its context – The unwelcome conduct involved verbal comments of a distinctly sexual nature made to or directed at Complainant in her work environment. Complainant was 27 years old and a single mother during her employment with Crystal. She quit her previous job to work for Crystal after being solicited to do so by Liniger. Crystal's president and general manager, both males who supervised Complainant, engaged in the conduct, sometimes as a repartee to each other's remarks.

Frequency – All of the unwelcome conduct occurred over a period of three months, from May 3 to July 30, 2010. There were at least 12 separate incidents.[6]

[6] *See* Ultimate Findings of Fact ##4-6.

Severity or Pervasiveness – The unwelcome conduct included the behavior set out in Ultimate Findings of Fact ##4-6 and focused on Liniger's and Skaggs's inquiries and comments about, as well as perceptions of Complainant's sex life and Liniger's attempts to date her. The severity and pervasiveness of this conduct was intensified because it began during Complainant's first week of employment, Complainant objected to it on multiple occasions, and Liniger and Skaggs laughed off her objections and continued to engage in similar conduct.

Physically threatening or humiliating – Complainant credibly testified that working for Crystal was a "horrible" experience for her due to Liniger's and Skaggs's sexual conduct, and that their conduct made her feel upset, awkward, uncomfortable, and embarrassing.

Unreasonable interference with Complainant's work performance – Complainant credibly testified that Liniger's and Skaggs's sexual conduct made it "incredibly difficult emotionally to do the work" that comprised her job, and that she went home each day "just feeling completely emotionally exhausted." She credibly testified that this was in marked contrast to previous jobs where she worked longer hours and still had "a lot of energy" at the end of the day. This demonstrates that Liniger's and Skaggs's sexual conduct unreasonably interfered with Complainant's job performance.

Based on the above, the forum concludes that Liniger's and Skaggs's unwelcome sexual conduct was sufficiently severe or pervasive to have unreasonably interfered with Complainant's work performance and that it created a hostile, intimidating or offensive work environment for Complainant from the objective standpoint of a reasonable person in Complainant's particular circumstances.

4. Complainant was harmed by the unwelcome conduct.

Liniger's and Skaggs's conduct effectively poisoned Complainant's work environment, causing her substantial emotional and mental distress as detailed above. This satisfies the harm element of the Agency's prima facie case.

5. Conclusion.

Crystal, acting through Liniger and Skaggs, committed an unlawful employment practice by subjecting Complainant to sexual harassment in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b). Crystal is liable for this harassment under OAR 839-005-0030(1)(c) and (e), as discussed in more detail later in this Opinion in the section titled "Liability."

B. Sexual Harassment – Quid Pro Quo

OAR 839-005-0030(1)(a) defines *quid pro quo* sexual harassment as:

"(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 sex 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 that individual."

1. OAR 839-005-0030(1)(a)(A) – Explicit or implicit term or condition of employment.

The Agency's prima facie case in an OAR 839-005-0030(1)(a)(A) case consists of the following elements: (1) Crystal was an employer subject to ORS 659A.001 to 659A.030; (2) Crystal employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Liniger and Skaggs engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) Complainant's submission to this conduct was made an explicit or implicit term or condition of Complainant's employment. *Cf. In the Matter of Spud Cellar Deli, Inc.,* 31 BOLI 106, 132, 140 (2010).

The first four elements are identical to those in a "hostile environment" case and require no further discussion, leaving the forum with the task of determining whether Complainant's submission to Liniger's and Skaggs's unwelcome sexual conduct was made an "explicit or implicit term or condition" of her employment. Reframed in the context of this case, the issue is whether Complainant was required to submit to that conduct in order to avoid any negative action being taken against her by Liniger or Skaggs with respect to her terms and conditions of employment.

The forum has already concluded that Liniger and Skaggs engaged in numerous acts that, in their totality, constituted unlawful "hostile environment" sexual harassment. The forum has also found that Complainant objected to that conduct on multiple occasions, and Liniger and Skaggs made light of her objections.[7] However, despite the offensiveness of Liniger and Skaggs's behavior, including Liniger's attempts to date her, there is no evidence that either Liniger or Skaggs made any explicit or implicit threats about what might happen to Complainant if she did not go along with their behavior. Complainant testified that a friend initially advised her not to complain about the e-mails[8] because she was a new employee, but did not testify that she was afraid her job might be at risk if she complained. In addition, she complained about the other offensive conduct on multiple other occasions without any adverse consequences. In conclusion, the forum concludes that Complainant's submission to Liniger's and Skaggs's unwelcome sexual conduct was not made either explicitly or implicitly a term or condition of employment and that Crystal did not violate OAR 839-005-0030(1)(a)(A).

[7] *See* Finding of Fact #19 – The Merits.
[8] *See* Finding of Fact #16 –The Merits.

2. OAR 839-005-0030(1)(a)(B) -- Rejection of unwelcome conduct used as basis for employment decision.

The Agency's prima facie case under OAR 839-005-0030(1)(a)(B) has the same first four elements as an OAR 839-005-0030(1)(a)(A) case. Accordingly, those elements require no further discussion. The fifth element is that Complainant's rejection of Liniger's and Skaggs's unwelcome sexual conduct must have been used as a basis for an employment decision affecting Complainant. Here, the alleged decision is Complainant's discharge.

A quick review of the facts shows that Complainant had objected to Liniger's and Skaggs's unwelcome sexual conduct on multiple occasions before July 28 with no repercussions. However, she had never voiced an objection to the e-mails that she found displayed on her computer monitor on June 11, 2010. At 8 a.m. on July 29, 2010, Complainant sent another e-mail to Liniger in which she objected to those e-mails in the following language:

> "Paul,
>
> "This is embarrassing for me but I would like to have a meeting with you in regards to the e-mails that you and mark were sending back and fourth [sic] about me. They were completely inappropriate, disturbing and hurtful. Please set aside some time today to meet with me to discuss this situation.
>
> "Thank you
>
> "Elisa"

By this e-mail, she effectively voiced her "rejection" to Liniger's and Skaggs's sexual conduct in their e-mail exchange. Liniger did not respond to the e-mail and avoided Complainant the remaining day and a half of her employment. On July 30, Skaggs gave Complainant her final paycheck and told her she was being let go because Crystal did not have the money to pay her.

For several reasons, the forum concludes that Complainant's July 29 e-mail to Liniger was the catalyst for her discharge. First, shortly before her discharge, Complainant had just heard Liniger and Skaggs bragging about how much money Crystal would be making the next month. Second, she received no warnings about her job performance prior to discharge. Third, there was no reliable evidence in the record that Liniger and Skaggs had any other e-mail exchanges about Complainant other than the ones left for her to view on her computer monitor.[9] Given the explicit nature of e-mail messages and their relative proximity in time, the forum finds it extremely unlikely

[9] During her investigation, Meredith requested that Liniger provide "[e]mail correspondence referencing [Complainant], including any email about her time management, use of the Internet, or conducting personal business during work[.]" Liniger's response, which was not supported by any evidence at hearing, was that he had told his "brother who works on my computer stuff to go ahead and delete all email accounts" and he could not find any e-mails responsive to Meredith's request. This request and response are contained in Exhibits A-6 and A-7.

that Liniger or Skaggs were unaware of the specific e-mails Complainant was referring to in her July 29 e-mail to Liniger. During Civil Rights Division senior investigator Meredith's investigation, Skaggs admitted that "Mr. Liniger, one of the owners did tell me that [Complainant] requested a meeting about e-mails[.]"[10] During Liniger's interview with Meredith, Liniger stated, when confronted by the e-mails, that "[s]he had to go looking for the email. I think she was plotting against me."[11] Finally, Complainant was fired the day after she voiced her "rejection" to Liniger's and Skaggs's sexual conduct in their e-mail exchange.[12] Taken together, these facts satisfy the fifth element of the Agency's prima facie case and the forum concludes that Crystal violated ORS 659A.030(1)(a) and OAR 839-005-0030(1)(a)(B) by discharging Complainant based on her rejection of Liniger's and Skaggs's unwelcome sexual conduct. Crystal is liable for this harassment under OAR 839-005-0030(1)(c), as discussed in more detail later in this Opinion in the section titled "Liability."

RETALIATION – DISCHARGE

The Agency's prima facie case in an ORS 659A.030(1)(f) retaliatory discharge case consists of the following elements: (1) Complainant opposed an unlawful employment practice; (2) Crystal discharged Complainant; and (3) there is a causal connection between Complainant's opposition and her discharge. The same facts that prove Complainant was discharged because she rejected Liniger's and Skaggs's sexual conduct also prove that she was discharged in retaliation for opposing an unlawful employment practice by sending her July 29 e-mail to Liniger.

RESPONDENT LINIGER AIDED & ABETTED RESPONDENT CRYSTAL IN DISCHARGING COMPLAINANT

ORS 659A.030(1)(g) provides that it is an unlawful employment practice "[f]or any person, whether an employer or employee, aid, abet, incite, compel or coerce the doing of any of the acts of this chapter or to attempt to do so." This forum has previously held that aiding and abetting, in the context of an unlawful employment practice, means "to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission." *In the Matter of Cyber Center, Inc.,* 32 BOLI 11, 37 (2012), citing *In the Matter of Sapp's Realty, Inc.,* 4 BOLI 232, 277 (1985).

In this case, Liniger was Crystal's owner and president throughout Complainant's employment. A corporate officer and owner who commits acts rendering the

[10] Skaggs's written statement is contained in Exhibit A-5.
[11] Meredith's interview notes are contained in Exhibit A-8.
[12] *Cf.* Barbara Lindeman and Paul Grossman, *Employment Discrimination Law, Fourth Edition,* volume I, pp. 1030-1034 (4th Ed. 2007)(citing Title VII retaliation cases in which a brief gap in time of hours or days between a plaintiff's opposition to unlawful behavior and employer's adverse action was held sufficient to establish a prima facie case).

corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice. *Cyber Center, Inc.,* at 37 (citing numerous other cases supporting this proposition). Ultimate Findings of Fact ##4-6 set out a number of unlawful acts of sexual harassment directed at Complainant that Liniger initiated, participated in, or acquiesced to. These acts make Liniger jointly liable as an aider and abettor for the sexual harassment Complainant was subjected prior to her discharge that he initiated, participated in, or acquiesced to. While there is no direct evidence that Liniger participated in the decision to discharge Complainant, the forum infers[13] his participation based on three facts. First, Complainant sent the e-mail that resulted in her discharge to Liniger and he received it and told Skaggs about it. Second, as Crystal's president he had the unquestionable authority to make that decision, as reinforced by his December 23, 2010, statement to Meredith that he had "decided to let [Complainant] go about a month before he did." Third, in the position statements submitted by Liniger and in his interview with Meredith, Liniger said nothing to indicate that anyone other than himself was responsible for the decision to discharge Complainant.

Respondent Liniger's active role in sexual harassing and discharging Complainant makes him an aider and abettor under ORS 659A.030(1)(g). His liability for his actions is discussed in the following section.

LIABILITY

A. Proxy – Crystal's Liability For Liniger's Actions

As Crystal's owner and corporate officer, Liniger's conduct is properly imputed to Crystal. OAR 839-005-0030(3) provides that "[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." Liniger's owner/corporate officer status makes Crystal strictly liable for Liniger's sexual harassment and discharge of Complainant.

B. Crystal's Liability for Skaggs's Actions

The standard for determining whether Crystal is responsible for Skaggs's on-the-job sexual harassment of Complainant is set out in OAR 839-005-0030(5):

> "(5) Harassment by Supervisor, No Tangible Employment Action: When sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:

[13] *See In the Matter of Income Property Management,* 31 BOLI 18, 39 (2010) (Evidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is the forum's task to decide which inference to draw).

"(a) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.

"(b) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:

"(A) That the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and

"(B) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm."

Skaggs was a supervisor with immediate authority over Complainant. Liniger, Crystal's owner and president, was aware of much of Skaggs's sexual harassment of Complainant and was an active participant in some of it. Based on OAR 839-005-0030(5)(b), the forum concludes that Liniger should have known of the rest of Skaggs's sexual harassment and imputes this knowledge to Crystal, making Crystal liable for all of Skaggs's sexual harassment. The forum does not consider the affirmative defenses set out in OAR 839-005-0030(5)(b) because Respondents failed to plead them in an answer.[14]

C. Liniger's Liability as an Aider and Abettor

As an aider and abettor to Crystal's sexual harassment and discharge of Complainant, Respondent Liniger is jointly and severally liable with Crystal for all damages awarded by this forum.[15]

DAMAGES

The Agency seeks back pay, reimbursement of out-of-pocket expenses, and damages for mental, emotional, and physical suffering.

A. Back Pay

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *In the Matter of From the Wilderness,* 30 BOLI 227, 290 (2009). The purpose of back pay awards in an employment discrimination case is to compensate a complainant for the loss of wages and benefits the he or she would have received but for the respondent's unlawful employment practices. Awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *In the Matter of Trees, Inc.,* 28 BOLI 218, 251 (2007). A complainant who seeks back pay is required to mitigate damages by using reasonable

[14] *See* OAR 839-050-0130(3) ("The failure of the party to raise an affirmative defense in the answer is a waiver of such defense.")
[15] *See, e.g., In the Matter of Dr. Andrew Engel, DMD, PC,* 32 BOLI 100, 148-49 (2012), *appeal pending.*

diligence to find other suitable employment. *In the Matter of Rogue Valley Fire Protection*, 26 BOLI 172, 184 (2005).

Through Complainant's credible testimony and documentation of her job search, the Agency established that she diligently sought other suitable employment after her discharge, eventually finding another job that started on November 1, 2010. While employed by Crystal, Complainant was paid a salary of $45,000 a year, or $3,750 a month. She had no earnings between her discharge and starting her new job. During that period of time, she would have earned $11,250 ($3,750 x 3 months), had she not been discharged. Her starting salary at her new job was $30,000 a year, or $2,500 a month. She received a raise to $35,000 a year beginning December 1, 2010, or $2,920 a month, and also received $450 in commissions in December 2010. Since January 1, 2011, she has been paid at least $45,000 a year. In total, she is entitled to $13,880 in back pay, as summarized in Ultimate Finding of Fact #12. Although the Agency amended its Formal Charges at hearing to substitute the sum "$11,250" in lost wages for the sum "$14,000," the forum is not limited in its award because the amendment did not delete the nonrestrictive phrase "at least" that prefaced the sum "$14,000" in the Formal Charges. Had the Agency done so, the forum would only be able to award $11,250 in back pay.

B. Out-of Pocket Expenses

This forum has consistently held that out-of-pocket expenses that are directly attributable to an unlawful practice are recoverable from a respondent as a means to eliminate the effects of any unlawful practice found. *From the Wilderness,* at 290. *See also In the Matter of Dr. Andrew Engel, DMD, PC,* 32 BOLI 100, 150 (2012), *appeal pending; In the Matter of Trees, Inc.,* 28 BOLI 218, 251 (2007); *In the Matter of Southern Oregon Subway, Inc.,* 25 BOLI 218, 242 (2004). In the past, the forum has awarded damages for expenses such as travel expenses incurred in obtaining alternative employment,[16] medical expenses that would have been covered by a respondent's insurance policy, had the complainant not been fired,[17] added costs incurred because of loss of use of an employee discount card,[18] and moving costs attributable to an unlawful act involving real property.[19] In this case, Complainant credibly testified that she had to pay out to $200 in late fees to credit card companies in 2010 because of her inability to make timely payments in the months following her discharge. She also credibly testified that her credit rating took a major beating as a direct result of those late payments. As a result, she will have to pay an extra $3,000 in

[16] *In the Matter of Barrett Business Services, Inc.,* 20 BOLI 189, 215, *aff'd Barrett Business Services, Inc. v. Bureau of Labor and Industries,* 173 Or App 444 (2001); *In the Matter of Day Trucking, Inc.,* 2 BOLI 83, 87-88 (1981).

[17] *In the Matter of Body Imaging, P.C.,* 17 BOLI 162, 175, 191 (199*8), affirmed in part, reversed in part, Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

[18] *In the Matter of Wal-Mart Stores, Inc*., 24 BOLI 37, 65 (2003).

[19] *In the Matter of Strategic Investments of Oregon, Inc.,* 8 BOLI 227, 250 (1990).

interest over the life of a car loan that she obtained in September 2012.[20] The forum finds that both of these expenses are a direct result of Respondents' unlawful practices and awards Complainant $3,200 in reimbursement for out-of-pocket expenses.

C. Emotional, Mental, and Physical Suffering Damages

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the complainant. 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. *From the Wilderness*, at 291-92.

In this case, the primary evidence of Complainant's emotional and mental suffering was her own compelling testimony.

The type of discriminatory conduct experienced by Complainant was verbal sexual harassment from Crystal's president/owner and general manager that focused on their graphic inquiries and speculations about Complainant's sex life and included Liniger's attempts to date her. The conduct took place over a three-month period, beginning in the first week of her employment and ending on the last day of her employment, with at least 12 specific incidents. Although there was no physical abuse, the toll on Complainant's psyche was severe and compounded by the fact that her harassers refused to take her complaints seriously.

Complainant testified at length and in considerable detail about the type and duration of her emotional, mental, and physical distress. Although her testimony is noted in detail in the Findings of Fact -- The Merits, the forum recapitulates it below to emphasize the reasons for its large award.

To add perspective to the effect that Respondents' discriminatory conduct had on Complainant, the forum briefly reviews Complainant's life before she started work at Crystal. She was 27 years old, a single mother with a six year old daughter, and had worked at good paying jobs her entire adult life. Most of her jobs had been in environments where most of the employees were men, and she had never before been subjected to unwelcome sexual conduct. She had never before been fired. She quit a good job to come to work for Crystal after being solicited to do so by Liniger.

Complainant found working for Crystal to be a "horrible" experience because of Liniger's and Skaggs's unwelcome sexual conduct that upset her and made her feel awkward, uncomfortable, and embarrassed during her employment. The embarrassment was magnified by Skaggs's post about "*9½ Weeks*" on her Facebook that could have been viewed by as many as 200 of Complainant's friends.[21] Liniger's

[20] *See* Finding of Fact #35 -- The Merits.
[21] *See* Finding of Fact #8 -- The Merits.

attempts to date her caused her additional discomfiture because she did not want to mingle with her boss on a social basis. Complainant often talked to her sister Becky[22] about Liniger and Skaggs's behavior. As Liniger's and Skaggs's comments began "to escalate" and it became more apparent that Liniger wanted to date Complainant, she stopped wearing makeup and began wearing different clothes to work. Compared to previous jobs where she had energy at the end of each day, she went home after each day at Crystal "just feeling completely emotionally exhausted." Because of her fatigue, she had less energy to spend quality time with her daughter after work. She became "super sensitive" after she found the emails on her computer, was more easily offended, and lost the ability to distinguish whether Liniger's and Skaggs's behaviors should actually have offended her or if she felt offended because she had become overly sensitized.

Complainant cried when she was fired, leaving Respondents' office in tears. Subsequently, she often talked to her sister Julie about her unfair discharge, repeatedly questioning her judgment in sending the July 28 and 29 e-mails to Liniger.

As mentioned earlier, Complainant could no longer pay all her bills after she was fired. She was accustomed to earning a good salary, and it was very hard for her to transition from earning a good salary to being "very poor" and "not having any money." Her only income between July 30 and October 30 was $200 a week in unemployment benefits. She suffered the humiliation and embarrassment of having to call her ex-husband and asking to borrow $1200 to help pay living expenses. She also had to borrow $200 from her parents. She lost weight and her "face broke out," making her believe she looked unhealthy.

Her credit rating took a major beating as a direct result of the late payments she made on her credit accounts as a direct result of being fired. The bank closed her checking account when she overdrew her checking account and she had to go to an ATM cash machine to get money to pay her bills until she could open another checking account. The drop in her credit rating was still impacting life in a major way at the time of the hearing, as shown by the high interest rate on her September 2012 car loan.

Before Complainant was fired, she slept 8-9 hours per night. After she was fired, she found herself awake at nights at first, then began sleeping 11-12 hours per night. She began having nightmares that Skaggs was shooting her, based on Skaggs's discussion at Crystal about keeping a gun in his car. Before working for Crystal, she had never had a panic attack. After her discharge, she experienced fear and anxiety and had several "panic attacks" after her nightmares, experiencing shortness of breath, a "feeling like she [couldn't] breathe," and "a very nervous feeling." She also experienced the "sudden onset of nerves where she had a shortness of breath" several times during her job search, as she worried about getting another job. As recently as

[22] Complainant testified that Becky was unavailable to testify at the hearing because she is currently working in China.

September 2012, she had a panic attack at the Pendleton Roundup when she stood in line to get her ticket and mistakenly thought she saw Liniger standing next to her.

Complainant has always been socially outgoing, but stopped going to social events after her discharge because she could no longer afford it and just did not want to see anyone. She did not attend a good friend's wedding because she could not afford to buy an appropriate dress. She no longer scheduled "play dates" with her daughter because she could not afford them. Her aloofness brought her additional grief because her friends, many of whom she had been friends with since her early teen years, did not understand.

At her new job, she found herself wondering what OAC's male employees were saying about her behind her back. After her experience at Crystal, she decided not to "friend" any of her co-workers on Facebook, something many of her co-workers found strange. When a male co-worker wanted to be friends with her, her immediate reaction was to decide she would not be friends with him, feeling "terrified that he was going to like me or fall in love with me or start to give me things" because of her experience with Liniger. At OAC, her first supervisor was a woman. When that woman was replaced by a male, Complainant found the transition difficult because of her recent experience with Liniger and Skaggs.

Finally, Complainant considered seeking counseling, but had no insurance and could not afford it.

In conclusion, Respondents' discriminatory conduct had a profoundly negative impact in many areas of Complainant's life over a substantial period of time. The Formal Charges seek "at least $100,000" in damages for emotional, mental, and physical suffering. Based on the record, the forum concludes that $150,000 is a more appropriate award.

MANDATORY TRAINING ON RECOGNIZING AND PREVENTING DISCRIMINATION IN THE WORKPLACE BASED ON SEX AND RETALIATION

In its Formal Charges, the Agency asked that Respondents be required to have "its managers, professional staff and employees participate in training on understanding and avoiding workplace harassment and other discrimination based on protected class, provided by the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to the Agency."

The Commissioner of BOLI is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ORS 659A.850(4). Among other things, that may include requiring the respondent to:

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

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

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

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

This statute gives the Commissioner the authority to require Respondents to undergo training of the type sought in the Formal Charges. However, since the unlawful employment practices only relate to the protected classes of sex and retaliation, requiring training related to all protected classes cuts an overly broad swath. Consequently, the forum has tailored the required training to sex and retaliation.[23]

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Crystal Springs Landscapes, Inc.'s violations of ORS 659A.030(1)(b) and ORS 659A.030(1)(f) and Respondent Paul Liniger's violation of ORS 659A.030(1)(g), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Crystal Springs Landscapes, Inc.** and **Paul Liniger** to 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 Elisa Apa** in the amount of:

1) THIRTEEN THOUSAND EIGHT HUNDRED AND EIGHTY DOLLARS ($13,880), less lawful deductions, representing wages lost by Elisa Apa between August 1, 2010, and January 1, 2011, as a result of Respondents' unlawful employment practices found herein; plus,

2) ONE HUNDRED AND FIFTY THOUSAND DOLLARS ($150,000), representing compensatory damages for emotional, mental, and physical suffering experienced by Elisa Apa as a result of Respondents' unlawful employment practices found herein; plus,

3) THREE THOUSAND TWO HUNDRED DOLLARS ($3,200) representing out-of-pocket expenses incurred by Elisa Apa as a result of Respondents' unlawful employment practices found herein; plus,

4) Interest at the legal rate on the sum of ONE HUNDRED AND SIXTY-SEVEN THOUSAND AND EIGHTY DOLLARS ($167,080) until paid.

[23] *Cf. Dr. Andrew Engel* at 154 (required training limited to discrimination based on religion); *In the Matter of Cyber Center, Inc.,* 32 BOLI 11, 44-45 (2012) (required training limited to discrimination based on sex/pregnancy).

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondents' unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent Crystal to require its current employees, if any, and Paul Liniger to participate in training on understanding and avoiding sexual harassment and ORS 659A.030(1)(f) retaliatory behavior in the workplace, with such training to be provided by the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to the Agency.

In the Matter of

DAN THOMAS CONSTRUCTION, INC.

Case No. 13-13
Final Order of Commissioner Brad Avakian
Issued June 13, 2013

SYNOPSIS

Respondent employed Claimant in 2010 in Oregon and Washington at the agreed rate of $14 per hour. Claimant earned a total of $14,357.00 in wages while working in Oregon and has been paid a total of $10,985.50 for that work, leaving $3,372.50 in unpaid, due, and owing straight time and overtime wages. Respondent's failure to pay the wages was willful, and he was ordered to pay Claimant $3,360.00 in penalty wages. Respondent was also ordered to pay $3,360.00 in civil penalties based on his failure to pay overtime wages to Claimant. ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 23-24, 2013, at the offices of the Port of Tillamook, located at 4000 Blimp Boulevard, Tillamook, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by chief prosecutor Jenn Gaddis, an employee of the Agency. Wage claimant Aaron Inclan (Claimant) was present throughout the hearing and was not represented by counsel. Dan Thomas Construction, Inc. ("Respondent") was represented at the hearing by Dan Thomas, its authorized representative.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Administrator Gerhard Taeubel; and Kristine "Tina" Inclan, Claimant's mother.

Respondent called the following witnesses: Dan Thomas, Respondent's corporate president; and Judy Thomas, Respondent's vice president and corporate secretary.

The forum received into evidence:

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

b) Agency exhibits A-1 through A-9, A-1, pp. 1-5, 11-74, A-10, A-11 (submitted prior to hearing) and A-12, A-13, A-14, A-15, A-15a, A-16, A-16a, and A-17 (submitted and received at hearing); and

c) Respondent exhibits R-1 through R-4, R-5, pp. 7-32, and R-6 through R-9 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, 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 13, 2011, Claimant filed a wage claim with the Agency alleging that Dan Thomas Construction, Inc. had employed him and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

2) On January 19, 2012, the Agency issued Order of Determination No. 11-1791 based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the Order alleged that:

- Claimant performed work for Respondent from January 4, 2010 through July 1, 2010, at the agreed rate of $14 per hour.
- Claimant worked a total of 911.5 hours in Oregon, 209.5 of which were hours worked over 40 hours at a given workweek.
- Claimant earned a total of $14,227.50 in straight time and overtime wages and was only paid $10,495.50, leaving unpaid wages in the amount of $3742.00;
- Respondent willfully failed to pay these wages and owes Claimant $3,360.00 in ORS 652.150 penalty wages.
- Respondent paid Claimant less than the wages to which Claimant was entitled under ORS 653.010 to 653.261 and is liable to Claimant for civil penalties in the amount of $3,360.00, pursuant to ORS 653.055(1)(b).

3) On March 5, 2012, Respondent filed an answer and request for hearing through Kelly Ireland, attorney at law, in which it denied that any wages were owed to Claimant and affirmatively alleged that Claimant was paid more than the amount he was owed for wages by keeping Respondent's tools, a work truck belonging to Respondent, and a car Respondent bought.

4) On February 15, 2013, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on April 23, 2013, at the offices of the Port of Tillamook. 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, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

5) On March 29, 2013, Respondent filed a motion to postpone and an authorization for Judy Thomas to act as Respondent's authorized representative. Respondent asserted the need for a postponement because:

- Respondent was unaware that Ireland, its former attorney, had requested a hearing due to Ireland's failure to forward any relevant documentation to Respondent.
- Respondent had another hearing in April in Washington regarding the same wage claimant and needed time to prepare for both cases.
- Respondent had no idea that this hearing was scheduled until a week before filing its motion to postpone.

On April 2, 2013, the Agency filed objections to Respondent's motion to postpone. On April 8, 2013, the ALJ denied Respondent's motion to postpone, finding that the Notice of Hearing was mailed to Respondent's correct street address, and that there was no evidence that Respondents did not receive the Notice or had made any efforts to find another attorney.

6) On April 16, 2013, Respondent filed a notice with the forum stating that Dan Thomas, Respondent's corporate president, was replacing Judy Thomas as Respondent's authorized representative.

7) 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.

8) During the hearing, the Agency stipulated that Claimant was paid for all wages earned in Oregon through April 16, 2010.

9) During the hearing, Dan Thomas requested that Judy Thomas be allowed to substitute for him as Respondent's authorized representative. The ALJ denied the request.

10) The ALJ issued a proposed order on May 17, 2013, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

32 BOLI ORDERS

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation engaged in the business of concrete-related construction and was based in Neskowin, Oregon, with the mailing address of PO Box 482, Neskowin, OR 97149. Respondent's corporate president was Dan Thomas. Judy Thomas, Dan Thomas's wife, was Respondent's corporate secretary and the person responsible for paying Respondent's employees.

2) At all times material herein, Respondent's work week was Monday through Sunday.

3) Claimant was employed by and worked for Respondent as a concrete laborer in 2010.

4) Claimant worked for Respondent in Oregon from January 4 through April 24, 2010, and in Oregon and Washington from April 27 through July 1, 2010, at the agreed rate of $14 per hour. His last day of work for Respondent was July 1, 2010. He quit working for Respondent because he was not being paid regularly and Respondent owed him a considerable amount of wages.

5) While employed by Respondent, Claimant maintained a hand written contemporaneous record of the hours he worked on weekly time sheets provided by Respondent. Claimant turned these time sheets in to Judy Thomas.

6) Other than Claimant's time sheets, Respondent maintained no other records showing the hours that Claimant worked. In addition, Respondent did not keep payroll records showing amounts paid to Claimant.

7) Claimant was paid a total of $10,985.50 for work he performed for Respondent in Oregon in 2010. That payment came from the following sources:

- $1,000.00 check (#21533) from Respondent, dated 3/11/10;
- $500.00 from a $1,500.00 deposit made directly to Claimant's bank account by Respondent on 3/31/10, of which Claimant retained $500.00 for himself and distributed $1,000.00 to other employees of Respondent;
- $600.00 check (#21400) from Respondent, dated 4/23/10;
- $5,000.00 check (#21633) from Respondent, dated 6/12/10;
- $3,000.00 from Respondent's Construction Contractor's Board ("CCB") bond after a July 7, 2011, CCB arbitration related to Claimant's attempt to collect pre-April 17, 2010, unpaid wages through Respondent's CCB bond; and
- $885.50 from Respondent pursuant to the CCB arbitration award

These payments were sufficient to pay Claimant in full for all straight time and overtime wages he earned while working for Respondent in Oregon through April 16, 2010.

8) From April 17 through July 1, 2010, Claimant worked the following straight time and overtime hours[1] for Respondent in Oregon, earning the wages set out in parentheses:

Week Ending	Total Hours	ST[2] Hours	OT[3] Hours	Total Earned
4/25/10	67	40 ($560)	27 ($567)	$1,127
5/2/10	25.5	14 ($196)	11.5[4] ($241.50)	$ 430.50
5/9/10	15	5 ($70)	10[5] ($210)	$ 280
5/16/10	14.5	14 ($196)	.5[6] ($10.50)	$ 206.50
5/23/10	0	0	0	$ 0
5/30/10	12.5	6 ($84)	6.5[7] ($136.50)	$ 220.50
6/6/10	56	40 ($560)	16 ($336)	$ 996
6/13/10	12	12 ($168)	0	$ 168
6/20/10	10.5	10.5 ($147)	0	$ 147
6/27/10	0	0	0	$ 0
7/4/10	6	6 ($84)	0	$ 84

In total, Claimant worked 147.5 straight time hours and 71.5 overtime hours in Oregon for Respondent from April 17 through July 1, 2010, earning $2,065.00 in straight time wages and $1,501.50 in overtime wages, for a total of $3,566.50.

9) From April 27 through June 30, 2010, Claimant also earned $5,411.00 while working for Respondent in the State of Washington.

10) Respondent issued a 2010 W-2 form to Claimant in which Respondent stated that Claimant had earned $19,768.00 in 2010 wages while working for Respondent.

11) At the time of hearing, Respondent had not paid Claimant for all work performed in Oregon from April 17 through July 1, 2010, and still owes him $3,372.50 for that work.

12) On September 13, 2011, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent at PO Box 482, Neskowin, OR 97149 that stated:

> "You are hereby notified that "AARON MANUEL INCLAN has filed a wage claim with the Bureau of Labor and Industries alleging:

[1] The forum has not included any time denoted as driving time based on Taeubel's testimony that driving time was not included in the Agency's computation of hours worked by Claimant.
[2] ST = straight time hours
[3] OT = overtime hours
[4] 26 straight time hours were also worked in Washington before Claimant worked the 11.5 overtime hours in Oregon.
[5] 35 straight time hours were also worked in Washington before Claimant worked the 10 overtime hours in Oregon.
[6] 26 straight time hours were also worked in Washington before Claimant worked the 11.5 overtime hours in Oregon.
[7] 34 straight time hours were also worked in Washington before Claimant worked the 11.5 overtime hours in Oregon.

"Unpaid wages of $4,757.00 at the rate of $14.00 per hour from January 4, 2010 to July 1, 2010.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before September 28, 2011, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

13) Respondent mailed a response on or about October 27, 2011, but did not send any money.

14) ORS 652.150 penalty wages are computed as follows for Claimant: $14 per hour x 8 hours x 30 days = $3,360.00.

15) ORS 653.055(1)(b) civil penalties are computed as follows for Claimant: $14 per hour x 8 hours x 30 days = $3,360.00.

ULTIMATE FINDINGS OF FACT

1) In 2010, herein, Respondent was an Oregon corporation engaged in the business of concrete-related construction that employed Claimant as a concrete laborer at the agreed rate of $14 per hour.

2) Claimant worked for Respondent from January 4 through July 1, 2010, quitting Respondent's employment on July 1, 2010. During this time, he earned $14,357.00 in wages in Oregon while working for Respondent.

3) At the time of hearing, Claimant had been paid for all the wages earned through April 16, 2010, while working in Oregon for Respondent.

4) Claimant worked 147.5 straight time hours and 71.5 overtime hours in Oregon for Respondent from April 17 through July 1, 2010, earning a total of $3,566.50.

5) Claimant was paid a total of $194.00 for the work he performed in Oregon for Respondent from April 17 through July 1, 2010, leaving $3,372.50 in unpaid, due, and owing wages.

6) On September 13, 2011, the Agency mailed a notice to Respondent's correct business address that notified Respondent of Claimant's wage claim and

demanded that Respondent pay the unpaid, due, and owing wages if the claim was correct. At the time of hearing, Respondent had not paid Claimant any of his earned, due, and owing Oregon wage for any of this work and still owes him $3,372.50 in unpaid wages.

7) ORS 652.150 penalty wages are computed as follows for Claimant: $14 per hour x 8 hours x 30 days = $3,360.00

7) ORS 653.055(1)(b) civil penalties are computed as follows for Claimant: $14 per hour x 8 hours x 30 days = $3,360.00

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer who directly engaged the personal services of Claimant in Oregon and suffered or permitted Claimant to work and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS 653.010 to ORS 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405, ORS 653.010 to ORS 653.261.

3) Respondent violated ORS 652.140(2) by failing to pay to Claimant all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after Claimant quit Respondent's employment. Respondent owes Claimant $3,372.50 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing and Respondent owes $3,360.00 in penalty wages to Claimant. ORS 652.150.

5) Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 by failing to pay him overtime wages for all hours worked over 40 in a given workweek and is liable to pay civil penalties to Claimant in the amount of $3,360.00 ORS 653.055(1)(b).

OPINION

CLAIMANT'S WAGE CLAIM

To establish Claimant's wage claim, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than minimum wage; 3) 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 Letty Lee Sesher,* 31 BOLI 255, 261 (2011).

CLAIMANT WAS EMPLOYED BY RESPONDENT

This element is undisputed, as Respondent admitted that it employed Claimant in its answer and request for hearing.

THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED

It is undisputed that Claimant's agreed rate of pay was $14 per hour. Claimant's overtime rate for hours worked over 40 in a given workweek is calculated by multiplying $14 per hour x 1.5 = $21 per hour. OAR 839-020-0030(1).

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

The Agency stipulated at the hearing that Claimant was paid for all hours worked through April 16, 2010. Accordingly, the forum only need determine the amount of extent of work performed by Claimant from April 17 through July 1, 2010. Claimant kept track of his hours on his weekly time sheets and credibly testified that they accurately reflect his hours worked. Claimant then gave them to Judy Thomas, who modified them to subtract Claimant's driving hours. In total, the modified time sheets show that Claimant worked 147.5 straight time hours and 71.5 overtime hours in Oregon for Respondent from April 17 through July 1, 2010. At hearing, the Agency conceded that it did not include driving hours in calculating the total hours worked by Claimant. The forum has done likewise.[8]

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

To begin, the forum addresses Respondent's defenses[9] that Claimant was paid more than the amount he was owed for wages by keeping Respondent's tools, a work truck belonging to Respondent, and a car Respondent bought for Claimant. At hearing, Respondent produced no credible evidence to support these defenses and the forum rejects them.[10]

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[8] *But see* OAR 839-020-0045(2)-(7), which sets out six different circumstances in which "travel time" must be counted as hours worked.

[9] *See* Finding of Fact 10 - Procedural.

[10] Even if Respondent had produced evidence to support these defenses, the forum would not consider the sums alleged to be involved as an offset against wages due to Claimant. *See, e.g., In the Matter of J & S Moving & Storage, Inc.,* 31 BOLI 286, 302 (2012) *(*Oregon wage and hour laws severely limit the circumstances under which an employer may deduct money from an employee's wages; an employer may not withhold an employee's wages based on allegations, even if confirmed, that the employee stole money from the employer); *In the Matter of Pavel Bulubenchi,* 29 BOLI 222, 233-34 (2007) (When respondent did not appear at hearing or otherwise produce any evidence to support his claim that a wage claimant requested that respondent deduct $3,500 from his wages as payment for a truck he purportedly purchased from respondent, the forum held respondent liable for the additional unpaid wages).

Based on the Agency's stipulation that Claimant was paid for all hours worked from January 4 through April 16, 2010, the issue before the forum is how much Claimant was paid, if anything, for the 147.5 straight time hours and 71.5 overtime hours he worked in Oregon after April 16. The forum relies on the following evidence in making its determination:

1. Claimant's 2010 W-2 showing Claimant earned $19,768.00 while working for Respondent;
2. A determination by the Washington Department of Labor & Industries that Claimant earned $5,411.00 while working for Respondent in Washington between April 27 and June 30, 2010;
3. Respondent's direct or indirect[11] payment of $10,985.50 to Claimant for wages earned in Oregon in 2010; and
4. The Agency's stipulation that Claimant was been paid for all work performed for Respondent in Oregon between January 4 and April 16, 2010.

Based on this evidence, the forum calculates Claimant's post-April 16 unpaid wages as follows:

Total wages earned in 2010:	$ 19,768.00
Less Washington wages:	- 5,411.00
Total 2010 Oregon wages:	$ 14,357.00
Less 2010 Oregon wages paid:	- $ 10,985.50
Total 2010 unpaid Oregon wages:	$ 3,372.50

Claimant earned $3,566.50 in Oregon from April 17 through July 1, 2010.[12] The difference of $194.00 between those earnings and the $3,372.50 in wages due to him is attributable to wages included in the $10,985.50 he received that are properly credited towards the wages he earned from April 17 through July 1, 2010.

In her testimony, Judy Thomas claimed that Claimant was overpaid for his "expenses," and that some of the money Respondent paid Claimant for expenses should be credited as wages paid. There are copies of a number of checks in the record that were made out to Claimant for "expenses," along with copies of a number of "expense" receipts that Claimant gave to Judy Thomas. However, because Thomas's testimony concerning those checks and receipts was disjointed, confusing, contradictory, and at times, simply unbelievable, the forum dismisses her claim that some of the money Respondent paid Claimant for expenses should be credited as wages paid.[13]

[11] "Indirect" refers to the Respondent's $3,000 CCB bond that was paid to Claimant after the CCB arbitration over Claimant's pre-April 17, 2010, wages earned in Oregon.
[12] *See* Finding of Fact 8 – The Merits.
[13] As an example, she testified that Claimant came to her house late at night when she was "heavily medicated," "asleep," and "not fully thinking," that Claimant told her what amount to write on his expense check and she wrote that amount with "nothing to back up the expenses," and that she did this because she "had trust" in Claimant. She further testified that she only wrote the checks out for whatever amount Claimant asked for because that was the only way to get him to leave. When asked on cross

CLAIMANT IS OWED ORS 652.150 PENALTY WAGES

The forum may award penalty wages when 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).

The Agency established by a preponderance of the evidence that Claimant and Respondent agreed upon a wage rate of $14 per hour and that Judy Thomas, Respondent's corporate secretary and bookkeeper who wrote pay checks to Respondent's employees, was aware of the hours worked by Claimant and the amount he was paid. There is no evidence that Respondent, through its agent Judy Thomas, acted other than voluntarily and as a free agent in underpaying Claimant. The forum concludes that Respondent acted willfully in failing to pay Claimant his wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the 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.
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimant's wages on September 13, 2011. The Agency's Order of Determination, issued on January 19, 2012, repeated this demand, and included a demand for overtime wages.[14] Respondent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum

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examination why she did not call Dan Thomas, her husband, to complain about Claimant's behavior, she testified that in April, May, and June 2010 he was "unreachable" even though he had a cell phone and was working in the continental United States.

[14] *See In the Matter of MAM Properties, LLC,* 28 BOLI 172, 190 fn. 7 (2007) (the Agency's Order of Determination constitutes a written notice of nonpayment of wages).

assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Penalty wages for Claimant equal $3,360.00 ($14 per hour x eight hours x 30 days).

CLAIMANT IS OWED AN ORS 653.055(1)(B) CIVIL PENALTY

ORS 653.055 provides that the forum may award civil penalties to an employee when his or her employer pays that employee less than the wages to which he or she is entitled under ORS 653.010 to 653.261. This includes overtime wages. "Willfulness" is not an element. *In the Matter of Letty Lee Sesher,* 31 BOLI 255, 264 (2011). Claimant earned $2,065.00 in straight time wages and $1,501.50 in overtime wages, for a total of $3,566.50, from April 17 through July 1, 2010, and was only paid $194.00. When $194.00 is subtracted from $1,501.50, $1,307.50 in unpaid overtime wages still remain. Based on these unpaid overtime wages, the forum assesses an ORS 653.055(1)(b) civil penalty of $3,360.00 against Respondent ($14 per hour x eight hours x 30 days).

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **DAN THOMAS CONSTRUCTION, INC.** to 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, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant in the amount of **TEN THOUSAND NINETY-TWO DOLLARS AND FIFTY CENTS ($10,092.50)**, less appropriate lawful deductions, representing $3,372.50 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from August 1, 2010, until paid; $3,360.00 in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from September 10, 2010, until paid; and an ORS 653.055(1)(b) civil penalty of $3,360.00, plus interest at the legal rate on that sum from September 10, 2010, until paid.

In the Matter of

GREEN THUMB LANDSCAPE AND MAINTENANCE, INC., SCOTT A. FRIEDMAN and JENNIFER FRIEDMAN,

Case No. 25-12
Final Order of Commissioner Brad Avakian
Issued July 29, 2013

SYNOPSIS

The Agency's Notice of Intent sought to assess $132,000 in civil penalties against Respondents and to place Respondents on the Commissioner's List of Ineligibles based on numerous alleged violations of Oregon's prevailing wage rate and wage and hour laws. The forum concluded that Respondent Green Thumb failed to pay the correct prevailing wage rate to four workers, filed one inaccurate and incomplete payroll report, and failed to provide two meal periods to an employee, and assessed civil penalties in the amount of $8,000. The forum also found that Green Thumb's underpayment of wages was unintentional and did not place Respondents on the Commissioner's List of Ineligibles. ORS 279C.845, OAR 839-025-0010, ORS 279C.840(1), OAR 839-025-0035(1), OAR 839-020-0050, ORS 653.261, OAR 839-020-0030, OAR 839-025-0050, ORS 652.610(4), ORS 653.045, OAR 839-020-0080, OAR 839-020-0083, ORS 279C.865, OAR 839-025-0530, OAR 839-025-0540, ORS 652.900, and OAR 839-020-1010.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 28-29, 2013, at the office of the Bureau of Labor and Industries ("BOLI" or "the Agency") located at 3865 Wolverine St. NE, Building E-1, Salem, Oregon.

BOLI was represented by chief prosecutor Jenn Gaddis, an employee of the Agency. Scott Friedman represented Respondent Green Thumb Landscape and Maintenance, Inc. ("Green Thumb") as its authorized representative, and Respondents Scott and Jennifer Friedman represented themselves.

The Agency called Dylan Morgan, BOLI Wage and Hour Division compliance manager, and Lois Banahene, BOLI Wage and Hour Division compliance manager (by telephone), as witnesses. Respondents S. and J. Friedman called themselves as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing). X-13 and X-14, consisting of Respondents' amended case summary filed on the afternoon of May 28, was offered but not received.

b) Agency exhibits A-1, pp. 1-5 and 12-28, A-2, A-3, A-6 through A-12, A-15, pp. 2-39, A-16, A-18 through A-22, A-24 through A-27, A-28, pp.2-5, A-32, p. 2, and A-34;

c) Respondent exhibits R-6, R-7, and R-11.

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

FINDINGS OF FACT – PROCEDURAL

1) On January 30, 2013, the Agency issued a Notice of Intent ("NOI") to Place on List of Ineligibles and Assess Civil Penalties in the amount of $132,000 against Respondents Green Thumb, S. Friedman, and J. Friedman. By paragraph number, the NOI alleged the following:

> 4. Respondents failed to pay weekly overtime wages to its workers on a non-public works project during 15 weeks in 2008 and 2009.
>
> 5. Respondents failed to pay the appropriate overtime based on a weighted average when its worker worked on a public works project and a non-public works project in the same workweek.
>
> 6. Respondents deducted money from a worker's pay for a 401(k) benefit plan but did not pay the deducted amounts to that plan.
>
> 7. Respondents failed to keep records as required.
>
> 8. Respondents failed to provide records to BOLI as required.
>
> 9. Respondents failed to pay final wages in a timely manner to its worker Patrick Eugene Reay.
>
> 10. Respondents failed to pay the prevailing wage rate for work performed on a public works project -- the West Salem Middle School New Construction Site Development project (the "Project") -- to six workers from August 31, 2010, to February 26, 2011.
>
> 11. Respondents filed 16 inaccurate and/or incomplete certified payroll statements for work performed on the Project and failed to certify the accuracy of the payroll statements during 11 weeks ending in September, October, November, and December 2008, and January 2009.[1]

[1] The Notice of Intent, at paragraph 11, alleges that Respondents "filed sixteen inaccurate and/or incomplete certified payroll statements for work performed on the West Salem Middle School New Construction Site Development project. Respondents failed to certify the accuracy of the payroll on

12. Respondents failed to provide meal periods to an employee.

13. Respondent Green Thumb should be placed on the Commissioner's List of Ineligibles based on Green Thumb's intentional underpayment of the prevailing wage rate to its workers on the Project.

14. Respondents S. Friedman, and J. Friedman were the Green Thumb corporate officers responsible for Green Thumb's intentional failure or refusal to pay the prevailing wage rate to workers on the Project and should be placed on the Commissioner's List of Ineligibles because of their responsibility.

The Agency alleged aggravating factors with respect to its allegations of failure to pay the current prevailing wage rate and the filing of inaccurate and/or incomplete certified payroll statements.

2) On February 19, 2013, Respondents, through counsel Michael Petersen, filed an answer and request for hearing. Among other things, Respondents alleged that there was no basis to place them on List of Ineligibles because the workers employed on Project were employed by Green Thumb, LLC, not by Respondent Green Thumb or the Friedmans.

3) On March 4, 2013, BOLI's Hearings Unit issued a Notice of Hearing to Respondents, their counsel, and the Agency setting a hearing date of March 26, 2013. On the same day, the ALJ issued a case summary order that required submission of case summaries by March 18, 2013, and included a statement of the possible sanctions for failure to comply with the case summary order.

4) On March 8, 2013, the ALJ granted Respondents' unopposed motion to postpone the hearing. On March 12, the ALJ issued an order resetting the hearing to begin on May 28, 2013, and setting a new case summary due date of May 17, 2013.

5) Respondents, through counsel, filed their case summary on May 16, and the Agency filed its case summary on May 17.

6) On May 22, Respondents' counsel Michael Petersen filed a letter withdrawing as Respondents' counsel, enclosing a letter authorizing Respondent S. Friedman to appear as the authorized representative for Green Thumb.

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

8) At the outset of the hearing, the Agency moved to amend paragraph 3 of its NOI to allege that the April 2010 prevailing wage rate rates applied to the Project. Respondents did not object and the ALJ granted the motion.

9) During the hearing, the Agency moved to amend its NOI to delete paragraph 9. Respondents did not object and the ALJ granted the motion.

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fourteen of the sixteen weeks, set forth in Exhibit "F." attached hereto. As found later in this Order, Respondents performed work on the Project from August 31, 2010, to February 26, 2011. However, Exhibit "F" is titled "FAILURE TO KEEP RECORDS AND PROVIDE RECORDS TO BOLI," followed by the statement "Respondents failed to keep records and make them available to BOLI" and a list of 11 weeks that stretch from September 2008 to January 2009.

10) On May 29, the second day of hearing, Respondent S. Friedman filed an amended case summary accompanied by five new exhibits, R-11 through R-15. The Agency objected to the admission of the case summary because it was untimely and the ALJ sustained the objection.

11) On June 24, 2013, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The last page of the Proposed Order contained an "Exceptions Notice" that included the following statement:

> "Pursuant to ORS chapter 183 and OAR 839-050-0380, you are entitled to file exceptions to this Proposed Order. For exceptions to be considered, you must file them within ten (10) days from the date of issuance of this Proposed Order. Exceptions must be specific and in writing.
>
> "If you file exceptions to this Proposed Order, THEY MUST BE FILED AT THE FOLLOWING ADDRESS:
>
> Bureau of Labor and Industries
>
> ATTN: Contested Case Coordinator
>
> 1045 State Office Building
>
> 800 NE Oregon Street
>
> Portland, Oregon 97232-2180"

12) On July 2, 2013, Respondents timely filed exceptions through Michael Petersen, who was retained by Respondents to file exceptions. Respondents' exceptions are addressed in the Opinion section of this Final Order.

Ruling on Agency's Motion for Extension of Time to File Exceptions

The Agency mailed exceptions on July 5, 2013. They were mailed directly to the ALJ at his Eugene office, but not to the address set out in Finding of Fact 11 – Procedural. On July 8, 2013, upon learning that two of the mailings had been returned for insufficient postage, the Agency moved for an extension of time until July 8, 2013, in which to file exceptions, attaching the exceptions to its motion.

On July 10, 2013, Respondents objected to the Agency's motion for an extension of time to file exceptions. On July 11, 2013, the Agency filed a Memo in Response to Respondents' objections, arguing that the extension should be allowed because, although the Agency's motion requesting the extension was filed after the deadline for filing exceptions, the Agency "did not realize its mistake in address until July 8, 2013."

OAR 839-050-0050 provides, in pertinent part:

> "(1) The administrative law judge may disregard any document that is filed with the Hearings Unit beyond the established number of days for filing.

"* * * * *

"(3) The administrative law judge may grant such an extension of time only in situations when the requesting participant shows good cause for the need for more time or when no other participant opposes the request. * * *."

The following definition of "good cause" applies to this proceeding:

"'Good cause' means, unless other specifically stated, that 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." OAR 839-050-0020(12)

In this case, the Agency's failure to follow the written directions on the Proposed Order's "Exceptions Notice" as to the address where exceptions must be mailed does not constitute "good cause." The Agency's motion for extension of time to file exceptions is DENIED.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Green Thumb Landscape and Maintenance, Inc. was an Oregon domestic corporation and contractor with its principal place of business at 4400 Dallas Highway, Salem, Oregon, and a mailing address of PO Box 5172. Respondent S. Friedman was Green Thumb's corporate president and Respondent J. Friedman was Green Thumb's corporate secretary.

2) On August 10, 2010, Salem-Keizer Public Schools filed a Notice of Public Works[2] with BOLI for the West Salem New Construction Site Development, Contract Number 50800497 (the "Project"). The Notice identified "6-4-10" as the date the contract was awarded and specified the contract amount as "$3,441,475.00." It listed Emery & Sons Construction as the prime contractor and "Green Thumb" as a "first-tier subcontractor" that would be performing "landscaping" work in the dollar value of $379,220.

3) The Project became a public works project on April 19, 2010, and Oregon's April 1, 2010, prevailing wage rates applied to the Project. On April 1, 2010, the applicable prevailing wage rate for landscape laborers on the Project was raised to $19.25 per hour, including fringe benefits, from the previous rate $18.97 per hour. This was the first time the rate had been changed in two years.

4) Green Thumb employed workers as landscape laborers on the Project from on or about August 31, 2010, until February 26, 2011.

[2] BOLI Form WH-81 (Rev 03-08)

FAILURE TO PAY CORRECT PREVAILING WAGE RATE FOR WORK PERFORMED ON WEST SALEM PROJECT TO SIX WORKERS

5) Green Thumb employed five workers -- Wayne Kirschenmann, Phil Koster, Augustine Navarro, Juan Carlos Roa, and Tito Velez -- at different times as landscape laborers on the Project.

6) Green Thumb paid these five workers the January 2010 prevailing wage rate of $18.97 per hour while they worked on the Project. In total, Kirschenmann, Koster, Navarro, and Roa were underpaid $261.29 in gross wages.[3]

7) Stephanie Wiltsey was Green Thumb's bookkeeper in 2010. She was in charge of Green Thumb's payroll and posting wage rates on prevailing wage rate jobs. Wiltsey and S. Friedman estimated the Project, but Wiltsey determined the prevailing wage rate that was applicable to Green Thumb's workers on the Project. Wiltsey made this determination because she failed to notice that the prevailing wage rate for Green Thumb's workers had been amended on April 1, 2010.

8) On May 17, 2011, BOLI Compliance Specialist Luis Martin del Campo sent a letter that included, among other things, his determination that Green Thumb had underpaid five workers on the Project a total of $272.49 by paying "the January 2010 Landscape Laborer PWR rate of $18.97, rather than the applicable April 2010 Amendment rate of $19.25." He itemized the underpayments as follows:

Worker's Name	Amount Underpaid	Liquidated Damages
Wayne Kirschenmann	$ 82.18	$ 82.18
Phil Koster	$158.95	$158.95
Augustine Navarro	$ 11.20	$ 11.20
Juan Carlos Roa	$ 8.96	$ 8.96
Jesus Zacarias	$ 11.20	$ 11.20
Totals	**$272.49**	**$272.49**

9) On May 30, 2011, Green Thumb issued checks to Kirschenmann, Koster, Navarro, Roa, and Zacarias for gross wages, less statutory deductions, equaling the "amounts underpaid and liquidated damages" listed by del Campo in his letter.

UNLAWFUL DEDUCTIONS FROM IGNACIO MENDEZ-CRUZ'S PAY

10) Ignacio Mendez-Cruz worked for Green Thumb from November 2008 through November 2009. He worked on both prevailing wage rate projects and non-prevailing wage projects during this time period.

[3] The forum does not include the underpayment to Velez because Exhibit D in the NOI does not allege that Green Thumb failed to pay Velez the prevailing wage rate on the Project, even though Green Thumb's WH-38s show that Velez on the Project and was underpaid.

11) Green Thumb had a 401(K) plan through American Funds during Ignacio Mendez-Cruz's employment. From November 2, 2008, through November 14, 2009, Green Thumb deducted $3,655.35 in fringe benefits from Ignacio Mendez-Cruz's pay as "401(k) Fringe." Those contributions were invested in the "American Balanced Fund" that was administered by American Fund.

12) Green Thumb's contributions to Mendez-Cruz's 401(k) were made quarterly as an electronic, lump sum transfer and Respondents had no way to track deposits by the individual.

13) On February 4, 2010, American Funds issued a check to Ignacio Mendez-Cruz in the net amount of $766.10, reflecting a gross amount, before deductions for state and federal tax, of $1,048.73. Accompanying the check was a statement on which was printed "Distribution Reason – Termination of Employment."

14) On March 30, 2010, Green Thumb issued a check #5380 to Ignacio Mendez-Cruz in the amount of $676.48, with a note on it that it was for "401K Distribution."

15) On June 8, 2010, Mendez-Cruz filed a wage claim with BOLI's Wage & Hour Division alleging that "Green Thumb Landscape," his employer, had unlawfully deducted money from his pay from "9/30/08" to "11/13/09." Mendez-Cruz wrote on his wage claim form that S. Friedman told him that "where the money had been invested, it has been lost."

16) Green Thumb paid the amounts alleged to be owed in Mendez-Cruz's wage claim. In conjunction with that payment, Scott and Jennifer Friedman signed a "Compliance Agreement" on October 17, 2010, on behalf of "Green Thumb LLC, dba: Green Thumb Contracting, Green Thumb Landscape and Maintenance Inc., Green Thumb Landscaping, Green Thumb Yard Maintenance Inc."[4]

FAILURE TO PAY OVERTIME BASED ON WEIGHTED AVERAGE

17) During Mendez-Cruz's employment from November 2008 through November 2009, he was paid Oregon's minimum wage of $8.00 per hour on non-prevailing wage rate jobs and the prevailing wage rate on public works jobs.

[4] The "Compliance Agreement" is a standard BOLI form ("WH-60B") that summarizes the requirements of ORS 279C.540(1) and OAR 839-025-0050(2), ORS 279C.836 and OAR 839-025-0015, ORS 279C.840(1) and OAR 839-025-0035(1), ORS 279C.840(4) and OAR 839-025-0033, ORS 279C.845 and OAR 839-025-0010, and ORS 279C.850(2) and OAR 839-025-0030(2). At the bottom of the form is a place for signatures, prefaced by the following statement:

> "I, _____, have read and understand the foregoing prevailing wage rate statutes and Oregon administrative rules, paraphrased above, the exact text of which is attached and incorporated by reference, and agree to future compliance with those statutes and the Oregon administrative rules. I understand that if I violate the prevailing wage rate laws, I may be subject to the imposition of liquidated damages, civil penalties and debarment."

18) Mendez-Cruz's 2008 pay stubs include categories entitled "Bonus Class 9" and "Bonus Class 10.5." In 2008, he was paid net wages of $97.50 in the "Bonus Class 9" category and $1,497.39 in the "Bonus Class 10.5" category. "**Green Thumb Contracting**" is printed on the top of all his 2008 paystubs and "Green Thumb Contracting, PO Box 5172, Salem, OR 97304 503/585-3704, Green Thumb LLC" is printed on the bottom.

19) Mendez-Cruz's 2008 pay stubs list the category of "Bonus Class 10.5." In 2009, he was paid net wages of $700.88 in the "Bonus Class 10.5" category. "**Green Thumb Contracting**" is printed on the top of all his 2009 paystubs and "Green Thumb Contracting, PO Box 5172, Salem, OR 97304 503/585-3704, Green Thumb LLC" is printed on the bottom of all but two of his 2009 paystubs. His paystubs for the pay periods "11/01/2009-11/07/2009" and "11/08/2009-11/14/2009" have "**Green Thumb Landscape and Maintenance, Inc.**" printed on the top and "Green Thumb Contracting, PO Box 5172, Salem, OR 97304 503/585-3704, Green Thumb LLC" printed on the bottom.

20) In 2009, Mendez-Cruz performed work on public works projects and non-public works projects during four separate weeks in which he received a bonus of $2.50 an hour over his regular pay rate of $8.00 per hour non-public works projects. The extra $2.50 per hour was not included in the computation of his overtime pay during those four weeks.

UNSIGNED, INCOMPLETE, OR INACCURATE CERTIFIED PAYROLL REPORTS

21) J. Friedman, on behalf of Green Thumb, filed 16 certified payroll reports on BOLI's "Payroll/Certified Statement Form WH-38"[5] during Green Thumb's work on the Project. They covered the weeks ending 9/4/10, 9/11/10, 9/18/10, 9/25/10, 10/2/10, 10/9/10, 10/16/10, 10/23/10, 10/30/10, 1/15/11, 1/22/11, 1/29/11, 2/6/11, 2/12/11, 2/19/11, and 2/26/11.

22) "CERTIFIED STATEMENT" is printed on top of one page of Form WH-38. Among other things, that page:

- asks for the date of the payroll report and the name of the person ("signatory") signing the report;
- sets out a number of conditions related to the payment of the prevailing wage rate that the signatory is to certify;
- contains a statement, printed above the line for the signatory's signature, that "I HAVE READ THIS CERTIFIED STATEMENT, KNOW THE CONTENTS THEREOF, AND IT IS TRUE TO MY KNOWLEDGE," with a line for the name and title of the signatory immediately below, and another line for the signatory's signature and a date.

[5] Form WH-38 is a form created by BOLI for use by contractors and subcontractors in submitting weekly payroll records to meet the requirements of ORS 279C.845 and OAR 839-025-0010.

23) Sixteen of Green Thumb's WH-38 forms provided by J. Friedman to the Agency have the CERTIFIED STATEMENT page attached to them, but only the forms for weeks ending 1/15/11, 1/22/11 and 1/29/11 bear J. Friedman's signature. The other 13 payroll reports have no signature on them. The Agency did not request copies of Green Thumb's WH-38 forms from the contracting agency.

24) Juan Carlos Roa worked on 8 hours on the Project on October 4 and on October 5, 2010, but was not listed on Green Thumb's WH-38 form for that week.

FAILURE TO PROVIDE MEAL PERIODS

25) Phil Koster was employed by Respondent Green Thumb on the Project in January and February 2011. On his time card for the week of "January 10-January 15th," time "IN" and time "OUT" are handwritten, with a handwritten signature at the bottom. The handwritten time for January 10 is "7:30-2," accompanied by the handwritten notation "(NO LUNCH)." The handwritten time for January 11 is "7-1:30," accompanied by the handwritten notation "(NO LUNCH)." The same time card has handwritten entries showing that Koster worked "7-1:30" and "7-3:30" on January 13 and 14. Koster's paystub for that week shows that he was paid for working 26.5 hours.[6] The certified payroll report filed by Green Thumb for that week shows that Koster worked and was paid for 26.5 hours, including 6.5 hours on January 10 and 6 hours on January 11.

26) Koster's time card for the week of "Feb 20th-Feb 26th" has one handwritten entry that states: "7:30 (NO LUNCH) 3:30" next to the date of February 20. Although there is a signature line at the bottom, the time card bears no signature. Koster's paystub shows that he was paid for working 8 hours on February 20. The certified payroll report filed by Green Thumb for that week also shows that Koster worked and was paid for 8 hours.

27) On August 15, 2007, the Agency issued an NOI in case #48-07 that proposed to place Green Thumb Landscape and Maintenance, Inc., Green Thumb LLC, and Scott A. Friedman on the list of those ineligible to receive contracts or subcontracts for public works for a period of three years and to assess civil penalties of $110,000 against them. These proposed actions were based upon alleged violations of Oregon's prevailing wage rate laws, including "failure or refusal to pay prevailing wages and filing inaccurate and incomplete certified payroll reports." On April 10, 2008, the forum issued a Final Order Based On Informal Disposition that incorporated a Consent Order respondents entered into with the Agency that resolved all outstanding issues. The Consent Order was signed by Scott Friedman, in his capacity as president of Green Thumb Landscape and Maintenance, Inc. and Green Thumb LLC. Paragraph 7 in the

[6] The paystub actually shows that he worked "26.30" hours and was paid gross wages of $421.82 and fringe benefits of $81.08, but those dollar amounts are actually obtained by multiplying 26.5 by his prevailing wage rate of $15.91 and fringe benefit amount of $3.06.

Consent Order stated that "[t]his Consent Order and resolution by Final Order does not constitute an admission of guilt or liability on the part of Respondents."

28) Morgan, Banahene, and S. Friedman were credible witnesses.

29) J. Friedman was credible except for her testimony that she sent signed copies of the certified payroll reports to the contracting agency on the Project, but didn't provide signed, certified copies to the Agency because she did not make copies of the documents sent to the contracting agency.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Green Thumb Landscape and Maintenance, Inc. was an Oregon domestic corporation. Respondent S. Friedman was Green Thumb's corporate president and Respondent J. Friedman was Green Thumb's corporate secretary.

2) On August 10, 2010, Salem-Keizer Public Schools filed a Notice of Public Works with BOLI for the Project and specified the contract amount as "$3,441,475.00."

3) The Project became a public works project on April 19, 2010, and Oregon's April 1, 2010, prevailing wage rates applied to the Project. The April 1, 2010, prevailing wage rate for landscape laborers on the Project was $19.25 per hour, including fringe benefits.

4) Green Thumb employed five workers as landscape laborers at different times on the Project from on or about August 31, 2010, until February 26, 2011.

5) Green Thumb paid its workers Kirschenmann, Koster, Navarro, and Roa the January 2010 prevailing wage rate of $18.97 per hour while they worked on the Project, underpaying them a total of $261.29 in gross wages.

6) Ignacio Mendez-Cruz worked for Green Thumb from November 2008 through November 2009. While he worked on prevailing wage rate projects, Green Thumb deducted $3,655.35 in fringe benefits from Mendez-Cruz's pay as "401(k) Fringe" that were transferred to and invested by American Fund.

7) During Mendez-Cruz's employment from November 2008 through November 2009, he was paid minimum wage of $8.00 per hour on non-prevailing wage rate jobs and the prevailing wage rate on public works jobs. Mendez-Cruz was also paid a bonus for some of the work he performed on non-public works. The bonus was not included in Green Thumb's calculations for his overtime pay in weeks when he worked on both public works and non-public works.

8) Green Thumb submitted 16 WH-38s related to work on the Project. Thirteen lacked a signature certifying that they were accurate. One of the WH-38s was

inaccurate and incomplete because it failed to include a worker who had worked on the Project during the week reported on the WH-38.

9) Green Thumb's employee Phil Koster was not given a meal period on January 10 or February 20, 2011, two days when he worked more than six hours.

CONCLUSIONS OF LAW

1) Respondent Green Thumb failed to pay the prevailing wage rate to four workers who performed manual labor on the Project, committing four violations of ORS 279C.840(1) and OAR 839-025-0035(1).

2) Respondent Green Thumb submitted a payroll report for the Project that failed to report hours worked on the Project by Juan Carlos Roa, committing one violation of ORS 279C.845 and OAR 839-025-0010.

3) Respondent Green Thumb failed to provide meal periods on two separate days to Phil Koster when he worked more than six hours, constituting two violations of OAR 839-020-0050.

4) Respondent Green Thumb did not fail to pay regular weekly overtime in violation of ORS 653.261 or OAR 839-020-0030 as alleged in paragraph 4 of the NOI.

5) Respondent Green Thumb did not fail to pay appropriate overtime wages based on a weighted average in violation of ORS 279C.840 or OAR 839-025-0050 as alleged in paragraph 5 of the NOI.

6) Respondent Green Thumb did not take unlawful deductions from Ignacio Mendez-Cruz's pay in violation of ORS 652.610(4) as alleged in paragraph 6 of the NOI.

7) Respondent Green Thumb did not fail to keep required records in violation ORS 653.045, OAR 839-020-0080, or OAR 839-020-0083 as alleged in paragraph 7 of the NOI.

8) Respondent Green Thumb did not fail to provide records to BOLI as required in violation of ORS 653.045, OAR 839-020-0080, or OAR 839-020-0083 as alleged in paragraph 8 of the NOI.

9) The Commissioner has the authority to assess civil penalties for violations of ORS 279C.845, OAR 839-025-0010, ORS 279C.840(1), OAR 839-025-0035(1), and OAR 839-020-0050. The imposition of $8,000 in civil penalties for Green Thumb's violations of these statutes and rules is an appropriate exercise of his authority. ORS 279C.865, OAR 839-025-0530, OAR 839-025-0540, ORS 652.900, and OAR 839-020-1010.

10) Respondent Green Thumb did not intentionally fail to pay the prevailing wage rate to four workers who performed manual labor on the Project.

OPINION

FAILURE TO PAY WEEKLY OVERTIME WAGES TO WORKERS ON THE "REGULAR RATE OF PAY" DURING 15 WEEKS IN 2008 AND 2009.

Paragraph 4 of the NOI alleges Green Thumb had committed 15 violations of ORS 653.261 and OAR 839-020-0030 by failing to pay overtime "on the regular rate of pay" during the weeks ending on 5/17/08, 5/24/08, 6/7/08, 6/14/08, 6/21/08, 6/28/08, 7/12/08, 7/19/08, 7/26/08, 8/9/08, 8/23/08, 9/27/08, 9/19/09, 9/26/09, and 10/3/09. There was no evidence presented to support these allegations and the forum dismisses them.

FAILURE TO PAY WEIGHTED AVERAGE OVERTIME

Paragraph 5 of the Agency's NOI alleges the following:

"Respondents failed to pay the appropriate overtime based on a weighted average, when a worker worked on public works projects and non-public works projects, during the same work week, set forth in Exhibit 'B' attached hereto. These are violations of ORS 279C.540 and OAR 839-025-0050. A civil penalty may be assessed for the above violation not to exceed $5,000. **CIVIL PENALTY of $8,000**. Four (4) violations at $2,000 per violation. OAR 839-025-0530(2)"

Exhibit 'B' attached to the NOI reads as follows:

"**EXHIBIT B**

GREEN THUMB LANDSCAPING AND MAINTENANCE, INC.

SCOTT FRIEDMAN

JENNIFER FRIEDMAN

FAILURE TO KEEP RECORDS AS REQUIRED

Respondents failed to keep records and make them available to BOLI.

Weeks Ending:

1. 09/13/08
2. 10/25/08
3. 11/01/08
4. 11/08/08
5. 11/15/08
6. 11/22/08
7. 11/21/08
8. 12/06/08
9. 12/20/08

10. 12/27/08

11. 01/03/09"

The forum infers from Morgan's testimony and Exhibit A-8 that the alleged violations are actually related to four alleged violations associated with Mendez-Cruz's employment and Respondent's failure to include a $2.50 per hour bonus in computing overtime wages due to Mendez-Cruz. However, this is not what the Agency pled in its NOI. The forum dismisses these allegations based on the Agency's failure to identify the violations correctly in its NOI or move to amend the NOI at hearing to conform to the evidence.

UNLAWFUL DEDUCTIONS

Paragraph 6 of the NOI alleges that "Respondents took deductions from Ignacio Mendez-Cruz's pay for a 401k plan and failed to pay the amounts to the plan." The following relevant facts are undisputed: (1) Green Thumb had a 401(k) plan administered by American Funds during Mendez-Cruz's employment; (2) the fringe benefits earned by Mendez-Cruz on public works jobs were not paid to Mendez-Cruz in his paycheck and were instead deducted and noted on his paystub as "401(k) Fringe"; and (3) Green Thumb deducted $3,655.35 in fringe benefits from Mendez-Cruz's pay as "401(k) Fringe" from November 2, 2008, through November 14, 2009. In dispute is whether Green Thumb actually paid the deducted amounts to American Fund.

This issue came to light when Mendez-Cruz filed a wage claim on June 8, 2010, with BOLI alleging that Green Thumb had unlawfully deducted money from his pay from "9/30/08" to "11/13/09." On his wage claim form, Mendez-Cruz wrote the following in response to two questions on the wage claim form (answers in italics):

"25. EXPLAIN WHY YOUR EMPLOYER HAS FAILED TO PAY YOUR WAGES"
"*because the boss says where the money was invested, it has been lost*."

"23. EXPLAIN WHY YOU BELIEVE YOU ARE STILL OWED WAGES"
"*because this is not the quantity taken from me*"[7]

Mendez-Cruz was listed as a witness on the Agency's case summary, but the Agency did not call him to testify at the hearing.

The Agency investigated Mendez-Cruz's wage claim and concluded that Green Thumb had not paid all deducted fringe benefits into the 401(k) plan administered by American Funds because Green Thumb did not provide any records showing the actual transfer of Mendez-Cruz's fringe benefits to American Funds; BOLI was unable to obtain records to confirm that the funds were not transferred because of privacy issues; and the amounts Mendez-Cruz received in his 401(k) termination checks when he left

[7] Mendez-Cruz completed BOLI's Spanish language wage claim. The questions and written answers were translated under oath by Dylan Morgan, who is bilingual in English and Spanish.

Green Thumb's employment was $1,725.21, considerably less than the $3,655.35 that was deducted.

At hearing, S. Friedman credibly testified that Green Thumb was unable to provide documentation of payment of Mendez-Cruz's fringe benefits into the 401(k) plan administered by American Funds because the transfers were made as a lump sum for all employees and because American Funds would not provide documentation to Green Thumb because of privacy issues.

The 401(k) termination checks Mendez-Cruz received from American Funds and Green Thumb prove that Green Thumb transferred at least some of Mendez-Cruz's 401(k) deductions to American Funds. The forum also takes official notice of the massive stock market crash in 2008-2009, the same period of time that Mendez-Cruz's fringe benefits would have been invested in the American Balanced Fund. Given the severity of that crash, there is distinct possibility that Mendez-Cruz's 401(k) could have suffered a major loss that could explain the difference between the amount of his investment and amount of his 401(k) payback.

Ultimately, it is the Agency's burden to prove that Green Thumb did not pay all of Mendez-Cruz's deducted fringe benefits into the 401(k) plan administered by American Funds. In this case, Green Thumb's failure to provide documentation of the actual transfer to American Funds and the payout to Mendez-Cruz of an amount less than his principal investment does not satisfy that burden.

FAILURE TO KEEP RECORDS AS REQUIRED

In paragraph 7 of its NOI, the Agency alleged that "Respondents failed to keep records as required, set forth in Exhibit 'B' attached hereto," in violation of "ORS 652.045, OAR 839-020-0080, and OAR 839-020-0083." Exhibit B consists of a list of 10 weeks in 2008 and one week in 2009 but does not identify any records that Respondents were required to keep during that period of time and failed to keep. Respondents denied this allegation in their answer, and there was no evidence presented at hearing to assist the ALJ in identifying how Respondents were deficient in their record keeping in the weeks listed in Exhibit B. Consequently, the forum finds no violation.

FAILURE TO PROVIDE RECORDS TO BOLI AS REQUIRED

In paragraph 8 of its NOI, the Agency alleged that "Respondents make (sic) records available to BOLI as required, as set forth in Exhibit 'C.' This is a violation of ORS 653.045, OAR 839-020-0080, and OAR 839-020-0083." Exhibit C in the NOI is identical to Exhibit B in the NOI, except that the list of weeks is prefaced by the following language:

"FAILURE TO MAKE RECORDS AVAILABLE TO BOLI AS REQUIRED
Respondents failed to keep records and make them available to BOLI."

Exhibit C does not identify any records related to the weeks listed that Respondents were required to make available to BOLI. Respondents denied this allegation in their answer, and the ALJ was unable to ascertain, based on the evidence presented at hearing, the records from the weeks listed in Exhibit C that Respondents were required to make available to BOLI. Consequently, the forum finds no violation.

GREEN THUMB FAILED TO PAY THE CORRECT PREVAILING WAGE RATE TO FOUR WORKERS FOR WORK PERFORMED ON THE PROJECT FROM AUGUST 31, 2010, TO FEBRUARY 26, 2011

In paragraph 10 of the NOI, the Agency alleges that "Respondents" violated ORS 279C.840 by failing to pay the prevailing wage rate for work performed on the Project to Wayne Kirschenmann, Phil Koster, Augustine Navarro, Juan Carlos Roa, Jesus Zacarias, and Ignacio Mendez-Cruz Tito Velez from August 31, 2010, to February 26, 2011.

ORS 279C.840 provides, in pertinent part:

> "(1) The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where the labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of contributions of a type referred to in ORS 279C.800 (1)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279C.800 (1)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage. The contractor or subcontractor shall pay all wages due and owing to the contractor's or subcontractor's workers upon public works on the regular payday established and maintained under ORS 652.120."

Green Thumb's WH-38s show that Green Thumb regularly paid its workers on a weekly basis from August 31, 2010, to February 26, 2011, and S. Friedman admitted at hearing that Green Thumb paid its workers 28 cents less than the applicable prevailing wage rate while they worked on the Project, a fact corroborated by the WH-38s. The wages that were underpaid were earned no later than February 26, 2011, and were not paid in full until May 30, 2011.[8]

Kirschenmann, Koster, Navarro, and Roa are listed in Green Thumb's WH-38s from August 31, 2010, to February 26, 2011. However, no evidence was presented to show that Mendez-Cruz was employed on the Project during that period of time. The only evidence of Zacarias's employment on the Project was a statement in del Campo's May 17, 2011, letter to Respondents, that Zacarias "worked from January 31, 2011 to February 06, 2011" on the Project, and Green Thumb's subsequent payment of $22.40

[8] *See* Finding of Fact #9 - The Merits.

gross wages to Zacarias. There is no other evidence in the record to support a finding that Zacarias worked on the Project.[9]

In conclusion, Green Thumb underpaid four workers employed on the Project on their regular paydays. In doing so, Green Thumb committed four violations of ORS 270C.840.

A. Civil Penalties

The Agency seeks a $5,000 civil penalty for each violation. The Agency alleges that Green Thumb's violation was aggravated because Respondent knew or should have known of the violation based on the circumstances surrounding the Consent Order described in Finding of Fact # 27 – The Merits. The forum agrees with the Agency's contention and finds no mitigating circumstances. The forum also notes that this is Green Thumb's first violation and the total underpayment of wages to the four workers was only $261.29, an amount Green Thumb promptly paid when informed by BOLI of the underpayment. Under these facts, an appropriate civil penalty is $1,250 for each violation, for a total of $5,000.

RESPONDENT GREEN THUMB COMMITTED ONE CERTIFIED PAYROLL VIOLATION RELATED TO THE PROJECT

In the Proposed Order, the ALJ concluded that Green Thumb had committed 13 violations of ORS 279C.845 and OAR 839-05-0010. In their exceptions, Respondents argued that this conclusion was in error and should be reversed based on a deficiency in the pleadings. Except for one violation, the forum agrees for reasons discussed below.

Paragraph 11 of the NOI alleges two types of certified payroll violations which, if proven, would constitute violations of ORS 279C.845(2) & (3) and OAR 839-05-0010. Specifically, it alleges:

> "Respondents filed sixteen inaccurate and/incomplete certified statements for work performed on the [Project]. Respondents failed to certify the accuracy of the payroll on fourteen of the sixteen weeks, set forth and Exhibit 'F' attached hereto."

ORS 279C.845 requires contractors and subcontractors on public works projects to file certified payroll reports and sets out the requirements for those reports. In pertinent part, it provides:

> **"279C.845 Certified statements regarding payment of prevailing rates of wage; retainage.** (1) The contractor or the contractor's surety and every

[9] Green Thumb's payment to Zacarias on May 30, 2011, does not constitute an admission that he worked on the Project.

subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:

"(a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has employed upon the public works; and

"(b) That no worker employed upon the public works has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract.

"(2) The certified statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read the certified statement, that the contractor or subcontractor knows the contents of the certified statement and that to the contractor or subcontractor's knowledge the certified statement is true.

"(3) The certified statements shall set out accurately and completely the contractor's or subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned upon the public works during each week identified in the certified statement."

OAR 839-025-0010 provides, in pertinent part:

"Payroll and Certified Statement

"(1) The form required by ORS 279C.845 is the Payroll and Certified Statement form, WH-38. This form must accurately and completely set out the contractor's or subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned each week during which the contractor or subcontractor employs a worker upon a public works project.

"(2) The contractor or subcontractor may submit the weekly payroll on the WH-38 form or may use a similar form providing such form contains all the elements of the WH-38 form. When submitting the weekly payroll on a form other than WH-38, the contractor or subcontractor must attach the certified statement contained on the WH-38 form to the payroll forms submitted."

With respect to the alleged violations of ORS 279C.845(3), Juan Carlos Roa's itemized pay stub for the week ending October 9, 2010, shows that he worked eight hours each day on the Project on October 4 and October 5. Green Thumb's WH-38 for that week does not list Juan Carlos Roa, making it an inaccurate and incomplete report and constituting one violation of ORS 279C.845(3) and OAR 839-025-0010. Banahene testified that the WH-38s were also defective in their failure to list Jesus Zacarias as a worker on the Project. However, there was no evidence presented, other than del Campo's assertion in his May 17, 2011, letter to Respondents, that Zacarias actually worked on the Project. This is insufficient to prove that Zacarias worked on the Project and should have been listed on Green Thumb's WH-38s.

The alleged violations of ORS 279C.845(2) are tied to "Exhibit F" that is attached to the NOI. Exhibit "F" is titled "FAILURE TO KEEP RECORDS AND PROVIDE RECORDS TO BOLI," followed by the statement "Respondents failed to keep records and make them available to BOLI" and a list of 11 weeks that stretch from September 2008 to January 2009. None of those weeks involve work performed on the Project, as Green Thumb did not even began work until September 2010, and there is no evidence concerning any certified payroll reports that Green Thumb may have submitted to a contracting agency on the listed weeks. The forum dismisses these allegations based on the Agency's failures to identify the violations correctly in the NOI's Exhibit "F" or to move to amend the NOI at hearing to conform to the evidence.

In conclusion, Green Thumb committed one violation of ORS 279C.845(3) by failing to list Juan Carlos Roa on its WH-38 for the week ending October 9, 2010.

A. Civil Penalty

In its NOI, the Agency sought civil penalties of $5,000 for each violation. Green Thumb's violation is aggravated by the fact that Green Thumb knew or should have known of it. There are no mitigating circumstances. Under these facts, an appropriate civil penalty is $1,000 for Green Thumb's single violation.

MEAL PERIODS

OAR 839-020-0050 provides, in pertinent part:

> "(2)(a) Except as otherwise provided in this rule, every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties.
>
> "* * * * *
>
> "(3) If an employer does not provide a meal period to an employee under section (2) of this rule, the employer has the burden to show that:
>
> "(a) To do so would impose an undue hardship on the operation of the employer's business as provided in section (4), and that the employer has complied with section (5) of this rule;
>
> "(b) Industry practice or custom has established a paid meal period of less than 30 minutes (but no less than 20 minutes) during which employees are relieved of all duty; or
>
> "(c) The failure to provide a meal period was caused by unforeseeable equipment failures, acts of nature or other exceptional and unanticipated circumstances that only rarely and temporarily preclude the provision of a meal period required under section (2) of this rule. If an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period."

Phil Koster's timecards show that he worked 6.5 hours with "no lunch" on January 10 and February 20, 2011. Green Thumb's WH-38s show Koster was paid for working 6.5 hours both of those days. Green Thumb's payment to Koster amounts to a tacit admission that Koster worked 6.5 hours each day without the meal period required by OAR 839-020-0050(2)(a).

At hearing, Respondents appeared to take the position that the Agency should have investigated whether any of the exceptions in OAR 839-020-0050(3) applied. However, the words "the employer has the burden to show" make it clear that this is an affirmative defense that Respondents bear the burden of proving. Respondents presented no evidence to support that burden.

In conclusion, Green Thumb committed two violations of OAR 839-020-0050 by failing to provide Koster with a meal period on January 10 and February 20, 2011.

Civil Penalty

The Agency sought $1,000 for each of the three alleged violations. The NOI alleged no aggravating circumstances and no evidence of any mitigating circumstances was presented. This is the first case in which the forum has found violations of OAR 839-020-0050. The maximum civil penalty allowed by OAR 839-020-1010 is $1,000. In this case, $1,000 is an appropriate civil penalty for each of the two violations found, for a total of $2,000.

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar[10] Green Thumb, S. Friedman, and J. Friedman for three years based on Green Thumb's alleged intentional failure or refusal to pay the prevailing rate of wage to its workers on the Project and S. and J. Friedman's alleged responsibility for that failure.

ORS 279C.860 provides, in pertinent part, that:

> (1) A contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for public works for a period of three years from the date on which the Commissioner of the Bureau of Labor and Industries publishes the contractor's or subcontractor's name on the list described in subsection (2) of this section. The commissioner shall add a contractor's or subcontractor's name to the list after determining, in accordance with ORS chapter 183, that:
>
> "(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works[.]"

OAR 839-025-0085 provides, in pertinent part, that:

[10] In this Order, "debar" and "debarment" are synonymous with placement on the List of Ineligibles.

> "(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that, for a period not to exceed three years, a contractor, subcontractor or any firm, limited liability company, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public works:
>
> "(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on a public works project as required by ORS 279C.840[.]"

The forum has already concluded that Green Thumb failed to pay applicable prevailing wage rates on the Project. The remaining questions are whether that failure was "intentional" and whether S. and J. Friedman were responsible for that failure. If so, the Commissioner is required to place Respondents on the List of Ineligibles for three years.

A. Intentional Failure to Pay.

To "intentionally" fail to pay the prevailing rate of wage, "the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it." *In the Matter of Labor Ready Northwest, Inc.,* 22 BOLI 245, 287 (2001), *rev'd in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 364, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004). "[A] negligent or otherwise inadvertent failure to pay the prevailing wage, while sufficient to require the repayment of the back wages and liquidated damages to the employee and to invoke civil penalties, is not sufficient to impose debarment." *Id.* Rather, a "culpable mental state" must be shown for the forum to conclude that Green Thumb "intentionally" failed to pay the prevailing wage rate.

In this case, S. Friedman and J. Friedman, Green Thumb's corporate officers, knew the Project was a prevailing wage rate job. S. Friedman and Wiltsey, Green Thumb's bookkeeper, estimated the Project, and the duty of determining the correct prevailing wage rate was delegated to Wiltsey. Wiltsey made an erroneous determination, with the result that Green Thumb underpaid four workers on the Project a total of $261.29. There is no evidence that S. Friedman, J. Friedman, or Wiltsey, Green Thumb's agents, consciously chose not to determine the prevailing wage rate or knew the correct rate prior to February 26, 2011, and consciously chose not to pay it. The Agency also failed to prove by a preponderance of the evidence that either S. Friedman or J. Friedman was responsible for underpaying the four workers during the Project. Finally, Green Thumb promptly paid the wages and liquidated damages when informed by BOLI of the underpayment.

In conclusion, the Agency did not prove that Green Thumb "intentionally" failed or refused to pay its four workers the prevailing wage rate under ORS 279C.860(1)(a).

Accordingly, S. Friedman or J. Friedman's responsibility for the underpayment is a moot issue.[11]

ORDER

NOW, THEREFORE, as authorized by ORS 279C.865 and ORS 652.900, and as payment of the penalties assessed as a result of its violations of ORS 279C.845, OAR 839-025-0010, ORS 279C.840(1), OAR 839-025-0035(1), and OAR 839-020-0050, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Green Thumb Landscape and Maintenance, Inc.** to 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, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of EIGHT THOUSAND DOLLARS ($8,000.00), plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date Respondent **Green Thumb Landscape and Maintenance, Inc.** complies with the Final Order.

In the Matter of

KC SYSTEMS, INC. fdba The Machine Shop,

Case No. 42-13
Final Order of Commissioner Brad Avakian
Issued July 29, 2013

SYNOPSIS

Two wage claimants who worked for Respondent performed work for which they were not properly compensated and were paid wages out of the Wage Security Fund ("WSF"). The Agency sought recovery of the amount paid out of the WSF and a 25 percent penalty. Based on Respondent's admissions in its answer, the forum granted summary judgment to the Agency and ordered Respondent to reimburse the WSF the wages paid out of the WSF and a 25 percent penalty. ORS 652.414.

The above-entitled case was assigned to Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon.

[11] Under ORS 279C.860(3), a corporate officer or agent who is responsible for the failure or refusal to pay can only be debarred if the corporation's failure or refusal to pay was "intentional."

32 BOLI ORDERS

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. After the Agency issued an Order of Determination ("OOD"), the Agency moved for and was granted summary judgment.

Having fully considered the entire record in this matter, I, Brad Avakian, 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 20, 2012, Agency issued an OOD in which it alleged that Respondent owed $5,398.94 in earned and unpaid wages to wage claimants Adam Weller and Jason Woolery ("Claimants") and that Respondent paid only $800 of those wages, leaving unpaid wages of $4,598.94. The OOD further alleged that the Agency paid the claimants $4,598.94 out of the Wage Security Fund ("WSF"), and that Commissioner is entitled to recover from Respondent the sum of $4,598.94 paid out of the WSF and a 25 percent penalty on that sum of $1,149.74.

2) On January 11, 2013, Respondent, through counsel, filed an answer and request for hearing in which it admitted BOLI's jurisdiction, liability for the unpaid wages, and liability for the WSF reimbursement, but denied owing a 25 percent penalty.

3) On June 19, 2013, the Agency filed a motion for Summary Judgment, contending it was entitled to judgment as a matter of law. On June 12, 2013, the ALJ issued an order setting a deadline for a written response by Respondent. Respondent, through counsel, timely filed a response.

4) On July 2, 2013, the ALJ issued a ruling **GRANTING** the Agency's motion for summary judgment. That ruling, reprinted in its substantive part below, is hereby **AFFIRMED**.

"**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 and the evidentiary burden on the participants 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].' ORCP 47C.

'In reviewing a motion for summary judgment, this forum 'draw[s] all inferences of fact from the record against the participant filing the motion for summary judgment * * * and in favor of the participant opposing the motion * * *.' *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff'd without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993).

"**Liability For Unpaid Wages**

"Respondent does not dispute liability for the unpaid wages and admitted in its answer that it is liable to repay the WSF the sum of $4,598.94 paid out from that fund.

"**Liability For 25 Percent Penalty**

"ORS 652.414(3) provides:

> 'The commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund under subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or $200, whichever amount is the greater.'

"Respondent's answer and response to the Agency's motion denies that a penalty is owed because Respondent's failure to make payroll was not due to any 'malicious intent' but happened because:

> 'The owner of the business took his own life without warning. The Personal Representative did not have access to funds to make payroll. These circumstances -- already tragic and difficult for the family and employees -- do not work a punitive penalty.'

"ORS 652.414 does not require the Agency to prove that Respondent intended not to pay wages it paid out to claimants out of the WSF in order to entitle the Agency to collect a 25 percent penalty. Rather, if the WSF makes a payout, then the Commissioner is automatically entitled to recover a penalty amounting to 25 percent of the amount of those wages.[1] Although the circumstances that gave rise to wage claims and subsequent payout by the WSF are unfortunate, they do not excuse Respondent from liability for an ORS 652.414(3) 25 percent penalty.

"**Conclusion**

"The Agency's motion for summary judgment is granted in its entirety. The hearing in this matter set for July 30, 2013, is canceled and I will issue a proposed order before that date."

[1] *Compare* ORS 652.150, which requires the Agency, in a wage claim not involving a payout from the WSF, to prove that the employer "willfully fail[ed] to pay any wages or compensation of any employee" before the claimant is entitled to collect penalty wages.

5) The ALJ issued a proposed order on July 8, 2013, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) Respondent employed Adam James Weller from September 3 to September 28, 2012, at the regular rate of $13.25 per hour and the overtime rate of $19.88 per hour. Weller also earned a $300 bonus during his employment.

2) Respondent employed Jason Woolery from September 3 to September 28, 2012, at the regular rate of $16.75 per hour. Weller also earned a $300 bonus during his employment.

3) Weller earned a total of $2,407.71 during his employment with Respondent and was not paid anything. Woolery earned a total of $2,991.23 during his employment with Respondent and was paid $800, leaving a balance due and owing of $2,191.23.

4) Claimants filed wage claims with BOLI alleging that Respondent owed unpaid wages of $2,407.71 to Weller and $2,191.23 to Woolery and assigned their wage claims to BOLI. BOLI determined that these amounts were owed and paid Weller $2,407.71 from the WSF and Woolery $2,191.23 from the WSF, for a total of $4,598.94.

5) Twenty-five percent of $4,598.94 is $1,149.74.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent employed Claimants Weller and Woolery. ORS 653.010.

2) BOLI's Commissioner has jurisdiction over the subject matter and Respondents herein. ORS 652.330, 652.332.

3) BOLI's Commissioner is entitled to recover $4,598.94 from Respondent, the amount paid out from the WSF, plus interest until paid. ORS 652.414.

4) BOLI's Commissioner is entitled to recover a penalty of $1,149.74 from Respondent as a 25 percent penalty on the sum of $4,598.94, plus interest until paid. ORS 652.414.

OPINION

Based on the allegations and its OOD and Respondent's admissions, the Agency established that Respondent employed Claimants, failed to pay them $4,598.94 in earned wages, and that Agency paid Claimants these wages out of the WSF. The ALJ granted summary judgment to the Agency regarding BOLI's entitlement to have Respondent reimburse the WSF for this amount and also pay a 25 percent penalty. This Final Order confirms the summary judgment ruling.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **KC Systems, Inc.** to 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, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of FIVE THOUSAND SEVEN HUNDRED FORTY EIGHT DOLLARS AND SIXTY-EIGHT CENTS ($5,748.68), representing the amount paid from the Wage Security Fund to Adam Weller and Jason Woolery, plus a 25 percent penalty on that amount, plus interest at the legal rate on that sum.

In the Matter of

BRUCE CRISMAN, dba Nu West Painting Contractors

Case No. 05-13
Final Order of Commissioner Brad Avakian
Issued August 26, 2013

SYNOPSIS

Respondent employed four Claimants in 2011 and 2012 in Oregon at the agreed rates of $9 or $10 per hour. During the weeks at issue, Respondent failed to pay the Claimants all the wages owing them. All four Claimants terminated their employment because they were not being paid. Notice was sent to the employer, who did not dispute the wages owed, but who nevertheless failed to pay any of the wages due, except $600.00, all to one Claimant. The amount of unpaid wages totals $5,160.00 for all four Claimants. The failure to pay was willful. Penalty wages in the amount of $9,120.00 are therefore due for failure to pay at termination. Civil penalties are also due in the additional amount of $9,120.00 for failure to pay overtime wages. ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Daniel Rosenhouse, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 25, 2013, at the Salem, Oregon office of the Bureau of Labor and Industries (BOLI or the Agency), at 3865 Wolverine Street NE, Building E-1. The Notice of Hearing set the hearing to begin at 11:00AM, but as set forth below, the proceedings did not commence until 11:30AM. They were concluded at approximately 2:05PM.

BOLI was represented by Case Presenter Chet Nakada, an employee of the Agency.

Wage claimants Abimael Cedillo-Flores (Abimael), Juan Rafael Lopez-Perez (Juan Rafael), and Luis Alberto Sebastian-Gonsalez (Luis) were present throughout the hearing and were not represented by counsel. Claimant Rene Sebastian-Gonsalez (Rene), also not represented by counsel, appeared by telephone during the time of his testimony; he was otherwise not present at the hearing. When referred to collectively, the four wage claimants are referred to herein as the Wage Claimants.

All of the Wage Claimants speak Spanish, and none of them was sufficiently fluent in English to understand the proceedings without translation. Accordingly, Mr. Philip Guttman, certified as an interpreter between English and Spanish pursuant to ORS 45.291, translated the questions to, and answers of, the Wage Claimants during their testimony, as well as at other times they spoke to the Forum. He also simultaneously translated the proceedings or summarized them, for the benefit of the Wage Claimants.

Neither Bruce Crisman (Respondent) nor any representative of his company appeared at the hearing. The Forum delayed the commencement of the hearing from 11:00AM to 11:30AM in order to account for any unexpected event that may have delayed the Respondent's appearance. But no appearance was ever made by the Respondent or any other person on his behalf, nor was any notice give to the Forum explaining his failure to appear. Nonetheless, the Agency presented its prima facie case, as required by OAR 839-050-0330(2).

The Agency called as witnesses all four Claimants and BOLI Compliance Specialist Stan Wojtyla. No other witnesses were called or testified.

The forum received into evidence Agency Exhibits A-1 through A-12. And in addition to the audio record of the hearing, the official record also includes Administrative Exhibits X-1 through X-6.

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

RULINGS AND RESOLUTIONS OF MOTIONS OR OBJECTIONS

For the reasons set forth above, Respondent was and is found to be in default for failing to appear at the hearing. OAR 839-050-0330(1)(d).

As set forth above, the Agency's proposed exhibits were admitted, upon its motion allowed by the ALJ.

32 BOLI ORDERS

The Forum has taken judicial notice of a standard calendar for the years 2011 and 2012.

FINDINGS OF FACT

1) On or about January 11, 2012, the Wage Claimants submitted wage claims to BOLI.

2) The Wage Claimants assigned their wage claims to BOLI.

3) The Wage Claimants were employed by Respondent to do painting or painting-related work in the construction trades at the following agreed rates of pay—

a. Abimael, at $10/hour;
b. Juan Rafael, at $9/hour;
c. Luis, at $9/hour;
d. Rene, at $10/hour.

4) At all material times, and for at least a few years prior to the time at issue in this Case, Respondent operated a construction painting business, with employees, within the State of Oregon.

5) Abimael worked hours as set forth below, and was entitled to be paid wages in the amounts set forth below—

a. For the week ending Saturday, November 26, 2011, 22.5 hours, for straight-time wages of $225.00;
b. For the week ending December 3, 2011, 22.5 hours, for straight time wages of $225.00;
c. For the week ending December 10, 2011, 40 hours straight time for straight time wages of $400.00, plus 9.5 hours overtime for overtime wages of $142.50, making a total of $542.50;
d. For the week ending December 17, 2011, 40 hours straight time for straight time wages of $400.00, plus 11 hours overtime for overtime wages of $165.00, making a total of $565.00;
e. For the week ending December 24, 2011, 11 hours, for straight time wages of $110.00;
f. For the week ending December 31, 2011, 14 hours, for straight time wages of $140.00;
g. For the week ending January 7, 2012, 13 hours, for straight time wages of $130.00;
h. The amounts above sum to a total earned for Abimael Cedillo-Flores of $1,937.50;
i. He received no pay for the hours set forth above, except $600.00 in cash received on January 14, 2012, resulting in a balance due him of $1,337.50 in wages. His employment terminated no later than January 7, 2012.

6) For each of the three weeks ending July 24, 2011, July 31, 2011, and August 7, 2011, Juan Rafael Lopez-Perez worked 40 hours straight time, for straight time wages of $360.00 plus 16 hours of overtime for $216.00, making a total earned of $1,728.00 [($360 + $216) x 3 = $1,728.00]. He received no pay for these hours worked. His employment terminated no later than August 7, 2011.

7) Luis Alberto Sebastian-Gonsalez worked the same hours as Juan Rafael Lopez-Perez, during the weeks ending July 31, 2011 and August 7, 2011, earning a total of $1,152.00, including $720.00 of straight time wages and $432.00 in overtime wages. He received no pay for these hours worked. His employment terminated no later than Sunday, August 7, 2011.

8) Rene Sebastian-Gonsalez worked hours as set forth below, and was entitled to be paid wages in the amounts set forth below—

a. For the week ending December 24, 2011, 24.5 hours, for straight time wages of $245.00.
b. For the week ending December 31, 2011, 50 hours, for straight time wages of $400.00 and overtime wages of $150.00.
c. For the week ending January 7, 2012, 20 hours, for straight time wages of $200.00.
d. The amounts above sum to a total earned for Rene Sebastian Gonsalez of $995.50. He received no pay for these hours worked. His employment terminated no later than Saturday, January 7, 2012.

9) Notice of wages due to the Wage Claimants from Respondent for 2011 and 2012 were sent to the Respondent on January 19, 2012.

10) Order of Determination No. 12-0075 was issued by the Agency on April 27, 2012 and was timely served upon and received by the Respondent on May 2, 2012. In pertinent part, the Order of Determination alleges that the Wage Claimants worked for the Respondent during 2011 and 2012, and were due wages and penalty wages for failure to pay wages due at termination and for failure to pay overtime wages.

11) Although Respondent responded to the Notice of wages due and to the Order of Determination, Respondent at no time denied that wages were due to the Wage Claimants or the amount of the wages and penalties alleged by the Agency to be due. The gist of the responses Respondent made was that he intended to make arrangements to pay the wages due and that he thereby claimed or intended not to be responsible for the penalty wages.

12) Credibility of the Witnesses. The testimony of Compliance Specialist Stan Wojtyla was credible. The recollections of the Wage Claimants, particularly Rene and Luis, were less than certain as to the details of exactly when they worked and the exact periods of time for which they were not paid. There were discrepancies between the written information in some of the wage claims and the testimony of the Wage

Claimants at the hearing. This is understandable, considering the time that has passed since the time the work was performed. The testimony of all the Wage Claimants at the hearing was, by no means, more favorable to them than the information originally supplied in the filed wage claims. Most notably, Luis testified that the statement in his written wage claim that his wages were $10/hour was incorrect; that his actual agreed rate of pay was $9/hour. Had he continued to maintain that the rate of pay set forth in his wage claim was correct, it appears there would have been no one at the hearing who would have contradicted him. Thus, although my findings of fact with respect to the hours they worked are not always consistent with the original claims filed by the Wage Claimants, I find that they were honestly trying to present their best recollections to the Forum and that the testimony of all of them was credible in the essentials, particularly with respect to the fact of their employment, the rate of pay, and the identity of their employer. The finding of general credibility with respect to hours worked and dates of employment is consistent with the legal principles respecting evidence of hours and rate of pay, as discussed below.

CONCLUSIONS OF LAW

1) All of the Wage Claimants were suffered or permitted to work by the Respondent and were, in fact, knowingly and intentionally employed by the Respondent during 2011 and/or 2012, and are therefore entitled to unpaid wages from the Respondent, plus interest from 5 days after the last day worked. ORS 652.140.

2) Each Wage Claimant is entitled to penalty wages from Respondent on account of the failure to receive all wages due at termination of their employment, as to each Wage Claimant, in the amount of the Wage Claimant's hourly rate ($10 for Abimael and Rene, and $9 for Juan Rafael and Luis) multiplied by 240, plus interest thereon from 35 days after the last day of employment. ORS 652.150.

3) Each Wage Claimant is entitled to a civil penalty from Respondent on account of the failure to receive the overtime wages to which each is entitled, in the same amounts as set forth in Conclusion of Law #2, above. ORS 653.055.

4) The Respondent is liable, as to each Wage Claimant, for the actual amount of wages, proven by credible evidence at the hearing, even if that amount is more than the amount alleged to be owed in the Order of Determination that was served on the Respondent.

5) Likewise, interest on the wages found due will also run from the date the evidence shows the wages to be due, rather than from the date alleged in the Order of Determination.

6) As assignee of the claims of all the Wage Claimants, the Agency is the proper party to which an award should be made.

7) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the

authority to order Respondent to pay Claimants their earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest, on all sums until paid. ORS 652.332.

OPINION

CLAIMANTS' WAGE CLAIMS

In this case, where the Respondent did not appear at the hearing and moreover, failed to contest the allegations that he employed the Wage Claimants and failed to contest the amount of the unpaid wages, it is the Agency's responsibility merely to establish a prima facie case. OAR 839-050-0330. To do this, the Agency must prove the following elements: 1) As to each Wage Claimant, that the Respondent employed him; 2) The pay rate upon which Respondent and Claimants agreed; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which he was not properly compensated. *See, In the Matter of Letty Lee Sesher,* 31 BOLI 255, 261 (2011); *In the Matter of E.H. Glaab*, 32 BOLI 60, 66 (2012).

Each Wage Claimant testified that he was employed by the Respondent. The testimony of Stan Wojtyla and the Agency's file, i.e., Exhibits A-1 through A-12, corroborate that testimony by showing that the Respondent, although he responded to the Order of Determination (Ex. A-8), and the Notice of Wage Claim (Ex. A-7, pages 1 and 4), never disputed that he employed any of the Wage Claimants. Thus, a prima facie case was established as to the first element—employment by the Respondent.

The same can be said as to the second element, rate of pay. I have, however, reduced the rate of pay for Luis Sebastian-Gonsalez from $10/hour to $9/hour because he acknowledged that, the Agency's allegations notwithstanding, his agreed rate of pay was $9 per hour. As to the other Wage Claimants, there was no discrepancy in the evidence. $10/hour was the rate of pay for Abimael Cedillo-Flores and Rene Sebastian-Gonsalez; $9/hour was the rate of pay for Juan Rafael Lopez-Perez and Luis Sebastian-Gonsalez. Thus, the first two elements were established by the Agency as to each Wage Claimant.

I now address together the final two elements—Claimants performed work for which they were not properly compensated, and the amount and extent of work each Claimant performed for Respondent. These two issues can be described as determining the amount of work, *i.e.*, the number of hours, for which each Claimant was not compensated, and the amount of compensation to which each Wage Claimant is therefore entitled. Because the evidence was not always consistent, I address these elements in more detail. Each Wage Claimant is discussed separately.

Abimael Cedillo-Flores

Although there is basic consistency between his wage claim and the Order of Determination, ambiguity arises because of anomalies on the calendar on his Wage Claim, which allegedly shows hours worked on the identified days. For example, page 1

of Ex. A-12 (an Exhibit disclosed and offered at the hearing for the first time) lists the days of the week from November 22 through December 5, 2011 as the day after their actual day on a real calendar. Page 2 of the same exhibit, covering December 7 through December 20 lists the days and dates accurately. Page 3 is incorrect as to December 30 (it lists it as a Thursday; it is actually a Friday), but is correct as to January 1 and 2.

These errors raise questions as to the entire reliability of the calendar and the records of hours kept by Mr. Cedillo-Flores. The errors make it difficult to determine hours worked, particularly within a particular workweek for purposes of determining overtime hours. However, these errors do not affect the resolution of the basic issue—that Mr. Cedillo-Flores, and the other workers, were definitely not paid the wages they were owed.

Moreover, it is primarily the employer's responsibility to keep records of the actual hours worked each pay period by each employee. ORS 653.045(1)(b). At hearing, it is the employee's responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate. *Nash v. Resources, Inc.*, 982 F. Supp. 1427, at 1435 (D. Or. 1997). Here, the employer has not produced any evidence of the precise amount of work nor has he produced any evidence negating the employees' evidence.

My best approximation of the actual hours worked by Mr. Cedillo-Flores is set forth in Finding of Fact 5). He is due $1,337.50 in wages.

Notwithstanding the fact that the Order of Determination seeks only $1,137.50 on behalf of Mr. Cedillo-Flores, and that the Agency is not allowed to amend that document to change the amount due. OAR 839-050-0440(4), Mr. Cedillo-Flores is still allowed to recover the actual wages that he earned. *In the Matter of John M. Sanford*, 26 BOLI 72, 86 (2004). Accordingly, I find that the Respondent is liable for $1,337.50 in wages to Mr. Cedillo-Flores, plus interest at the legal rate on that amount from January 13, 2012, which is five business days after his termination of employment. ORS 652.140(2)(c).

Juan Rafael Lopez-Perez

There are no inconsistencies or anomalies with respect to the wages due to Juan Rafael Lopez-Perez. The Respondent is liable for $1,728.00 in wages to him, plus interest from August 12, 2011, 5 business days after his termination.

Luis Alberto Sebastian-Gonsalez

Luis Alberto Sebastian-Gonsalez testified that his rate of pay was $9/hour, rather than the $10/hour set forth in the Order of Determination and in his wage claim. I find his testimony to be more credible than the information written down in the documentary

evidence. Luis was very unsure in his testimony of the hours that he worked and for which he was unpaid. He did seem fairly certain, however, that he worked the same hours as Juan Rafael and that Juan Rafael was likely to have kept better and more accurate records of hours worked than did Luis. On the other hand, Juan Rafael testified that he did not always work together on the same crew with the other Wage Claimants—that they were generally split into two different work crews.

It is difficult to choose the most credible from among these varying stories. Keeping in mind, once more, that the primary responsibility for tracking hours is the employer's, and that in the absence of clearly reliable evidence, it is permissible to make an approximation, I have chosen to believe that Luis Alberto Sebastian-Gonsalez worked the same hours as Juan Rafael Lopez-Perez—56 hours per week, rather than the 50 hours reported in his Wage Claim and in the Order of Determination. But I also find that he was unpaid for only two weeks—the weeks ending July 31 and August 7, 2011, as claimed in his Wage Claim, rather than the 3 weeks that Juan Rafael was unpaid. Consequently, his total earned, at his admitted rate of $9 per hour, is $1,152.00, as set out in Finding of Fact 7).

Notably, the Order of Determination served on the Respondent only seeks $1,100.00 in wages for Luis. For the same reasons as stated above respecting Abimael, I nevertheless find that wages may be recovered from the Respondent in the amount of $1,152.00 for Luis, plus interest on that amount from August 12, 2011, the date five days after his termination from work.

Rene Sebastian-Gonsalez

Rene Sebastian-Gonsalez was also very uncertain of the hours he worked and for which he was unpaid. Before admitting he really didn't remember very well, he testified that the period for which he wasn't paid was November and December 2011, rather than the summer of 2011. The summer of 2011 is the time period in the BOLI calculation (Ex. A-3, page 1), his Wage Claim (Ex. A-3 at pages 2-3 and 6), and the Order of Determination (Ex. A-8, page 5).

On the other hand, page 7 of Ex. A-3, also apparently a part of Rene's Wage Claim, lists his unpaid work time as having occurred in December 2011 and January 2012, which is closer to his initial testimony. Adding still more difficulty with his list on page 7 is that it, like Abimael's list discussed above, incorrectly associates days of the week with dates—he lists December 22 and 23 as a Wednesday and Thursday instead of the actual Thursday and Friday.

For the reasons explained above with respect to Abimael, these anomalies raise questions of reliabiliy. But also for the reasons stated above, the questions raised are not so great as to make me unable to approximate the wages due. Accordingly, I find, as set forth in Finding of Fact 8), that Rene is owed wages by the Respondent in the amount of $995.50, plus interest at the legal rate from January 13, 2012. These determinations and calculations are based primarily upon page 7 of Exhibit A-3,

claiming hours in December 2011 and January 2012, rather than the calendar at page 6, of Exhibit A-3, upon which the Agency seems to have based its calculations.

PENALTY WAGES

Penalty wages are awarded when a respondent's failure to pay wages at termination of employment was willful. ORS 652.150. 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).

Respondent was an experienced employer. It is difficult to imagine how Respondent could have paid wages or failed to pay wages without having met the standards set out in *Sabin*. Respondent never claimed otherwise.

The method of calculation for payment of penalty wages is set out in ORS 652.150(1). The evidence was that notice of nonpayment was sent to the Respondent, as required by ORS 652.150(2) and that payment was still not made, within 12 days as required by the statute, or at any other time. Interest on said penalties runs from 30 days after the date the wages were due to be paid. Where the last day worked was earlier than that alleged in the Order of Determination, interest runs from the date established by the evidence. *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 P3d 1030 (2003).

Penalty wages when the employee earns $10/hour, as did Abimael Cedillo-Flores and Rene Sebastian-Gonsalez are $2,400.00 ($10 x 40 hours x 30 days = $2,400.00). Penalty wages when the employee earns $9/hour, as did Luis Sebastian-Gonsalez and Juan Rafael Lopez-Perez are $2,160.00 ($9 x 40 hours x 30 days = $2,160.00).

CIVIL PENALTY

In addition to the penalty for failure to pay wages due at termination, ORS 653.055 provides that an employer is responsible to pay a civil penalty to an employee if the employer pays that employee less than the wages to which he or she is entitled under ORS 653.010 to 653.261. ORS 653.055(1)(b). This includes overtime wages. “Willfulness” is not an element. *In the Matter of Letty Lee Sesher,* 31 BOLI 255, 264 (2011). As set out in the Findings of Fact, all of the Wage Claimants earned overtime pay. None of them was paid their overtime pay.

The overtime penalty is calculated by the same method as the penalty for failure to pay wages at termination. ORS 653.055(1)(b). Thus, additional penalties are owed to each of the Wage Claimants in the same amount as set forth above respecting failure to

pay wages at termination. Interest runs on the overtime penalty from the date the wages were due.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Bruce Crisman** to pay, by delivering to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, certified checks payable to the Bureau of Labor and Industries, which is to hold said funds in trust for the Wage Claimants, in the following amounts, but reduced by lawful deductions as described in 5., below:

1. On account of wages and penalties awarded for Abimael Cedillo-Flores
    a. For gross unpaid wages, ONE THOUSAND THREE HUNDRED THIRTY-SEVEN DOLLARS AND FIFTY CENTS ($1,337.50), plus interest at the legal rate on that amount from January 13, 2012; plus
    b. For penalties under ORS 652.150, TWO THOUSAND FOUR HUNDRED DOLLARS ($2,400.00), plus interest at the legal rate on that amount from February 13, 2012; plus
    c. For penalties under ORS 653.055, TWO THOUSAND FOUR HUNDRED DOLLARS ($2,400.00), plus interest at the legal rate on that amount from January 13, 2012.
2. On account of wages and penalties awarded for Juan Rafael Lopez-Perez
    a. For gross unpaid wages, ONE THOUSAND SEVEN HUNDRED TWENTY-EIGHT DOLLARS ($1,728.00), plus interest at the legal rate on that amount from August 12, 2011; plus
    b. For penalties under ORS 652.150, TWO THOUSAND ONE HUNDRED SIXTY DOLLARS ($2,160.00), plus interest at the legal rate on that amount from September 12, 2011; plus
    c. For penalties under ORS 653.055, TWO THOUSAND ONE HUNDRED SIXTY DOLLARS ($2,160.00), plus interest at the legal rate on that amount from August 12, 2011.
3. On account of wages and penalties awarded for Luis Alberto Sebastian-Gonsalez
    a. For gross unpaid wages, ONE THOUSAND ONE HUNDRED DOLLARS ($1,100.00), plus interest at the legal rate on that amount from August 12, 2011; plus
    b. For penalties under ORS 652.150, TWO THOUSAND ONE HUNDRED SIXTY DOLLARS ($2,160.00), plus interest at the legal rate on that amount from September 12, 2011; plus

c. For penalties under ORS 653.055, TWO THOUSAND ONE HUNDRED SIXTY DOLLARS ($2,160.00), plus interest at the legal rate on that amount from August 12, 2011.

4. On account of wages and penalties awarded for Rene Sebastian-Gonsalez

   a. For gross unpaid wages, NINE HUNDRED NINETY-FIVE DOLLARS and fifty cents ($995.50), plus interest at the legal rate on that amount from January 13, 2012; plus

   b. For penalties under ORS 652.150, TWO THOUSAND FOUR HUNDRED DOLLARS ($2,400.00), plus interest at the legal rate on that amount from February 13, 2012; plus

   c. For penalties under ORS 653.055, TWO THOUSAND FOUR HUNDRED DOLLARS ($2,400.00), plus interest at the legal rate on that amount from January 13, 2012.

5. The principal amounts set forth immediately above, in Sections 1a, 2a, 3a, and 4a, are gross amounts of wages due and shall be reduced by the legally required deductions for state and federal taxes and other legal deductions that are appropriate for the Wage Claimant for whom the payment is being made. Respondent, at the time of submitting the payments to BOLI, shall provide a written record, as would generally be required on a paycheck, of the amounts of deductions taken, and shall designate the reasons therefor. Respondent shall forward such deducted taxes to the appropriate governmental agencies to the extent otherwise required by law.

_____

32 BOLI ORDERS

In the Matter of

BLACHANA, LLC, dba Twilight Room Annex aka The P Club, and Christopher Penner, Individually under ORS 659A.403(3) and ORS 659A.409, and as Aider or Abettor under ORS 659A.406

Case No. 25-13
Final Order of Deputy Commissioner Christie Hammond
Issued August 28, 2013

SYNOPSIS

Respondent Penner, and Respondent Blachana, through Respondent Penner, denied access to the P Club to the Rose City T-Girls based on the sexual orientation of the Rose City T-Girls' members, in violation of ORS 659A.403, by leaving voice mails with the T-Girls' spokesperson in which Penner asked the T-Girls not to come back to the P Club on Friday nights, their regular gathering night at the P Club. By this action, Respondent Penner also aided and abetted Blachana in its denial, thereby violating ORS 659A.406. Through the voice mails, Penner and Blachana issued a discriminatory "notice" or "communication" in violation of ORS 659A.409. The forum awarded a total of $400,000 in mental, emotional, and physical suffering damages to 11 members of the T-Girls who testified at hearing, and assessed civil penalties of $5,000. ORS 659A.400, ORS 659A.403, ORS 659A.406, ORS 659A.409, ORS 659A.855, OAR 839-005-0021, OAR 839-005-0003(7)(8)(14).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 7 - 9, 2013, at 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 case presenter Chet Nakada, an employee of the Agency, and chief prosecutor Jenn Gaddis, an employee of the Agency. Sue-Del McCulloch, attorney for the Rose City T-Girls ("T-Girls") was present throughout the hearing. Respondents Blachana, LLC ("Blachana") and Christopher Penner ("Penner") were represented by Jonathan Radmacher, attorney at law. Respondent Penner was present throughout the hearing.

The Agency called the following witnesses: Christopher Penner, Respondent; Shannon Minter, expert witness (by telephone); Brandy Pirtle, former Civil Rights Division senior investigator; aggrieved persons Cassandra Lynn, Amy Lynn, Roxy Sugarrush, Kelley Davis, Susan Miller, Jennifer Carr, Jan Jeffries, Wilma Johns, Chris Elliott, Cristine Burnett, and Victoria Nolan; and Peggy Hoffner and Lynn Jeffries.

Respondent called the following witnesses: Dyane Jacobson (by telephone); Cindy Benton; and Christopher Penner.

The forum received into evidence:

a) Administrative exhibits X-1 through X-41 and X-46 (submitted or generated prior to hearing), and X-42 through X-45 (submitted after hearing);
b) Agency exhibits A-1 through A-6 and A-8 (submitted prior to hearing)
c) Respondents' exhibits R-2, R-4, and R-5 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Christie Hammond, Deputy 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 3, 2012, Brad Avakian, Commissioner of the Oregon Bureau of Labor and Industries, filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging that Blachana was a place of public accommodation that, acting through Penner, made a discriminatory communication and excluded individuals from its establishment "based solely on their real or perceived sex, sexual orientation or gender identity" and that Penner aided and abetted Blachana's unlawful practices.

2) On October 9, 2012, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination in which it found substantial evidence of unlawful discrimination by a place of public accommodation against Blachana that was aided and abetted by Penner on the basis of sex, sexual orientation, and gender identity in violation of ORS 659A.403, ORS 659A.406, and ORS 659A.409.

3) On November 18, 2011, the Agency issued Formal Charges that alleged:

(a) Blachana operated a restaurant and bar in north Portland, Oregon that offered goods and services to the public and was known as "The P Club";

(b) Penner was an owner and manager of The P Club;

(c) Beginning in 2010, a group known as the "T-Girls" that included persons "whose appearance, expression, or behavior differs from that traditionally associated with their assigned sex at birth," gathered at The P Club on Friday nights;

(d) On June 18, 2012, Penner left a message on the voice mail of a P Club patron named Cassandra, a member of the T-Girls, in which he asked Cassandra and her "group not to come back on Friday nights."

(e) On June 21, 2012, Penner left another message on Cassandra's voice mail in which he explained that "money" was the reason he asked the T-Girls not to come back on Friday nights, and added that people thought that The P Club

was a “tranny bar” or a “gay bar” and that they just did not want to be there on Friday nights.

(f) The T-Girls stopped patronizing The P Club after Penner’s voice mails.

(g) Blachana and Penner violated ORS 659A.403(3) and ORS 659A.409 and Penner, by aiding and abetting Blachana, violated ORS 659A.406.

The Formal Charges sought "[d]amages for emotional, mental and physical suffering in the amount of at least $50,000” for the T-Girls and other “similarly situated aggrieved person[s].” The Formal Charges also sought civil penalties, as authorized by ORS 659A.855, “in the amount of $1,000 for each violation found to have been committed by each Respondent.” The Formal Charges did not name any of the persons for whom damages were being sought (“aggrieved persons”) except for Cassandra.

4) On January 7, 2013, the Hearings Unit issued a Notice of Hearing stating the time and place of the hearing as March 19, 2013, beginning at 9:00 a.m., at BOLI’s Portland, Oregon office.

5) On January 29, 2013, Respondents jointly filed an answer through Jonathan Radmacher, attorney at law. Among other things, Respondents denied engaging in the unlawful practices alleged in the Formal Charges and further denied that Blachana “was in all respects a place of public accommodation, as it maintained areas from which the general public was excluded or restricted.” Respondents asserted several affirmative defenses, including:

> “Pursuant to the First Amendment to the U.S. Constitution, and pursuant to Article I, Section 8 of the Oregon Constitution, Respondents had a right to request that the Rose City T-Girls no longer use the P Club as its gathering on Friday nights, and to the extent that ORS 659A.400 *et seq* interferes with Respondents' rights of free speech, the statutes and rules implemented to enforce them are unconstitutional."

6) On January 30, 2013, Respondents filed motions to have the Rose City T-Girls and other allegedly aggrieved persons referenced in the Formal Charges added as “claimants and/or complainants in this matter” and require the Agency to make its Formal Charges more definite and certain by identifying the persons alleged to be aggrieved by Respondents' actions.

7) On February 7, 2013, the ALJ issued an interim order initially ruling on Respondent's motions. Regarding the motion for joinder, the order stated:

> “The section of the Formal Charges entitled “**I. Jurisdiction**" states that the Charges are based on a verified complaint (#STPASO120803-11077) filed by the Commissioner pursuant to ORS 659A.825. In pertinent part, that statute provides:
>
> > “(1)(b) If the Attorney General or the commissioner has reason to believe that a violation of ORS 659A.403, 659A.406 or 659A.409 has occurred,

> the Attorney General or the commissioner may file a complaint under this section against any person acting on behalf of a place of public accommodation and against any person who has aided or abetted in that violation."

"This statute gives a BOLI commissioner the right to file a complaint ('commissioner's complaint') against a place of public accommodation, and as a corollary, to seek damages on behalf on any persons damaged by a violation of ORS 659A.403, 659A.406 or 659A.409. In a commissioner's complaint, the commissioner is the complainant. In contrast, under ORS 659A.820(2), individual persons are granted the right to file complaints alleging violations of ORS 659A.403, 659A.406 or 659A.409. When they do so, they become the complainant in the case. In either situation the forum has the authority to issue an appropriate cease and desist order, which may include damages to persons affected by the unlawful practice.

"In their Answer, Respondents deny the allegation that the Commissioner filed a verified complaint on which the Formal Charges are based. **Assuming** that complaint #STPASO120803-11077 is indeed a 'commissioner's complaint' filed pursuant to ORS 659A.825 on behalf of the Rose City T-Girls, and/or those 'similarly situated,' neither OAR 839-050-0170(1) nor OAR 839-050-0020(3) require that the individuals for whom the Formal Charges seek emotional distress damages be joined as complainants."

The ALJ denied Respondents' motion to make more definite and certain, finding that the Formal Charges adequately met the due process requirements of OAR 839-050-0060(1) if the original complaint filed with the CRD was in fact a "commissioner's complaint" filed pursuant to ORS 659A.825. The ALJ noted that discovery was the appropriate procedure for ascertaining the identity of the aggrieved persons.

The ALJ additionally ordered the Agency to provide a copy of the original complaint filed with the CRD prior to a final ruling on Respondents' motions.

8) On February 8, 2013, the Agency filed a copy of complaint STPASO120803-11077, the original complaint filed with the CRD. The complaint form stated that the "Complainant" was "Commissioner Brad Avakian" and it was signed by Commissioner Avakian. That same day, the ALJ issued an interim order denying Respondents' motion for joinder.

9) On February 18, 2013, Respondents filed a motion to depose the aggrieved persons, stating the depositions were sought:

> "in part to obtain the same rights as already exercised by the Agency, and in part to come to an accurate understanding of the nature of complaining witness' [sic] alleged damages, so that Respondents can adequately prepare for the hearing in this matter. * * * Obtaining sworn answers to questions, related to their claims and claims for damages, is fundamental to Respondents' rights to defend themselves."

The Agency filed timely objections to Respondents' motion.

10) On February 25, 2013, the ALJ issued an interim order denying Respondent's motion. The interim order noted that Respondents had made a limited attempt to obtain informal discovery and there was no showing that the Agency had denied any of Respondents' discovery requests except for the deposition request. The ALJ also noted:

> "As to Respondents' assertion that obtaining 'sworn answers to questions, related to their claims and claims for damages is fundamental to Respondents' rights to defend themselves,' the forum notes that sworn statements can be obtained through interrogatories, and Respondents have not asserted that they have served interrogatories, that the Agency has failed to respond to them, or that the answers provided in response to interrogatories 'are so inadequate that [Respondents] will be substantially prejudiced by the denial of [Respondents'] motion to depose a particular witness.'
>
> "In short, Respondents have failed to demonstrate that other methods of discovery, including interrogatories, are so inadequate that Respondents will be substantially prejudiced by the denial of its motion to depose [the aggrieved persons]."
>
> "* * * Respondents' motion to depose witnesses is **DENIED**. Respondents must first attempt to gain the information it seeks via sworn statements through interrogatories. If the Agency is uncooperative, or if Respondents can demonstrate that the information it has obtained from the interrogatories will substantially prejudice Respondents in the absence of a deposition, Respondents may renew its motion to depose witnesses."

11) On March 1, 2013, Respondents filed an unopposed motion to postpone the hearing to allow Respondents to complete discovery. On March 5, 2013, the ALJ granted Respondents' motion. During a subsequent prehearing conference, the participants mutually agreed to reset the hearing to begin on May 7, 2013.

12) On March 14, 2013, the Agency filed a motion for a protective order requesting that the legal names of the aggrieved persons be kept private.

13) On March 22, 2013, Respondents filed a motion to compel the Agency to respond to five specific interrogatories, stating that the Agency had refused to provide any answers to those interrogatories and arguing that the five interrogatories asked questions which, if answered, "might give rise to admissible evidence."

14) On March 27, 2013, the ALJ issued a protective order that allowed Respondents' attorney to have the legal names of all the aggrieved persons, but prohibited Respondents' attorney from disseminating those legal names except under specific conditions set out in the protective order. To a limited extent, the order also restricted the conditions under which the five legal names of aggrieved persons that had already been disclosed could be used in discovery.

15) On March 28, 2013, the Agency filed objections to Respondents' motion to compel a response to interrogatories. On March 29, 2013, the ALJ concluded that three of Respondents' interrogatories were reasonably likely to produce information generally relevant to the case and ordered the Agency to answer those interrogatories.

16) On April 25, 2013, Respondents and the Agency agreed to a list of pseudonyms to be used as a substitute for the legal names of six of the aggrieved persons at hearing to protect the privacy of the aggrieved persons.

17) On April 26, 2013, the ALJ issued a second protective order related to the release of an aggrieved person's medical records by the Agency to Respondents.

18) On April 26, 2013, the Agency and Respondents timely filed case summaries with accompanying exhibits. The Agency's case summary listed Shannon Minter as an expert witness, listing his "Expert Witness Qualifications" as follows:

> "Shannon Minter is the Legal Director of the National Center for Lesbian Rights in the nation's leading advocacy organizations for lesbian, gay, bisexual, and trans-gender people. Shannon serves on the Boards of Faith in America and the Transgender Law & Policy Institute. He has previously served on the American Bar Association Commission on Sexual Orientation and Gender Identity. Mr. Minter has been practicing law for twenty years and has previously testified as an expert witness regarding legal issues for lesbian, gay, bisexual and transgender people.
>
> "Mr. Minter will testify to the difficulties lesbian, gay, bisexual and transgender people have gathering safely in public places. Mr. Minter will also testify to the physical and emotional damages that lesbian, gay, bisexual and transgender people experience."

19) On April 30, 2013, the ALJ issued a third protective order related to the release of a second aggrieved person's medical records by the Agency to Respondents.

20) On April 30, 2013, in response to a question from the participants as to whether the aggrieved persons who would be testifying as witnesses at the hearing would be allowed to remain in the hearing before their testimony in the Agency's case in chief, the ALJ ordered that all witnesses except for Commissioner Avakian and Christopher Penner would be excluded from the hearing except while testifying.

21) On May 3, 2013, Respondents filed a motion to exclude the testimony of Shannon Minter, arguing that neither of the topics that Minter was expected to testify about was an appropriate subject for expert testimony. In the alternative, Respondents requested that Minter's "entire file, including all communications, must be made available" to Respondents.

22) At the start of the hearing, 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.

23) During the hearing, Minter was allowed to testify as to the difficulties that lesbian, gay, bisexual, and transgender people have gathering safely in public places and the physical and emotional damages that lesbian, gay, bisexual and transgender people generally experience, based on the ALJ's determination that such testimony might help the ALJ understand the evidence. Respondents objected to his testimony and were granted a continuing objection.

24) During the hearing, the Agency objected to Dyane Jacobson's testimony concerning whether she had ever observed Penner exhibiting any bias towards people in the "LGBT community" on the grounds that it was character evidence. The ALJ allowed Jacobson to answer the question as an offer of proof, reserving ruling for the proposed order. The Agency's objection is sustained.

25) At the conclusion of the hearing, the ALJ granted the Agency's request to submit a brief addressing Respondents' constitutional free speech defense, with a filing deadline of May 31. Respondents were given until June 14 to file a responsive brief, with the Agency having the option to respond by June 28, 2013. The Agency, through its counsel Assistant Attorney General Judith Anderson, and Respondents filed timely briefs.

26) On June 27, 2013, the Agency, through Anderson, filed a response to Respondents' brief. On July 9, 2013, Respondents filed an objection to the Agency's response, contending that it should not be considered because it contained legal argument not raised in the Agency's original brief, and a sur-response. Respondents' objection is overruled.

27) On July 31, 2013, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency and Respondents both timely filed exceptions. Those exceptions are addressed in changes in the Findings of Fact – The Merits and in the Opinion sections of this Final Order.

28) On August 21, 2013, Respondents filed a document entitled "Response to Agency's Objections to Proposed Order" in which Respondents argued that the Agency's exceptions should be rejected. Although this document necessarily becomes part of the record, the forum does not consider its merits because the forum did not request such a response and there is no procedure in OAR 839-050-0000 *et seq* for filing responses to exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Blachana was an Oregon domestic limited liability company. At all times material herein, The P Club and Twilight

Room Annex were assumed business names[1] doing business at 5262 N. Lombard, Portland, Oregon, and were owned and operated by Blachana.

2) At all times material herein, Respondent Penner was a member of Blachana, LLC and, except for one year, has held an ownership interest in the P Club for the last 25 years. He also kept the books for the P Club. At all times material herein, Respondent Chris Penner was the Twilight Room Annex's authorized representative listed on the Secretary of State's business registry.

3) At all times material herein, the P Club was a "neighborhood" bar and grill that catered to a wide community and offered liquor, food, games, dancing, and video lottery.

4) The P Club has sponsored diverse events in the past such as "a reception for a lesbian marriage"; multiple "pride" events, including events that involved cross-dressers; and "fame" nights for gay, lesbian, and transgendered persons.

5) In the last seven years,[2] no customer who has entered the P Club while P Club manager Cindy Benton was present has been refused service during their visit because of how they were dressed or because of their sexual orientation.

6) The Rose City T-Girls ("T-Girls") are a private Yahoo group started in 2007 by aggrieved person Cassandra Lynn because of Lynn's desire to build a social group for transgendered persons and teach them that they did "not have to just live in a big closet and be in a gay club." The T-Girls are a diverse, informal social group that includes straight people, married couples, non-married couples, males who identify as females, cross-dressers, males who have physically transitioned to females, lesbians, and gay males. The group welcomes everyone, especially "cross-dressers." The group is designed to give members a means of communicating and organizing so they can get together and participate in group activities. The group presently has 250 members, including out-of-state members, and eight "moderators" who "police" the group and approve new members. C. Lynn and aggrieved person Susan Miller are the group "administrators." C. Lynn is the group spokesperson and also screens Yahoo group applications to keep out "inappropriate persons." The T-Girls chose Friday night as a regular gathering night because Friday is the night most convenient for group members. Their gathering places were posted on the group's Yahoo website.

7) Except for Chris Elliott, all the aggrieved persons prefer to be addressed as "Ms." and to be referred to with feminine pronouns.

[1] Although it was undisputed that Blachana owned and operated both assumed business names, the exact period of time that each assumed business name was used by Blachana was not clear from the record. For the sake of convenience, the forum hereafter refers to the business at which the T-Girls gathered as the "P Club."

[2] This finding is based on Benton's testimony and Benton has only worked at the P Club since July 2006.

8) Before July 2010, the T-Girls had been gathering on Friday nights at the Candlelight Club. In or around July 2010, the T-Girls were asked not to gather at that Club more than one Friday a month, and they began looking for a new Friday night gathering place.

9) Between September 2010 and January 2011, the T-Girls gathered intermittently on Friday nights at the P Club as they explored possible new Friday gathering spots. In January 2011, the T-Girls decided to make the P Club their "regular Friday nightspot."

10) The T-Girls found the P Club to be an ideal place for their gatherings for a number of reasons,[3] including its spaciousness, variety of games, good food and drink, a band, a dance floor, and televisions for T-Girls who like to watch sports. They felt welcomed and were treated well by the P Club's employees. With one exception, they never experienced any trouble with the P Club's other patrons. All the aggrieved persons felt safe at the P Club because of their group presence and the P Club's well-lit parking lot, with bouncers who would walk them to their cars if needed. A number of T-Girls came to the P Club on their "first time out."

11) From eight to 54 T-Girls gathered at the P Club every Friday night between January 2011 and June 18, 2012. During this same time, the T-Girls also held a group dinner on Wednesday nights at the Fox & Hound, afterwards going to C.C. Slaughter's, a "gay" bar.

12) While at the P Club, all the aggrieved persons except for Chris Elliott cross-dressed as females and assumed the mannerisms they associated with their female identities.

13) The T-Girls regularly talked among themselves about public bathroom issues related to the use of women's bathrooms by male T-Girls who were presenting themselves as females. C. Lynn and other T-Girls also talked to new male members about proper bathroom etiquette when they used the women's bathroom in the P Club. (Testimony of C. Lynn)

14) Cindy Benton managed the P Club during the time when the T-Girls attended it on Friday nights. Benton and a co-worker named Nicole worked as bartenders together on Friday nights for the first "eight to 12 months" that the T-Girls used the P Club as their Friday night gathering place.

15) Between January 2011 and June 18, 2012, C. Lynn and aggrieved person S. Miller regularly asked Cindy and Nicole if there were any problems -- particularly with bathroom issues -- associated with the T-Girls and were always told there were no problems.

[3] Several aggrieved person testified that the P Club "had something for everybody."

16) Between January 2011 and June 2012, on some Friday nights the P Club had very few or no other customers than the T-Girls.

17) At some point between January 2011 and June 2012, Penner was told by another bar owner and the manager of another bar that the P Club was perceived as a "gay" or "tranny" bar.

18) Sometime in 2011, Penner perceived that the P Club's business was declining and talked to Benton about it. At that time, Benton told Penner that if the T-Girls were asked not to come back, there would be no business at all on Fridays.

19) Some female customers of the P Club complained to Benton about having to share the women's restroom with the T-Girls. When the T-Girls were in the P Club, Benton noticed some customers come in the front door, look around, then leave and not come back.

20) In late 2011, Benton elected to stop working as a bartender on Friday nights because business had declined and two bartenders were no longer needed. Clientele from previous years were no longer coming on Friday nights.

21) On a Friday night in early June 2012, after Nolan and a number of other T-Girls had missed the previous Friday, Nicole, the P Club's bartender, told Nolan not to ever miss another Friday because the T-Girls were about the only people coming in on Fridays and their absence "really hurt the business" when they were gone.

22) Annual Friday night food and beverage sales for the P Club totaled $109,617.40 in 2009, $103,121.50 in 2010, $97,464.36 in 2011, and $81,454.53 in 2012. Broken down further, Friday night food and beverage sales for the P Club from January through the third Friday in June[4] totaled $54,113.29 in 2009, $47,960.38 in 2010, $47,091.03 in 2011, and $42,226.13 in 2012. Friday night food and beverage sales for the P Club from the fourth Friday in June through December 31 totaled $55,504.11 in 2009, $55,161.12 in 2010, and $50,373.33 in 2011.

23) In June 2012, Penner decided to ask the T-Girls to stop using the P Club as their regular Friday night gathering place, describing his thought process in the following words:

> "My thought was to do a name change, call it the Twilight Room Annex and tie it into the popularity of the Twilight Room, which is known worldwide and I came back over and was looking at what was going on in the place. I was looking at my Friday night sales and said * * * 'what are we going to do to get people back in this place again? What has happened on Friday nights? Why are people not

[4] The forum uses this comparative time span because the T-Girls did not go to the P Club after the third Friday in June 2012 and began using the P Club as their regular Friday night gathering place in January 2011.

coming back no matter what the name of the place is?' And it came down to the Rose City T-Girls."

24) On June 18, 2012, Penner telephoned C. Lynn and left the following voice mail message:

"Hello, my name is Chris, I'm the owner of the P Club Bar and Grill on North Lombard. Um, unfortunately, uh due to circumstances beyond my control I am going to have to ask for you, Cass, and your group not to come back on Friday nights. Um, I really don't like having to do that but unfortunately it's the area we're in and it's hurting business a lot. If you have any questions, please feel free to give me a call at [xxxx][5]. Again I'm really sorry about having to do this but yeah give me a call. Thanks, bye."

25) In response to Penner's voice mail, C. Lynn telephoned Penner and left a message asking what the "real reason" was for Penner's request that the T-Girls not come back on Friday nights.

26) On June 21, Penner telephoned C. Lynn and left the following voice mail message:

"Hello Cassandra, this is Chris from the P Club. Sorry it took me awhile to return your phone call. There is no underlying reason for asking you folks not to come back other than money. Um, sales on Friday nights have been declining at the bar for the last 18 months. Uh, about a year ago I was looking at asking you folks not to come in anymore and the girls said, 'No, no, no don't,' so I gave it a while longer. Um, I own another bar in north Portland; sales are doing great on Fridays, and so I've done some investigating as to why my sales are declining and there's two things I keep hearing: People think that (a) we're a tranny bar or (b) that we're a gay bar. We are neither. People are not coming in because they just don't want to be there on a Friday night now. In the beginning sales were doing fine but they've been on a steady decrease so I have to look at what the problem is, what the reason is, and take care of it; that's my job as the owner. So unfortunately, I have to do what I have to do and that is the only reason. It's all about money. So I'll be back in town tonight; if you want to give me a call I should be answering my phone; I've been out of town for the past few days. So, there we are, take care. Bye bye."

27) C. Lynn understood Penner's voice mails[6] to mean that the P Club "wasn't a tranny bar" and "we're not allowed in there."

28) None of the aggrieved persons visited the P Club after June 18, 2012.

[5] Penner left his phone number in the message but the forum has redacted it to preserve his privacy.
[6] In the remainder of this order, Penner's June 18 and 21 voice mail to C. Lynn are referred to simply as "the voice mails."

Cassandra Lynn

29) C. Lynn is a male who refers to himself as a "girl" and is married to a female. C. Lynn began dressing as a female when she was young. The P Club gatherings were "very, very important" to her, and she only missed five Fridays. The voice mails made her intensely "angry" and were "devastating" to her. All she could think about was "what happened on Friday night * * * that prompted that phone call." The voice mails were "probably the most humiliating thing" that has happened in her life. In her words, she felt that:

> "I had done nothing wrong except spend $8-10,000 in that business * * * I felt totally disgraced." * * * It was the first time in my life I felt utterly discriminated against for being a tranny because I probably wouldn't have been kicked out if I had been in male mode and went back there the next day."

She was so upset by the voice mails that she considered disbanding the T-Girls. As a result of the voice mails, she felt irritable at work and lost sleep, frequently waking in the middle of the night and asking herself what the T-Girls had done to provoke Penner's voice mail.

30) After C. Lynn received the voice mails, she posted a note on the T-Girls' website stating that Penner had asked the T-Girls not to come back to the P Club. Subsequently, she posted a transcription of the voice mails, then the actual voice mails on the website.

31) After Penner's voice mails, C. Lynn and other T-Girls began looking for a new place to gather on Friday nights, a time-consuming experience that was frustrating for them. In August or September 2012,[7] the T-Girls began to gather regularly on Friday nights at the Sweet Home Bar & Grill ("Sweet Home"), which continued to be the T-Girls' regular gathering place at the time of hearing. C. Lynn finally started "healing" about three weeks after the T-Girls began gathering regularly at Sweet Home, when she felt the T-Girls had been accepted there.

Amy Lynn

32) Amy Lynn is a male who identified herself as "60% Amy and 40% male." She still has to work as a male but does "almost everything else as Amy" and would be "Amy" all the time but for her job. She has been dressing like a woman her entire life. She first began going out in public as a woman in 2008 and has been a member of the T-Girls since October or November 2009.

33) A. Lynn began going to the P Club with the T-Girls in late 2010 when they were looking for a new Friday gathering place. From January 2011 to June 18, 2012, she went to the P Club at least three Fridays a month. She liked to go to the P Club

[7] Several aggrieved persons testified that it was "two or three months" after June 18, 2012 that the T-Girls began gathering regularly at Sweet Home.

because of the variety of entertainment it offered, especially ping-pong, and she danced with a lot of the "regulars" at the P Club. A. Lynn first learned of Penner's voice mails by reading C. Lynn's posted note on the T-Girls' website, then listened to them about a week later. She felt "angry at first," then "hurt * * * when it seemed like everything was going so well." She was offended by the voice mails and would not have gone back to the P Club after that for any reason. After hearing the voice mails, she quit going out for almost three months, during which time she dressed as a woman at home but stopped going out in public dressed as a woman. She lost 15 pounds in that time and limited her socializing. At the time of the hearing, she had been attending the T-Girls' Friday night gatherings at Sweet Home.

Roxy Sugarrush

34) Roxy Sugarrush is a male who has identified herself "Roxy" for the past 11 years, but is not "Roxy" fulltime. Being "Roxy" gives her a "tremendous amount of self-confidence that I don't normally have." Sugarrush joined the T-Girls in 2007 and was the third member of the group. She feels that the T-Girls are her "surrogate family" and "sisters." While in public with the T-Girls, Sugarrush usually went out as "Roxy." Her good feeling as "Roxy" is enhanced when she is with the T-Girls.

35) Sugarrush attended the T-Girls' Friday night gatherings at the P Club two or three times a month. She especially liked to go to the P Club because it was a "non-gay club." The P Club staff was always "very nice" to her, and she made friends with a group of ladies at the P Club who played bunco and whom she would not have met at a gay club. Aggrieved person Chris Elliott, Sugarrush's boyfriend, told her about the voice mails before she listened to them. Listening to the voice mails made her feel "very angry," and then she felt depressed "for maybe a day" and didn't feel like going out for "maybe a month or so." She interpreted the voice mails as "kicking [the T-Girls] out" and was offended by Penner's statement that he didn't want to be labeled as a "tranny bar." Sugarrush moved from Texas to Portland to get away from discrimination and "it was upsetting to have it happen here." After the voice mails, she stopped going to the P Club because "we were asked not to go and I figured if they didn't want my money, then I wouldn't be there." Sugarrush still meets with the T-Girls at Sweet Home on Friday nights and likes going there.

Kelley Davis

36) Kelley Davis identifies herself as a "transsexual" who is not gay and stated she was "legally female" at the time of the hearing.

37) At the time of hearing, Davis had been a member of the T-Girls for about five years. She attended two Friday gatherings a month at the P Club with the T-Girls. She liked gathering at the P Club because there was good attendance and she had a good time and felt safe. Davis learned of and listened to the voice mails through the T-Girls' website. She spent a lot of money at the P Club. She felt "sad and angry right away" after hearing the voice mails and felt that way for "a couple of weeks." She

believed that the T-Girls were told not to come back because they were transgendered and the owner thought the P Club was being perceived as a "tranny bar." Previously, Davis had been asked to leave several places because she is transgendered and the voice mails were "just another one on top of the ones that I've already had happen" and "another example of being transgendered in this society and being told that you don't belong." She now attends the T-Girls' Friday night gatherings at Sweet Home twice a month.

Susan Miller

38) Susan Miller identifies as a non-gay male who cross dresses as a female but is "not transitioning." She has been blogging about her life as "Susan" since 2006 or 2007 and feels "more relaxed and at ease as Susan." She has been a member of the T-Girls since 2008.

39) Miller went to the P Club every Friday night with the T-Girls. She first learned of the voice mails from the note C. Lynn posted on the T-Girls' website, then listened to them after C. Lynn posted the voice mails on the website. She understood the voice mails as a "definitive we weren't welcome there." She felt disappointed, upset, and a "little sick" after hearing the voice mails, in part because Nicole and Cindy had always told her there were no problems at the P Club related to the T-Girls. She found it "hard to be told you're not welcome somewhere just because of who you are." As a result of the voice mails, she had trouble sleeping for a month, began eating "a little more sugar than I should have" and gained about 10 pounds. She was also a little short-tempered and tired at work and was late to work twice because of her lack of sleep. She felt "just not myself" and "pulled away from my friends that I have outside of my Susan life." She lost some other friends she made at the P Club who were not T-Girls and whom she only saw at the P Club.

40) After hearing the voice mails, Miller did not want to go back to the P Club because she didn't want to risk being kicked out or having the police called while she was cross-dressed.

Jennifer Carr

41) At the time of hearing, Jennifer Carr was a married male who was "transitioning" to female, had been taking transition hormones the prior 15 months, and had her name legally changed to Jennifer Carr three weeks before the hearing. Carr joined the T-Girls in July 2011 after reading S. Miller's blog. Her first trip to the P Club and first time going out in public dressed as a woman was on January 28, 2012. She feared for her safety prior to entering the P Club. Her visit to the P Club was the first time she had ever met "anyone else like me," and she met several other male T-Girls who were also "transitioning" and was able to ask them questions about taking hormones and "transition" surgery.

42) After her first trip to the P Club, Carr went to the P Club two or three times a month on Friday nights, finding each gathering "easier" to attend. At the P Club, she also talked to other patrons who were curious about the T-Girls. Carr first learned of the voice mails from C. Lynn and listened to them when they were posted on the T-Girls' website. When she heard them, "it was though the rug had just been pulled out from under me. * * * I had a place where I felt safe to express myself. That was gone in an instant." She understood the voice mails as a message that the T-Girls were not welcome at the P Club any night of the week. By this time, Carr had started taking hormones "and was on the track to transition." The voice mails caused her to reassess her situation and she "took a step back and withdrew a bit for awhile." She felt depressed "for awhile" and was "sad and irritable." It was hard for her to have something "that for me was such a wonderful thing to be gone and on such bad terms. * * * that was where we felt safe and then it wasn't." It also made her angry to have to "scope out places that might be okay for you to go; * * * [whereas] most people just go and they're welcome." She was concerned for her safety when going to new places, and she did not go out with the T-Girls again for a month after hearing the voice mails. When she did go out again with the T-Girls, she was very self-conscious and even asked the waitress if they were welcome to come back. Carr still feels upset and angry when she drives past the P Club.

Jan Jeffries

44) Jan Jeffries is a male who identifies as a "cross-dresser" and dresses as a woman 30 percent of the time, dressing as a man at work. She has gone out in public "as a woman" since Halloween 2007, and it took her about a year to feel comfortable in public as a woman. She joined the T-Girls in December 2008 and began going to the P Club with the T-Girls in 2010, attending with her wife.

45) In the summer, J. Jeffries went to the P Club every Friday with the T-Girls, going once or twice a month the rest of the year. The T-Girls are important to her because it's "a group of friends; a group of people I feel comfortable with." She first learned of the voice mails on the T-Girls' website, then listened to them on the website. She understood the voice mails to mean that the T-Girls were being asked to leave and not return, and further believed that the voice mails were caused by her dressing as a woman. It made her feel "a little disappointed" and "more than a little upset" because she "was under the impression we were welcome and I didn't feel any of us had done anything that was wrong to have gotten 86'd." She felt "a little dismayed" because they would have to find a new place and questioned "what went wrong" that caused the T-Girls to be unwelcome. She was discouraged at having to look for a new Friday night gathering place and experienced emotional distress from the voice mails for about a month. In June and July 2012, Jeffries was also upset by personal family issues.

Wilma Johns

46) Wilma Johns is a genetic, married male who identifies as "transgender" and goes out dressed as a woman. She first went out in public dressed a woman in the

1980s and initially found it "terrifying." She joined the T-Girls in July 2009 after meeting C. Lynn. She feels “safety in numbers” and the T-Girls have been a support group and social organization for her. She went to the P Club every Friday night when the T-Girls first began gathering there, getting a ride with C. Lynn. She later only attended once or twice a month because her job took her out of town every other weekend. She looked forward to the T-Girls’ Friday gatherings because of the “companionship,” “camaraderie” and because “we just generally had fun together.” Although she had no problems at the P Club, other T-Girls told her that some of the female patrons of the P Club had objected to the T-Girls’ use of the women’s bathroom.

47) In June 2012, Johns saw C. Lynn’s note on the T-Girls website saying that the T-Girls “had got kicked out of another club” while Johns was out of town for three weeks. When she returned to Portland, C. Lynn played the voice mails for her. Johns interpreted the voice mails to mean that the T-Girls should not come back to the P Club. After being out of town for three weeks instead of his usual two, Johns was “really looking forward to going back to the P Club” and found it “really disappointing because the place we had gone before they didn’t want us * * * It was kind of devastating.” Johns is African-American and the voice mails brought up intense repressed memories related to discrimination she had experienced in the past because of her race and color. On Friday nights after that, Johns had no place to go because she lacked a ride, and going out alone using public transportation was not an option, as it would have required either returning home by 10 p.m. or running the risk of being stranded somewhere in Portland late at night while dressed as a woman. This depressed her and she stopped dressing as a woman because it made no sense to dress up when there was no place to go with the other T-Girls.

Chris Elliott

48) Chris Elliott is a gay male who identifies as a male and who joined the T-Girls in 2007.

49) Elliott attended the T-Girls Friday night gatherings at the P Club almost every Friday night between January 2011 and June 18, 2012. While there, he dressed in jeans and a long sleeve shirt and enjoyed playing pool and socializing with the T-Girls. He never had any problems with any of the P Club’s employees. He also enjoyed the P Club because, unlike gay bars, it was not a “meat market.”

50) Elliott first heard the voice mails when C. Lynn played the voice mails to him from her phone. He concluded from listening to them that the P Club did not want the T-Girls coming in “ever again.” The voice mails made him feel “angry,” “terrible,” and were “painful.” They hurt him “deeply” because the T-Girls “had been going there for so long and in my mind there was no indication that there was anything wrong with us going there.” He felt depressed afterward and could not understand “why this was happening.” He felt that his “mental security” was at risk because he felt “if this could happen here, it could happen anywhere.” It made him feel “grumpier” at work until the T-Girls began gathering at Sweet Home.

32 BOLI ORDERS

Cristine Burnett

51) Cristine Burnett is a genetic male who has identified as a "female in a male body" since the age of five and goes out in public dressed as a woman. She would have had sexual reassignment surgery in 2004 except for her disabling medical conditions. She has been legally known as "Cristine" since 2004 and has dressed as a woman "24/7" since 2004. She was one of the original eight members of the T-Girls. Because of her disabilities, it is important for her to "socialize, to be out meeting people, and still feeling a purpose." Being out with other people helps keep her stress to a minimum, which in turn helps keep her from having another heart attack. She attended T-Girls' Friday night gatherings at the P Club almost every Friday night from January 2011 to June 18, 2012.

52) Attending T-Girls functions enables Burnett to get out socially in a safe setting. One thing she particularly liked about the P Club was its "good parking" that made it safer and more convenient for her to navigate from her car with her walker. Hearing the voice mails was "quite devastating" for her and negatively affected her stress level. Burnett had testified at public hearings in Salem in 2007 in support of new state laws protecting transgendered persons against discrimination, and listening to the voice mails made her feel like "part of my life just went down the drain." In particular, she "hates" the word "tranny." Burnett cannot go to Sweet Home with her boyfriend because of the easy availability of video poker games and his "problem with video poker machines" that was not an issue at the P Club because the video poker machines "were somewhat out of sight."

Victoria Nolan

53) Victoria Nolan was born as a genetic male. She began the transition from male to female in September 2011 and completed the physical transition from male to female in January 2013. She joined the T-Girls in late 2010 and enjoys being a member. At T-Girl gatherings, she was able to discuss transitioning with other T-Girls who had gone through that process.

54) Nolan began going to Friday night P Club gatherings with the T-Girls in December 2010 and attended every Friday. She liked the activities at the P Club, particularly the dancing, pool tables and shuffleboard, and felt comfortable there. She also liked the good food, the size of the P Club, and that it was quiet enough to carry on a conversation. The staff was "wonderful" to her. Over time, she became a mentor to other T-Girls who were considering transitioning.

55) Nolan learned of the voice mails from C. Lynn, who called Nolan and described them. The voice mails came as "a huge surprise" and a "pretty big blow at

first" and didn't "make sense" to her.[8] The voice mails were the first time Nolan experienced a business, as opposed to an individual, "taking exception" to her and made her fearful that this would keep happening to her in public establishments. She had just "locked in" her surgery date for sexual reassignment surgery when she heard the voice mails and began to question if she could handle this type of occurrence. She experienced some sleepless nights. Whenever she walked into a new public place, she wondered if she would be helped or asked to leave. It also affected her confidence and she wondered if people were talking behind her back.

56) At the time of hearing, Nolan was only attending the T-Girls' gatherings at Sweet Home every third Friday because Sweet Home has fewer activities she likes than the P Club.

57) Transgendered persons include transsexual persons, persons who are undergoing or in the process of undergoing gender transition, people who may live part time as one gender and part time as the other, people who cross dress by wearing clothing typically associated with the other gender, and people who appear "gender non-conforming." A "transgendered woman" is a person who was "assigned a male identity at birth and who assumes a woman's identity."

58) It is important for transgendered persons to be able to gather publicly for a number of reasons, including:

- To have an opportunity to obtain and share information about unique legal and medical challenges that transgendered persons face;
- Safety in numbers, for transgendered women in particular, who may be targeted for acts of physical violence;
- There is a significant amount of social stigma and potential isolation for transgendered persons;
- Learning how to socialize and interact with other people in a mainstream setting in the transgendered person's true gender – the gender that corresponds to a person's internal gender identity;
- Comfort from being with other persons who understand transgender issues because they are also transgendered.

Credibility Findings

59) Minter, Pirtle, C. Lynn, Hoffner, A. Lynn, Sugarrush, Davis, Miller, Carr, Jeffries, L. Jeffries, Johns, Elliott, Burnett, Nolan, Benton and Jacobson were credible witnesses and the forum has credited their testimony in its entirety.

[8] In her testimony, she explained: "We were regulars. We spent good money there. We'd been going there for a long time. There didn't seem to be hardly any other * * * customers there." It felt kind of like "when the rug gets pulled out."

60) Chris Penner's testimony was not credible in two key respects. First, his testimony that the P Club's business dropped "20 percent" on Friday nights while the T-Girls were in attendance was not borne out by revenue figures offered and received into evidence by Respondents that showed Penner's testimony was exaggerated.[9] Second, his testimony that his voicemail was only a "request" and that the sexual orientation of the T-Girls was not a factor in his request for them to not come back on Fridays was disingenuous. The forum has only credited his testimony when it was undisputed or corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Blachana LLC was an Oregon domestic limited liability company that owned and operated the P Club and Twilight Room Annex as a bar and grill at 5262 N. Lombard, Portland, Oregon. At all times material herein, Respondent Penner was a member of Blachana, LLC.

2) The Rose City T-Girls are a private Yahoo social group started in 2007 that includes straight people, married couples, non-married couples, males who identify as females, cross-dressers, males who have physically transitioned to females, lesbians, and gay males.

3) From eight to 54 T-Girls gathered at the P Club every Friday night between January 2011 and June 18, 2012. Among others, the T-Girls who gathered at the P Club included 10 of the 11 aggrieved persons who identified, dressed, made up, and assumed the mannerisms they associated with their female identities, along with some of their wives, and at least one gay male who dressed as a male.

4) In June 2012, Penner decided to ask the T-Girls to stop using the P Club as their regular Friday night gathering place. On June 18, 2018, Penner telephoned C. Lynn and left a voice mail in which he asked the T-Girls "not to come back on Friday nights."

5) In response to Penner's voice mail, C. Lynn telephoned Penner and left a message asking what the "real reason" was for Penner's request that the T-Girls not come back on Friday nights. On June 21, Penner returned C. Lynn's phone call and left the following voice mail message:

> "Hello Cassandra, this is Chris from the P Club. * * * There is no underlying reason for asking you folks not to come back other than money. Um, sales on Friday nights have been declining at the bar for the last 18 months. * * * Um, I own another bar in north Portland; sales are doing great on Fridays, and so I've done some investigating as to why my sales are declining and there's two things I keep hearing: People think that (a) we're a tranny bar or (b) that we're a gay bar.

[9] *See* Finding of Fact #22 – The Merits.

> We are neither. People are not coming in because they just don't want to be there on a Friday night now. In the beginning sales were doing fine but they've been on a steady decrease so I have to look at what the problem is, what the reason is, and take care of it; that's my job as the owner. So unfortunately, I have to do what I have to do and that is the only reason. It's all about money. * * *"

6) After receiving the voice mails, C. Lynn posted their content on the T-Girls' website, then posted a link to the actual voice mails on the website. All of the aggrieved persons listened to the voice mails and understood Penner's voice mails to be a message that the T-Girls were not welcome in the P Club any night of the week because Penner thought their presence was causing customers to perceive the P Club as a "tranny" club or gay bar.

7) None of the aggrieved persons visited or attempted to visit the P Club after June 18, 2012.

8) All of the aggrieved persons experienced mental and emotional suffering in varying degrees as a result of Penner's voice mails. C. Lynn, A. Lynn, Miller, and Nolan also experienced physical suffering.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Blachana, LLC was a place of "public accommodation" as defined in ORS 659A.400.

2) At all times material herein, Respondent Christopher Penner was an individual and a "person" under ORS 659A.010(9) and ORS 659A.406.

3) The actions, statements and motivations of Respondent Penner are properly imputed to Blachana, LLC.

4) Blachana, LLC and Respondent Penner each committed one violation of ORS 659A.403(3) by denying full and equal accommodations, advantages, facilities and privileges to the T-Girls, in particular Cassandra Lynn, Amy Lynn, Roxy Sugarrush, Kelley Davis, Susan Miller, Jennifer Carr, Jan Jeffries, Wilma Johns, Chris Elliott, Cristine Burnett, and Victoria Nolan ("aggrieved persons"), based on their sexual orientation.

5) Respondent Penner committed one violation of ORS 659A.406 by aiding and abetting Blachana, LLC in discriminating against the T-Girls and the aggrieved persons based on their sexual orientation.

6) Respondent Penner and Respondent Blachana each committed one violation of ORS 659A.409 by issuing a notice and communication, through Penner's voice mails, that the T-Girls, including the aggrieved persons, would be denied

accommodations, advantages, facilities, services, or privileges on account of their sexual orientation.

7) 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 practices found. ORS 659A.800 to ORS 659A.865.

8) Pursuant to ORS 659A.850 and ORS 659A.855, the Deputy Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award compensatory damages to the aggrieved persons resulting from Respondents' unlawful practices and to assess civil penalties based on those same practices. The sum of money awarded and civil penalties assessed against Respondents in the Order below are an appropriate exercise of that authority.

OPINION

INTRODUCTION

In its Formal Charges, the Agency alleges three unlawful practices. First, that Penner and Blachana violated ORS 659A.403(3) by denying the T-Girls "full and equal accommodations, advantages, facilities and privileges * * * based on sexual orientation." Second, that Respondent Penner violated ORS 659A.406 by aiding and abetting the P Club's violation of ORS 659A.403(3). Third, that the Respondent Penner, acting on behalf of the P Club and Blachana, violated ORS 659A.409 by:

> "publish[ing], circulat[ing], issu[ing] or display[ing] a communication or notice to the effect that accommodations, advantages, facilities, services or privileges * * * would be refused, withheld or denied to, or that discrimination would be made against, the T-Girls on account of sexual orientation."

The Formal Charges further allege that both Respondents are jointly and severally liable for the unlawful practices and seek damages for all 11 members of the T-Girls who are "aggrieved persons" in this proceeding, as well as civil penalties pursuant to ORS 659A.855 from each Respondent for each aggrieved person.

In defense, Respondents contend that Penner's request that the T-Girls no longer come to the P Club was not a refusal of service or a notice that service would be refused, but merely a "request." Respondents further deny that service was ever refused to the T-Girls and assert that: (1) Respondents had a right, pursuant to the First Amendment to the U.S. Constitution and Article I, Section 8 of the Oregon Constitution, to request that the T-Girls no longer use the P Club as its gathering place on Friday; and (2) To the extent that ORS 659A.400 *et seq* interferes with Respondents' rights of free speech, the statutes and rules implemented to enforce them are unconstitutional.

THE P CLUB IS A "PLACE OF PUBLIC ACCOMMODATION"

ORS 659A.400 defines "place of public accommodation" in the following words:

"(1) A place of public accommodation, subject to the exclusion in subsection (2) of this section, means any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise.

"(2) However, a place of public accommodation does not include any institution, bona fide club or place of accommodation which is in its nature distinctly private."

Undisputed evidence established that the P Club is a bar that offers drinks, dancing, food, and games. Penner testified that the P Club is a "neighborhood bar open to everyone," and Benton added that the P Club "[is] just kind of noted as that neighborhood bar; everyone's allowed in there." Based on this evidence and the absence of any evidence to show that any of the exceptions in ORS 659A.400(2) apply, the forum finds that the P Club is a "place of public accommodation" under ORS 659A.400.

DENIAL OF FULL AND EQUAL ACCOMMODATIONS, ADVANTAGES, FACILITIES AND PRIVILEGES -- ORS 659A.403(3)

A. Respondents denied full and equal accommodations, advantages, facilities and privileges to the T-Girls.

ORS 659A.403 provides, in pertinent part:

"(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of * * * sexual orientation[.]

"* * * * *

"(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section."

The T-Girls, including the aggrieved persons, used the P Club as their regular Friday night gathering place from January 2011 until mid-June 2012. On June 18, 2012, Penner left a voice mail with C. Lynn, the T-Girls' spokesperson, in which he stated that "due to circumstances beyond my control I am going to have to ask for you, Cass, and your group *not to come back* on Friday nights."[10] On June 21, 2012, Penner left a second voice mail in response to C. Lynn's inquiry about the "real reason" for asking the T-Girls not to come back on Friday nights. That voice mail included the statement "[t]here is no underlying reason for asking you folks *not to come back* other than money."[11] (Emphasis added)

[10] *See* Finding of Fact #24 – The Merits.
[11] *See* Finding of Fact #26 – The Merits.

It is undisputed that Penner's statements constitute a request for the T-Girls not to come back to the P Club on Friday nights. Respondents argue that the Agency did not meet its burden of proving that Penner's request amounted to a "denial" for several reasons. First, Penner's message was only a "request" and not a "denial." Second, there was no evidence that any member of the T-Girls visited the P Club after June 18 and was turned away or otherwise denied the use of any of the P Club's accommodations, advantages, facilities and privileges. Third, there was no evidence, other than the aggrieved persons' testimony that they interpreted Penner's voice mail to mean that they were not welcome at the P Club any night of the week, to show that the T-Girls would not have been welcomed at the P Club any night of the week except for Fridays. The forum addresses these arguments separately.

1. Penner's "request" was the same as a "denial."

In both voice mails, Penner specifically asked the T-Girls "not to come back" to the P Club on Friday nights. In the second voice mail, he specifically stated that the reason was because he was losing money on Friday nights due to declining sales since the T-Girls began using the P Club as their Friday night gathering place. A reasonable person would have interpreted his request as a statement that the T-Girls were not welcome at the P Club on Friday nights because their presence was hurting the P Club's business. Under the circumstances, his request that the T-Girls not come back on Friday nights is the functional equivalent of "deny[ing]" under or 659A.403(3).

2. The T-Girls were not required to visit the P Club after June 18, 2012 to establish a violation of ORS 659A.403(3).

This issue was previously addressed by the forum in the case of *In the Matter of The Pub,* 6 BOLI 270 (1987), in which a black woman approached the front door of respondent's bar, saw a sign posted on the door that read "NO SHOES, SHIRTS, SERVICES, NIGGERS," and left without attempting to enter. Reasoning that a narrow interpretation of the statute "would stifle the goal of eliminating discrimination," the forum held that the woman was not required by ORS 30.670[12] to have entered, requested service, and had been denied service in order to establish a violation of the statute. *Id.* at 282-83. The forum also held that, under those circumstances, it was unnecessary for the woman to have performed a futile act to establish a violation of law. *Id.* Under the circumstances of this case, the forum interprets Penner's request for the T-Girls "not to come back" on Friday nights as a statement that they were not welcome at the P Club on Friday nights, the same conclusion reached by the aggrieved persons. Notably, Penner did not testify that the T-Girls would have been welcome on Friday nights or any other night, had they chosen to return. Relying on the forum's holding in *The Pub*, the forum finds that the aggrieved persons were not required to actually visit the P Club on a Friday night after hearing Penner's voice mails in order to establish a violation of ORS 659A.403(3).

[12] ORS 30.670 was renumbered as ORS 659.037, which was in turn renumbered as ORS 659A.403.

3. Respondents' Friday night denial constituted a denial of "full and equal" access to the P Club's accommodations, advantages, facilities and privileges.

In his voice mails, Penner specifically asked the T-Girls "not to come back" to the P Club on Friday nights. Based on the content of the voice mails, all the aggrieved persons testified they believed they were not welcome back in the P Club any night of the week. There is no other evidence other than the aggrieved persons' subjective beliefs to support that conclusion. Penner's stated reason was specifically tied to the P Club's declining business on Friday nights. Although Friday night was the only night of the week that the T-Girls gathered at the P Club, this fact alone does not lead to an inference that Penner, through his voice mails, denied the use of any of the P Club's accommodations, advantages, facilities and privileges to the T-Girls on any other night of the week.

Whether or not the T-Girls were denied access to the P Club on any night other than Friday is irrelevant. Friday night is the only night they went to the P Club; Friday night is the only night targeted in the voice mails; and Friday night is the night on which the Agency's allegation of an unlawful practice under ORS 659A.403(3) is founded. ORS 659A.403(3) makes it unlawful for any place of public accommodation to deny the "full and equal accommodations, advantages, facilities and privileges" to a person based on that person's sexual orientation. "Full and equal" means the same accommodations, advantages, facilities and privileges accorded to persons in general. In this case, Penner testified that the P Club is a "neighborhood bar open to everyone," and there was no evidence that any other person or group was ever excluded unless they had been asked to leave because of disruptive behavior. Denial of access to the T-Girls for only one night a week, assuming *arguendo* that the T-Girls would have remained welcome every night but Friday, constitutes a denial of "full and equal" access to the P Club's accommodations, advantages, facilities and privileges because no other person or group was denied similar access.

B. Respondents' denial was "on account" of the T-Girls' sexual orientation.

The Formal Charges allege that the T-Girls were asked not to come back on Friday nights "based on" their "sexual orientation." ORS 659A.403 prohibits discrimination in places of public accommodation "on account of" the sexual orientation of any person. BOLI has defined "sexual orientation" by rule in OAR 839-005-0003(14) as:

> "an individual's actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's assigned sex at birth."

OAR 839-005-0003(8) defines "gender identity" as:

> "an individual's gender-related identity, whether or not that identity is different from that traditionally associated with the individual's assigned sex at birth,

> including, but not limited to, a gender identity that is transgender or androgynous."

OAR 839-005-0003(7) defines "gender expression" to mean:

> "the manner in which an individual's gender identity is expressed, including, but not limited to, through dress, appearance, manner, or speech, whether or not that expression is different from that traditionally associated with the individual's assigned sex at birth."

1. "Sexual orientation" of the T-Girls.

The forum first addresses the "sexual orientation" of the T-Girls, specifically the "sexual orientation" of the aggrieved persons. Ten of the 11 aggrieved persons, all of whom were T-Girls in June 2012 who regularly visited the P Club on Friday nights, were born as genetic males but have the gender identity of females and consider themselves to be transgendered persons. They expressed that gender identity at the P Club by cross-dressing, making themselves up, and assuming the mannerisms they associated with their female identities. Elliott, the 11th T-Girl, was also born as a genetic male, identifies as a gay male, and was identified by Sugarrush as her "boyfriend."

2. Connection between the T-Girls' sexual orientation and the denial.

Penner testified that the circumstance that led to his decision was dwindling Friday night sales, and his assessment of the reason for that decline. He testified that he considered taking action in 2011 when Friday night sales began dwindling, but decided against it based on his bartenders' advice that there would be no customers if the T-Girls did not come in. By the time he left the voice mails with C. Lynn, he had been told by another bar owner and manager that the P Club was perceived as a "gay" or "tranny" bar. Penner's perception at that time was that that the T-Girls had:

> "pretty much taken over the P Club bar on Friday nights; it had effectively become their clubhouse and no other customers were really coming into the place on Friday nights anymore, whereas in the beginning when they were first coming in the place was doing pretty good business without the Rose City T-Girls."

In early June 2012, Penner evaluated Friday night sales at the P Club and decided to ask the T-Girls to stop using the P Club on Friday night. His thoughts, in his words, were: "[w]hy are people not coming back no matter what the name of the place is?' And it came down to the Rose City T-Girls."

On June 18, 2012, Penner telephoned C. Lynn and left his first voice mail message asking the T-Girls not to come back on Friday nights, stating that their presence was "hurting business a lot." On June 21, he left a second voice mail message in which he stated that the only "underlying reason" for asking the T-Girls not to come back was "money," and added that the two things he kept hearing as reasons for his declining sales were that people thought the P Club was a "tranny bar" or a "gay

bar." Nothing in the record shows that people would have a reason for drawing that conclusion aside from the regular Friday night presence of the T-Girls.

Taken together, this evidence shows that Penner decided to ask the T-Girls not to come back on Friday nights on account of his perception that the P Club was losing business because the T-Girls' sexual orientation caused people to think that that the P Club was a bar targeted to transgendered and gay persons. The P Club's decline in Friday night sales between January 2011 and June 2012[13] is not a defense, and no evidence was presented to show that the T-Girls had caused any other problems at the P Club that might have justified Penner's decision to ask them not to return on Friday nights.

Based on the foregoing, the forum concludes that Penner asked the T-Girls not to come back on Friday nights based on their sexual orientation, thereby violating ORS 659.403(3).

RESPONDENT PENNER AIDED AND ABETTED THE P CLUB IN ITS VIOLATION OF ORS 659.403(3)

This is the first case brought before this forum alleging aiding and abetting in the context of discrimination by a place of public accommodation. Previously, in employment discrimination cases, the forum has defined aiding and abetting as "to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission." *See, e.g., In the Matter of Cyber Center, Inc.,* 32 BOLI 11, 35 (2012), *citing In the Matter of Sapp's Realty, Inc.,* 4 BOLI 232, 277 (1985). The forum adopts the above definition, deleting the word "employment."

ORS 659A.406 provides, in pertinent part:

> "Except as otherwise authorized by ORS 659A.403, it is an unlawful practice for any person to aid or abet any place of public accommodation, as defined in ORS 659A.400, or any employee or person acting on behalf of the place of public accommodation to make any distinction, discrimination or restriction on account of * * * sexual orientation * * *."

"Person" includes "[o]ne or more individuals." ORS 659A.001(9). In this case, Respondent Penner was an individual and the person acting on behalf of Respondent Blachana who made the decision to ask the T-Girls to not come back to the P Club on Friday nights and communicated that decision. Based on those actions, the forum concludes that Respondent Penner aided and abetted Respondent Blachana in its violation of ORS 659A.403, thereby violating ORS 659A.406.

[13] Interestingly, sales figures provided by the P Club show that the P Club's yearly sales had approximately the same decline between 2009 and 2010 as between 2010 and 2011, the first year the T-Girls began gathering regularly at the P Club.

ORS 659A.409 – DISCRIMINATORY NOTICE OR COMMUNICATION

The Formal Charges allege that Penner, acting on behalf of the P Club, violated ORS 659A.409 when he "published, circulated, issued or displayed a communication or notice to the effect that accommodations, advantages, facilities, services or privileges of the P Club would be refused, withheld or denied, or that discrimination would be made against, the T-Girls on account of sexual orientation" through the two voice mails he left with C. Lynn. The Formal Charges additionally allege that Blachana also violated ORS 659A.409 through Penner's voice mail.

ORS 659A.409 provides, in pertinent part:

> "[I]t is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display * * * any communication, notice * * * of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation * * *."

The forum has already determined that the P Club, through Penner's voice mails, committed an unlawful practice in violation of ORS 659A.403 on account of the T-Girls' sexual orientation, and that Penner was "acting on behalf" of the P Club in leaving the voice mails. The forum must now determine whether those voice mails were a "communication," or "notice" and whether they were "publish[ed]," "circulate[d]," "issue[d]," or "display[ed]" as set out in ORS 659A.409.

None of those six words are defined in ORS chapter 659A. ORS 659A.805(1)(a) delegates the authority to BOLI's Commissioner to adopt "reasonable rules" to "[e]stablish[] what acts and communications constitute a notice, sign or advertisement that public accommodation * * * will be refused, withheld from, or denied to any person * * * because of * * * sexual orientation * * *[.]" To date, no such rules have been adopted. There is no prior case law interpreting these words in the context of ORS 659A.409 and neither side offered any legislative history to assist the forum in interpreting them. Since these are words of common usage, the forum determines their meaning from the plain, natural and ordinary meaning contained in Webster's Third International Dictionary. *See, e.g., In the Matter of Kenneth Wallstrom,* 32 BOLI 66, 83-84 (2012).

A. "Notice" or "Communication"

Webster's relevant definitions of "notice" and "communication" are:

> "**Notice**
>
> "**1 a** (1)**:** formal or informal warning or intimation of something**:** ANNOUNCEMENT <subject to change without notice ~ — *Dun's Rev.*> <was

~that Britain meant to crack down on violence — *Time*> <give ~ of the fat and wrinkles coming to the young bride — H.M.Parshley>"

Webster's Third New International Dictionary (unabridged ed. 2002), at 1544.

"**Communication**

"**2 a :** facts or information communicated **b :** a letter, note, or other instance of written information <he had not yet read the spy's ~>"

Id., at 460. Based on these definitions, Penner's voice mails constituted both a "notice" and a "communication" within the meaning of ORS 659A.409.

B. "Publish," "Circulate," "Issue", or "Display"

Webster's potentially relevant definitions of "circulate," "issue," "display," and "publish" in their transitive verb forms are set out below:

"**Circulate**

"**3 :** to cause to pass from person to person and usually to become widely known **:** DISSEMINATE <this evidence of weakening enemy morale was instantly *circulated* to our own people — D.D.Eisenhower>"

Id., at 409.

"**Issue**

"**1 :** to cause to come forth : give vent to : DISCHARGE, EMIT <a volcano *issuing* smoke and fire> * * * **3 a :** to cause to appear or become available by officially putting forth or distributing or granting or proclaiming or promulgating **:** cause to appear through issuance <the government *issued* a new airmail stamp> <*issued* a decree> <*issued* a formal letter to his adherents> <*issued* rifles and rations> **b :** to cause to appear or become available by bringing out for distribution to or sale or circulation among the public **:** PUBLISH <*issued* the book shortly after the author's death>"

Id., at 1201.

"**Display**

"**2 a :** to spread before the view **:** exhibit to the sight or mind : give evidence of : SHOW, MANIFEST, DISCLOSE <~*ed* the flag for all to see> <~ a map on the table> <~ one's appreciation> <~ criminal tendencies>; specifically **:** to put on exhibition <these reproductions have been ~*ed* throughout Canada — *Report:* (*Canadian*) *Royal Commission on Nat'l Development*> <two model houses were ~*ed* for a week> **b :** to exhibit conspicuously <~ a gift for ham acting> **c :** to set forth (as in representation or narrative) **:** DESCRIBE, DEPICT <the canvases ~*ed* shabby acrobats — *Time*> **d :** to set in ~ in printing"

Id., at 654.

"**Publish**

"**1 a :** to declare publicly **:** make generally known **:** DISCLOSE, CIRCULATE <publish glad tidings, tidings of peace — Mary A. Thomson> <the plan of action has not been ~*ed* in detail — D.S.Campbell>; *specif* **:** to impart or acknowledge to one or more persons <a slander is not actionable unless it is ~*ed* to a third person — T.F.T.Plucknett> <do ~ and declare this to be my last will and testament>" **b :** to proclaim officially **:** PROMULGATE <~ an edict> **c :** to make public announcement of (banns of marriage)"

Id., at 1837. Based on these definitions, the forum finds that Penner violated ORS 659A.409 by "issu[ing]" a "notice" and "communication" as described in ORS 659A.409.[14] Blachana also violated 659A.409 through Penner's voice mails because Penner, a member of Blachana, was acting as Blachana's agent in leaving the voice mails.

RESPONDENTS' AFFIRMATIVE DEFENSE OF UNCONSTITUTIONALITY

In their answer, Respondents pled the following affirmative defense:
"Pursuant to the First Amendment to the U.S. Constitution, and pursuant to Article I, Section 8 of the Oregon Constitution, Respondents had a right to request that the Rose City T-Girls no longer use the P Club as its gathering on Friday nights, and to the extent that ORS 659A.400 *et seq* interferes with Respondents' rights of free speech, the statutes and rules implemented to enforce them are unconstitutional."

In their post-hearing brief, Respondents make it clear that this defense is based on their contention that Respondents only made a "request" that the T-Girls not return, that Respondents never refused to provide or denied service to the T-Girls, and that to punish Respondents for making a "request" violates Respondents' constitutional free speech rights. In contrast, the forum has concluded that Respondents' "request" was not just Penner freely speaking his mind, but an actual denial of service. Respondents do not contend that the constitution protects them from actually denying service. Under these circumstances, neither the state nor Federal constitutions protect Respondents' actions that the forum has found to violate ORS 659A.403, ORS 659A.406, and ORS 659A.409.

In their case summary, Respondents also argued that:

"The definition of 'sexual orientation' in ORS 174.100(6) is so broad as to be unconstitutional, in that it creates a special class of protection for those who may simply be choosing their clothing, instead of those who would be reasonably identified as being gay, lesbian, bi-sexual, or transgendered."[15]

[14] Having found that Penner violated ORS 659A.409 by "issu[ing]" a "notice" or "communication," the forum does not find it necessary to determine whether he also "circulate[d]," "display[ed]," or "publish[ed]" them.
[15] The forum notes that ORS 174.100(6) and OAR 839-005-0003(14) contain identical language.

Respondents did not include this defense in their answer or move to amend their answer to include their argument that ORS 174.100(6) is unconstitutional.

OAR 839-050-0130(3) provides that "[t]he failure of the party to raise an affirmative defense in the answer is a waiver of such a defense." Unconstitutionality is an affirmative defense[16] that Respondents waived by not raising it in their answer. Accordingly, the forum need not consider it.

In their exceptions, Respondents correctly cite *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) for the proposition that "[i]n construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties." However, *Stull v. Hoke* does not require the forum to consider the constitutionality of the ORS 174.100(6), only its correct interpretation. In this case, the Proposed Opinion correctly interpreted the language of ORS 174.100(6) and rules promulgated by BOLI[17] in applying that language to the evidence in the record and making legal conclusions.

DAMAGES

The Formal Charges seek damages for emotional, mental and physical suffering in the amount of "at least $50,000" for each of the 11 aggrieved persons. In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the aggrieved persons. The actual amount depends on the facts presented by each aggrieved person. An aggrieved person's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of C. C. Slaughters, Ltd.,* 26 BOLI 186, 196 (2005).

In this case, each of the aggrieved persons experienced some level of emotional and mental suffering as a result of being asked not to return to the P Club on Friday nights, and three of the aggrieved persons also experienced physical suffering. The forum addresses their claims individually.

Cassandra Lynn

C. Lynn started the T-Girls based on her desire to build a social group for transgendered persons. The P Club gatherings were very important to her. She only missed five Fridays and spent thousands of dollars there. Penner's voice mails made her very angry and upset and caused her to feel disgraced and extremely humiliated, so much so that she initially considered disbanding the T-Girls. She lost sleep, was irritable at work, and repeatedly questioned what the T-Girls had done to provoke

[16] *See also* ORCP 19B, entitled "**Affirmative Defenses**," which provides: "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction * * * unconstitutionality * * * and any other matter constituting an avoidance or affirmative defense."
[17] OAR 839-005-0003(7), (8) & (14).

Penner's decision. After June 18, 2012, she spent a substantial amount of time looking for a new place for the T-Girls to gather on Friday nights, a time-consuming experience that took several months and was frustrating for her. Her emotional distress lasted around three months. The forum finds that $50,000 is an appropriate award to compensate C. Lynn for the emotional, mental, and physical suffering she experienced as a result of Respondents' unlawful practices.

Amy Lynn

Amy Lynn has been a member of the T-Girls since fall 2009 and went to the P Club with the T-Girls at least three Fridays a month. She particularly liked the P Club because of its variety of entertainments and enjoyed dancing with the P Club's regular clients. Penner's voice mails made her feel angry, then hurt and offended. After hearing them, she stopped going out in public dressed as a woman, limited her social life, and lost 15 pounds because of the stress. The forum finds that $35,000 is an appropriate award to compensate A. Lynn for the emotional, mental, and physical suffering she experienced as a result of Respondents' unlawful practices.

Roxy Sugarrush

Roxy Sugarrush moved from Texas to Portland to get away from discrimination and considered the T-Girls to be her "surrogate family" and "sisters." Her good feeling as "Roxy" is enhanced when she is with the T-Girls. She went to the P Club with the T-Girls two or three times a month. She especially liked the P Club because it was a "non-gay club" and she made friends with a group of ladies who played bunco at the P Club whom she would not have met at a gay club. Listening to the voice mails made her feel very angry and depressed for a day, and she didn't feel like going out for a month afterwards. She was offended by Penner's statement that he didn't want the P Club to be labeled as a "tranny bar." At the time of hearing, she was meeting with the T-Girls at Sweet Home on Friday nights and liked going there. The forum finds that $35,000 is an appropriate award to compensate Sugarrush for the emotional and mental suffering she experienced as a result of Respondents' unlawful practices.

Kelley Davis

Kelley Davis had been a member of the T-Girls for about five years at the time of hearing and went to the P Club two Friday gatherings a month. She particularly liked gathering at the P Club because there was good attendance and she had a good time and felt safe. She spent a lot of money at the P Club, and felt sad and angry for two weeks after hearing Penner's voice mails. She had previously been asked to leave several places because she is transgendered; to her the voice mails were "just another one on top of the ones that I've already had happen" and "another example of being transgendered in this society and being told that you don't belong." The forum finds that $35,000 is an appropriate award to compensate Davis for the emotional and mental suffering she experienced as a result of Respondents' unlawful practices.

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Susan Miller

Susan Miller has been a member of the T-Girls since 2008. She and C. Lynn were the T-Girls' website "administrators" and went to the P Club every Friday night. She and C. Lynn were jointly responsible for ensuring that the T-Girls presence caused no problems for the P Club. The voice mails made her feel disappointed, upset, and a "little sick" after hearing the voice mails, and she found it "hard to be told you're not welcome somewhere just because of who you are." Because of the voice mails, she had trouble sleeping for a month, gained about 10 pounds, was a little short-tempered and tired at work, and was late to work twice because of her lack of sleep. She felt "just not myself" and "pulled away from my friends that I have outside of my Susan life" and also lost some other friends she made at the P Club who were not T-Girls and whom she only saw at the P Club. The forum finds that $40,000 is an appropriate award to compensate Miller for the emotional, mental, and physical suffering she experienced as a result of Respondents' unlawful practices.

Jennifer Carr

Jennifer Carr joined the T-Girls in July 2011 after reading S. Miller's blog. In January 2012, she made her first trip to the P Club, which was also her first time going out in public dressed as a woman. That visit to the P Club was the first time she had ever met another transgendered person, and she went to the P Club three or three times a month after that. At the P Club, she also talked to other patrons who were curious about the T-Girls. When she heard Penner's voice mails, her immediate reaction was that she no longer had a place "where I felt safe to express myself." The voice mails caused her to reassess her transition from male to female. She felt temporary depression, sadness, and irritability. She had trouble accepting that the T-Girls could no longer gather at the P Club and it made her angry to have to have to look for a new gathering place where she would be safe and accepted. The forum finds that $40,000 is an appropriate award to compensate Carr for the emotional and mental suffering she experienced as a result of Respondents' unlawful practices.

Jan Jeffries

Jan Jeffries joined the T-Girls in December 2008. In the summer, J. Jeffries went to the P Club every Friday, and once or twice a month the rest of the year. Penner's voice mails made her feel some upset and disappointment. She was mildly dismayed and discouraged that the T-Girls would have to find a new Friday night gathering place and did not understand what they had done to make them be unwelcome. These feelings lasted for about a month or so. The forum finds that $20,000 is an appropriate award to compensate Jeffries for the emotional and mental suffering she experienced as a result of Respondents' unlawful practices.

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Wilma Johns

Wilma Johns joined the T-Girls in July 2009, and initially went to the P Club every Friday night, but later only attended once or twice a month because of her job. She particularly looked forward to the P Club gatherings with the T-Girls because they were a support group and social organization for her. Penner's voice mails were very disappointing and "kind of devastating" to Johns. She is African-American and the voice mails brought up intense repressed memories related to discrimination she had experienced in the past because of her race and color. Subsequently, she has not been able to go out in public on Friday nights dressed as a woman or with the T-Girls because of transportation issues and she stopped dressing as a woman on Friday nights. The forum finds that $40,000 is an appropriate award to compensate Johns for the emotional and mental suffering she experienced as a result of Respondents' unlawful practices.

Chris Elliott

Chris Elliott joined the T-Girls in 2007 and went to the P Club almost every Friday night with the T-Girls. He enjoyed playing pool and socializing with the T-Girls and also enjoyed the P Club because, unlike gay bars, it was not a "meat market." Penner's voice mails made him angry, were painful to him, and hurt him deeply. His self-esteem suffered; he felt depressed and could not understand why the T-Girls were not allowed to come back and he felt "if this could happen in this place, it could happen any place[.]" He was grumpy at work for at least two months. The forum finds that $25,000 is an appropriate award to compensate Elliott for the emotional and mental suffering he experienced as a result of Respondents' unlawful practices.

Cristine Burnett

Burnett was one of the original eight members of the T-Girls, and went to the P Club with the T-Girls almost every Friday night. Because of her disabilities and heart condition, it is very important for her to socialize and be out with other people. In particular, the P Club's parking lot made it safe and convenient for her to navigate from her car with her walker. Penner's voice mails were "quite devastating" for her, particularly the use of the word "tranny," and negatively affected her stress level, and made her feel like part of her life "just went down the drain." She cannot go to the T-Girls' new Friday gathering place with her boyfriend because of the easy availability of video poker games, which was not an issue at the P Club. The forum finds that $40,000 is an appropriate award to compensate Burnett for the emotional and mental suffering she experienced as a result of Respondents' unlawful practices.

Victoria Nolan

Victoria Nolan joined the T-Girls in late 2010. She went to all the Friday night gatherings at the P Club. She liked the activities at the P Club, particularly the dancing, pool tables and shuffleboard, and felt comfortable there. She also liked the good food,

the size of the P Club, and liked that it was quiet enough to carry on a conversation. Penner's voice mails came as "a huge surprise" and a "pretty big blow at first" and made no sense to her. It was the first time that a commercial business had taken "exception" to her and made her fearful that this would keep happening to her in public establishments. At the time, she had just locked in her surgery date for sexual reassignment surgery and began to question if she could handle this type of occurrence. After the voice mails, she experienced some sleepless nights, and whenever she walked into a new public place, she wondered if she would be helped or asked to leave. Her confidence was also affected and she wondered if people were talking behind her back. At the time of hearing, she was only attending the T-Girls' gatherings at Sweet Home every third Friday because Sweet Home does not have as many of the activities Nolan likes as the P Club. The forum finds that $40,000 is an appropriate award to compensate Nolan for the emotional, mental, and physical distress he experienced as a result of Respondents' unlawful practices.

ORS 659A.855 CIVIL PENALTIES

The Formal Charges ask the forum to: (1) assess a civil penalty of $1,000 against Respondent Blachana, LLC dba Twilight Room Annex aka The P Club for its violations of ORS 659A.403 and ORS 659A.409, multiplied by the number of aggrieved persons; and (2) assess a civil penalty of $1,000 against Respondent Penner for each aggrieved person for Penner's violations of ORS 659A.403, ORS 659A.406, and ORS 659A.409, multiplied by the number of aggrieved persons.

ORS 659A.855 provides, in pertinent part, that

> "(1)(a) If the Commissioner of the Bureau of Labor and Industries files a complaint under ORS 659A.825 alleging an unlawful practice other than an unlawful employment practice, and the commissioner finds that the respondent engaged in the unlawful practice, the commissioner may, in addition to other steps taken to eliminate the unlawful practice, impose a civil penalty upon each respondent found to have committed the unlawful practice.
>
> "(b) Civil penalties under this subsection may not exceed $1,000 for each violation."

ORS 659A.825 provides, in pertinent part:

> "(1)(a) If the * * * Commissioner of the Bureau of Labor and Industries has reason to believe that any person has committed an unlawful practice, the * * * commissioner may file a complaint in the same manner as provided for a complaint filed by a person under ORS 659A.820.
>
> "(b) If the * * * commissioner has reason to believe that a violation of ORS 659A.403, 659A.406 or 659A.409 has occurred, the * * * commissioner may file a complaint under this section against any person acting on behalf of a place of public accommodation and against any person who has aided or abetted in that violation."

The complaint in this case that initiated this matter was a "commissioner's complaint"[18] under ORS 659A.825. Consequently, the commissioner has the authority to impose civil penalties under ORS 659A.855 "for each violation."

In this case, although all the aggrieved persons were affected and have been awarded damages, those damage awards stem from only five actual violations – (1) Blachana's generic denial to the T-Girls, through Penner, in violation of ORS 659A.403, constituting separate violations by Penner and Blachana; (2) Penner's aiding and abetting of that denial in violation of ORS 659A.406; and (3) Blachana and Penner's separate violations of ORS 659A.409. The forum may assess a maximum civil penalty of $1,000 for each violation. This is the first case to come before the forum in which the Agency has sought ORS 659A.855 civil penalties. Unlike BOLI's Wage and Hour Division, the Civil Rights Division has promulgated no rules to guide the forum in deciding whether to assess the maximum civil penalty of $1,000 for each violation or a lesser amount.[19] Under these circumstances, the forum finds that $1,000 is an appropriate civil penalty for each violation, for a total of $5,000.

EXCEPTIONS

A. Agency Exceptions.

Proposed Findings of Fact – The Merits 4, 5, 12, and 60 have been modified in response to the Agency's exceptions.

B. Respondents' Exceptions.

Respondents filed seven exceptions.

First, Respondents contend that the Proposed Order "relies upon cases that have no precedential value," specifically referring to prior BOLI Final Orders. Respondents' exception is legally unsound. The Commissioner is entitled to rely on a BOLI Final Order as precedent until such time as (1) it is reversed or modified by an appellate court decision; or (2) the Commissioner or an appellate court overrules a point of law contained in a Final Order.

Second, the "[p]reservation question is irrelevant in determination of whether statute has been correctly interpreted." Respondents' exception is tied to the argument they raised in their case summary that ORS 174.100(6) is unconstitutionally broad in its definition of "sexual orientation" because it "creates a special class of protection for

[18] *See* Finding of Fact #1– Procedural.

[19] *See, e.g.,* OAR 839-020-1020, which provides following criteria for determining a civil penalty: "(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules; (b) Prior violations, if any, of statutes or rules; (c) The magnitude and seriousness of the violation; (d) Whether the employer knew or should have known of the violation; (e) The opportunity and degree of difficulty to comply; and (f) Whether the employers' action or inaction has resulted in the loss of a substantive right of an employee."

those who may simply be choosing their clothing, instead of those who would be reasonably identified as being gay, lesbian, bi-sexual, or transgendered." The forum addresses this exception in the portion of the Opinion entitled "Respondents' Affirmative Defense of Unconstitutionality."

Third, the testimony of Shannon Minter should have been excluded. The forum disagrees. Minter's testimony was relevant and helpful to the forum to provide context for the issues transgendered persons face in today's society. Minter's testimony was not unfairly prejudicial because the forum did not rely on it in making a determination that Respondents engaged in an unlawful practice or in assessing damages.

Fourth, "no customer has been refused service." Respondents except to the omission of the fact that the T-Girls stated they did not want to "take over" Respondents' facility. Respondents contend this shows that Penner was merely acceding to the T-Girls' desire by asking them not to return to the P Club on Fridays since they were causing the P Club to lose business. Respondents cite three cases in support of this exception. All of these cases[20] are from other jurisdictions whose decisions are not binding on this forum and none are on point, as they all involve 42 U.S.C. §1981 actions and race discrimination and have dissimilar facts.

Fifth, "[t]he Proposed Order confuses what Mr. Penner said, with what Cassandra Lynn said." All the aggrieved persons listened to Penner's actual voice mails within a relatively short period of time after those voice mails were left on Lynn's phone. Their testimony concerning why they felt excluded was based primarily on their reaction to those actual voice mails, even though Cassandra Lynn may have communicated her own thoughts and interpretation of those voice mails first.

Sixth, "[t]he P Club would not have asked the Rose City T Girls to leave." Contrary to Respondents' exception, there was no testimony that the T-Girls would not have been asked to leave, had they returned to the P Club.

Seventh, "[t]he Proposed Order punishes Respondents' speech." This exception has already been adequately addressed in the section of the Opinion entitled "Respondents' Affirmative Defense of Unconstitutionality."

In conclusion, all of Respondents' exceptions are overruled for the reasons stated above.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of violations of ORS 659A.403 and ORS 659A.409 by **Respondent Blachana, LLC** and violations of ORS 659A.403, ORS 659A.406, and ORS 659A.409 by **Respondent Christopher Penner**, and as payment of the damages awarded, the

[20] *Morris v. Office, Inc*., 89 F3d 411 (7th Cir 1996); *Jackson v. Tyler's Dad's Place, Inc.,* 850 F Supp 53 (DDC 1994); *White v. Denny's, Inc.,* 918 F Supp 1418 (D Colo 1996).

Deputy Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Blachana, LLC and Christopher Penner** to 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 aggrieved persons **Cassandra Lynn, Amy Lynn, Roxy Sugarrush, Kelley Davis, Susan Miller, Jennifer Carr, Jan Jeffries, Wilma Johns, Chris Elliott, Cristine Burnett, and Victoria Nolan** in the amount of:

1) FOUR HUNDRED THOUSAND DOLLARS ($400,000), representing compensatory damages for emotional, mental, and physical suffering experienced by the aggrieved persons as a result of Respondents' unlawful practices found herein, to be apportioned as follows:

Cassandra Lynn: $50,000

Amy Lynn: $35,000

Roxy Sugarrush: $35,000

Kelley Davis: $35,000

Susan Miller: $40,000

Jennifer Carr: $40,000

Jan Jeffries: $20,000

Wilma Johns: $40,000

Chris Elliott: $25,000

Cristine Burnett: $40,000

Victoria Nolan: $40,000

plus,

2) Interest at the legal rate on the sum of $400,000 from the date of issuance of the Final Order until Respondents comply with the requirements of the Order herein.

B. NOW, THEREFORE, as authorized by ORS 659A.850 and ORS 659A.855, and to eliminate the effects of the violations of ORS 659A.403 and ORS 659A.409 by **Respondent Blachana, LLC** and as payment of the civil penalties assessed, the Deputy Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Blachana, LLC** to 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 the amount of:

1) TWO THOUSAND DOLLARS ($2,000); plus,

2) Interest at the legal rate on the sum of $2,000 from the date of the Final Order until Respondent Blachana, LLC complies herein.

C. NOW, THEREFORE, as authorized by ORS 659A.850 and ORS 659A.855, and to eliminate the effects of violations of ORS 659A.403, ORS 659A.406, and ORS 659A.409 by **Respondent Christopher Penner**, and as payment of the civil penalties assessed, the Deputy Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Christopher Penner** to 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 the amount of:

1) THREE THOUSAND DOLLARS ($3,000); plus,

2) Interest at the legal rate on the sum of $3,000 from the date of the Final Order until Respondent Penner complies herein.

In the Matter of

COLUMBIA COMPONENTS, INC.

Case Nos. 29-12 & 60-12
Final Order of Commissioner Brad Avakian
Issued December 19, 2013

SYNOPSIS

The Agency's Formal Charges alleged that Respondent subjected Complainant to "hostile environment" sexual harassment and fired her based on her whistleblowing activity to the Social Security Administration. The Agency failed to prove by a preponderance of the evidence that Complainant was subjected to unlawful sexual harassment or that Complainant was fired for reasons related to any contacts she had with the Social Security Administration. The forum dismissed the Formal Charges.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 16-18, May 20-23, and October 8-9, 2013, at 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 chief prosecutor Jenn Gaddis, an employee of the Agency. Durga Scheper, ("Complainant"), was present throughout the hearing. Respondent was represented by

Daniel Barnhart, attorney at law. Mike Able, Respondent's corporate president, was present throughout the hearing as the person designated to assist Respondent in the presentation of its case, as was Stephanie Page, Mr. Barnhart's legal assistant.

The Agency called the following witnesses: Complainant; Tiffany Pine, Complainant's daughter; Dean Scheper, Complainant's husband; and Lloyd Perez, Civil Rights Division senior investigator.

Respondent called the following witnesses: Complainant; Dean Scheper; Lloyd Perez; Hoyt Corbett, Jr. (by telephone); Lori Peterson, Respondent's insurance broker (by telephone), Mike Able, and Linda Able, Mike Able's wife.

Respondent called the following witnesses: Complainant; Dean Scheper; Lloyd Perez; Hoyt Corbett, Jr. (by telephone); Lori Peterson, Respondent's insurance broker (by telephone), Mike Able, and Linda Able, Mike Able's wife.

The forum received into evidence:

a) Administrative exhibits X1 through X37;
b) Agency exhibits A1, pp. 1-6, A2, A3, A6, A9, A10, A15 through A17, p.10, A22, and A30;
c) Respondent's exhibits R1 through R3, R6, R8, R10 through R14, R19, R20, R22 through R33, R36, R38, R39, R41, R42, R45, R45a, R46 through R50, R52, R55 through R76, R78, p.2, R79 through R81, and R84.

Having fully considered the entire record in this matter, I, Brad Avakian, 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 17, 2011, Complainant filed a verified complaint with BOLI's Civil Rights Division alleging "hostile environment" sexual harassment. On April 19, 2011, Complainant filed a second verified complaint with BOLI's Civil Rights Division alleging that Respondent had fired her because of her whistleblowing activity. (Exs. A2, A3)

2) On March 14, 2012, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination in which it found substantial evidence of unlawful discrimination by Respondent based on sex in violation of ORS 659A.030(1)(b) and based on whistleblowing activity in violation of ORS 659A.199 and ORS 659A.230. (Ex. A9)

3) On December 27, 2012, the Agency issued two sets of Formal Charges. Case no. 59-12 alleged that Respondent employed Complainant and that Respondent's president, Mike Able, sexually harassed Complainant by subjecting her to a hostile, intimidating or offensive working environment through series of obscene emails and obscene pictures that appeared on Complainant's computer on multiple occasions.

Case no. 59-12 sought $200,000 in damages for emotional, mental, and physical suffering. Case no. 60-12 alleged that Respondent, through Mike Able, terminated Complainant because she filed or attempted to file corrected Social Security information with the Social Security Administration, thereby violating ORS 659A.230(1), OAR 839-010-0100(2), OAR 839-010-0140(1), ORS 659A.199(1), and OAR 839-010-0100(1). Case no. 60-12 also sought $200,000 in damages for emotional, mental, and physical suffering. (Exs. X2, X4)

4) On December 27, 2012, BOLI's Hearings Unit issued separate Notices of Hearing for case nos. 59-12 and 60-12, setting the time and place of the hearing for both cases for April 15, 2013, beginning at 11:00 a.m., at BOLI's Portland, Oregon office. (Exs. X2, X4)

5) On January 16, 2013, Respondent timely filed answers to both sets of Formal Charges through Daniel Barnhart, attorney at law. (Exs. X10, X11)

6) On January 14, 2013, the ALJ issued an interim order proposing to formally consolidate both cases. On January 23, 2013, having received no objections, the ALJ issued an interim order consolidating both cases for hearing. (Exs. X9, X14)

7) The Agency and Respondent both timely filed case summaries and amended case summaries. (Exs. X16, X17, X22, X23)

8) On April 10, 2013, Respondent filed a motion to postpone the hearing based on Complaint's alleged failure to respond to Respondent's informal discovery requests. At the same time, Respondent filed a motion to compel Complainant to respond to its discovery requests and to take Complainant's deposition. In its motion, Respondent contended that Agency did not adequately respond to Respondent's request for production, that Complainant provided "vague and incomplete" and unsworn responses to Respondents interrogatories, that Respondent had notified that Agency of these issues, and that the Agency had not responded in a satisfactory manner. On April 12, 2013, the Agency filed objections to Respondent's motion, contending it responded adequately to Respondent's informal discovery requests and that Respondent's motions were "untimely and made solely for the purposes of delay." (Exs. X18, X19, X20)

9) On April 12, 2013, the ALJ conducted a prehearing conference with Ms. Gaddis and Mr. Barnhart to address Respondent's motions. During the conference, Mr. Barnhart withdrew Respondent's motion to postpone and supplemented Respondent's motion to compel. The ALJ issued a verbal ruling during the conference, documented later that day by an interim order to entitled "Rulings on Respondent's Motion to Compel and Postpone Hearing." In pertinent part, the interim order is printed below:

> "On April 10, 2013, Respondent filed a motion to compel the production of documents requested informally by Respondent and to be allowed to depose Complainant. The forum regards Respondent's motion as a motion for a discovery order. OAR 839-050-0200. During the prehearing conference this

morning, Mr. Barnhart supplemented that motion with the following three requests:

1. That Complainant be required to verify that the Interrogatory responses, including the references incorporated therein, are true.

2. That Complainant be required to confirm that, if no documents are produced in response to Respondent's Request for Production, no such documents exist and that the Agency be prohibited from introducing evidence related to documents that have not been produced.

3. That Complainant be required to respond in writing to Respondent's Interrogatory #1.

"During the conference, I issued the following oral rulings, which are confirmed by this interim order:

"RESPONDENT'S REQUESTS FOR PRODUCTION

"To the extent they have not already been provided, the Agency is ordered to provide documents responsive to Respondent's Requests for Production Nos. 2-5, 23-24, 29, and 42.

"To the extent they have not already been provided, the Agency is ordered to provide documents responsive to Respondent's Requests for Production Nos. 6, 16 and 21 as to any documents created **after** Complainant's cessation of employment with Respondent.

"To the extent they have not already been provided, the Agency is ordered to provide documents responsive to Respondent's Request for Production No. 22 as to documents created since January 1, 2006.

"RESPONDENT'S REQUEST FOR ANSWER TO INTERROGATORY NO. 1

"I ordered that the Agency provide a written, sworn answer by Complainant to Respondent's Interrogatory No. 1.

"RESPONDENT'S REQUEST THAT COMPLAINANT VERIFY TRUTH OF INTERROGATORY RESPONSES

"I ordered that Complainant be required to verify that the Interrogatory responses, including the references incorporated therein, are true, and that Ms. Gaddis prepare an appropriate verification form for that purpose.

> **"RESPONDENT'S REQUEST FOR CONFIRMATION AND SANCTIONS**
>
> "I declined to order that Complainant be required to confirm that, if no documents are produced in response to Respondent's Request for Production, that no such documents exist and that the Agency be prohibited from introducing evidence related to documents that have not been produced, instead noting that OAR 839-050-0200(11) may apply in these circumstances.
>
> **"RESPONDENT'S MOTION TO DEPOSE COMPLAINANT**
>
> "I did not issue an oral ruling on Respondent's motion to depose Complainant during the conference. However, that motion is **DENIED**.
>
> **AGENCY'S DEADLINE FOR PROVIDING ORDERED DISCOVERY**
>
> "I ordered that the Agency deliver the documents and interrogatory response that are the subject of this interim order to Mr. Barnhart by 5 p.m. on April 15, 2013, and that Respondent will be allowed to supplement its case summary with any of those documents and the interrogatory response. Should Respondent elect to do so, Respondent may file its case summary addendum at the commencement of the hearing and should bring three copies, plus the original."

10) At the start of the hearing, the ALJ orally 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. (Statement of ALJ)

11) After the Agency rested its case-in-chief on April 18, 2013, Respondent's attorney requested an opportunity to inspect the original investigative files in both cases. Based on discovery issues that arose during the testimony of Lloyd Perez, the ALJ granted the request. The Agency asked that the ALJ conduct an *in camera* inspection of the files before allowing Respondent's attorney to view them, a request that was granted. The ALJ inspected the files, redacting nine documents, and allowed Respondent's attorney to inspect the remainder of the investigative files. Respondent's attorney asked that a number of designated pages be copied for him and he was provided with color copies. Exhibit X24 contains copies of the copies that were provided to Respondent's attorney before the hearing adjourned. (Statements of ALJ, Gaddis, Barnhart; Ex. X24)

12) The hearing adjourned on April 18, 2013. Later that day, the Agency filed a "Supplement to the Record Regarding Alleged Discovery Issues." In that document, Ms. Gaddis stated that she confirmed from her e-mail records that she had previously sent the documents to Mr. Barnhart which he contended he never received. (Ex. X25)

13) On May 17, 2013, the ALJ issued an order clarifying his ruling on Respondent's motion to produce the Agency's entire investigative files. That order read as follows:

"On April 18, 2013, after the Agency had rested its case-in-chief, Respondent's attorney Daniel Barnhart asked that the Agency be required to produce all documents in its investigative files and allow him to make color copies. This request was in response to testimony given by Lloyd Perez, Agency investigator that raised questions as to whether Mr. Barnhart had been provided copies of all non-privileged documents in those files. In response, the Agency case presenter stated that Respondent had already been provided with copies. I ruled that I would conduct an *in camera* inspection of the files provided to me by Jenn Gaddis, the Agency's chief prosecutor representing the Agency in this case, segregate any documents that appeared to be privileged, then give Mr. Barnhart an opportunity to inspect the remainder of the files. At Mr. Barnhart's request, I also agreed to issue a written ruling before the hearing reconvened on May 20 that identified the documents in the files that I had not allowed him to inspect and released any documents I determined were not privileged or otherwise exempt from disclosure.

"After I conducted an *in camera* inspection, Mr. Barnhart was given the opportunity to inspect both investigative files. He identified pages he wanted color copies of and color copies were made of those pages and given to him by Rebekah Taylor-Failor, the Agency's contested case coordinator. Subsequently, at my request, Ms. Taylor-Failor provided me with color copies of all the documents she had provided to Mr. Barnhart. Those copies have been marked as Exhibit X-24 and are admitted into the record as an administrative exhibit.

"I also note that on April 18, 2013, Ms. Gaddis filed a response to Mr. Barnhart's request for the investigative files and related assertions that he had not been provided with certain documents in which she attached color copies of all the documents she had earlier sent to him in response to his discovery requests. That response and the attached copies have been marked as Exhibit X-25 and are admitted into the record as an administrative exhibit.

"The following is a brief description of the documents I segregated from the investigative files that Mr. Barnhart was not allowed to inspect:

1. Five page "Hearings Unit Case Assessment Form" prepared by Marcia Ohlemiller, the Commissioner's Legal Policy Advisor, marked "Bureau of Labor Internal Advisory Document," dated June 11, 2012, that evaluates the hearing-worthiness of the two cases.

2. Five page draft Formal Charges, with edits, for case No. 59-12.

3. Three page "notes from conversation" with Complainant, dated "on or about 5/9/12," and conducted by Agency case presenter Patrick Plaza.

4. Two page summary of case, dated April 9, 2012, marked "Internal Advisory Document," prepared by Amy Klare, Administrator, BOLI Civil Rights Division.

5. 34 pages faxed from Worksource Oregon to Patrick Plaza, Agency case presenter, on November 7, 2012, re: Durga Scheper, pursuant to ORS 657.665(4)(f).

6. 27 page Accurint search report, requested by Patrick Plaza, Agency case presenter, printed August 23, 2012.

7. One page of handwritten notes related to conciliation efforts by Sue Jordan, CRD Portland Operations Manager, made between 3/19 and 3/26/12.

8. Letters dated June 27, 2012, to "Respondent and/or Respondent's Attorney" and "Complainant and/or Complainant's Attorney" from Marcia Ohlemiller stating that case nos. 59-12 and 60-12 have been referred to "the Hearings Unit for contested case proceedings" and that the case presenter representing the Agency is Patrick Plaza.

"ORDER

"After inspecting these documents, I have determined that all but the documents described in "8" are exempt from disclosure. I am attached copies of the documents described in "8" with this Order. I will return the other documents to Ms. Gaddis when the hearing reconvenes on May 20." (Ex. X26)

15) The hearing reconvened on May 20. On May 23, the ALJ adjourned the hearing in this case to allow Respondent to take Complainant's deposition, stating that a written order would be issued that set out the scope of the deposition. On June 5, 2013, the ALJ issued the following order:

"To put things in context, prior to the hearing I denied Respondent's motion to depose Complainant but issued an order compelling the Agency to provide certain documents requested by Respondent. During the hearing, on several occasions it became clear that Complainant possessed documents either requested by Respondent and/or set out in my discovery order that Complainant did not provide until Respondent was able to ascertain existence of those documents during Complainant's testimony. It was also apparent to me that Complainant had been less than forthcoming with regard to the existence of those documents. Rather than allow the hearing to further degenerate into an inquiry by Respondent about what other relevant evidence Complainant may have been asked or ordered to provide before the hearing but had not provided, I adjourned the hearing to allow Respondent to take Complainant's deposition. This order confirms that ruling and sets out the scope of the deposition.

"If Respondent does not desire to take Complainant's deposition, Respondent's attorney is instructed to notify me no later than Friday, June 14, 2013. Once I receive that notification, I will convene another "prehearing" conference to set a mutually convenient date to reconvene the hearing. However, if Respondent does not take this opportunity to take Complainant's deposition, Respondent will not be allowed to ask any further questions of Complainant or her husband at hearing related to the existence and production or non-production of any documents or records sought in Respondent's request for production of documents.

"SCOPE OF DEPOSITION

"Respondent is allowed to conduct this deposition for the sole purpose of ascertaining what records Complainant has in her control or possession that are responsive to Respondent's January 16, 2013, requests for production ##2-5, 8[1]-14, 16-19, 23-26, 28-34, and 41-42. Based on the Agency's Formal Charges, Respondent's Answer, and seven days of hearing, I find that these requests are reasonably likely to produce information generally relevant to the case. OAR 839-050-0200(7).

"LIMITS ON USE OF DEPOSITION

"Except as directly related to the above-cited requests for production, the scope of the deposition does not extend to seeking answers to Respondent's interrogatories. Furthermore, although Respondent may use the deposition, if necessary, in support of a motion for a discovery order to require production of any newly-ascertained records relevant to Respondent's requests for production, the deposition may not otherwise be used as evidence at the hearing.

"COSTS OF DEPOSITION

"Respondent is responsible for any costs associated with conducting the deposition. Respondent and Agency must each pay for their own copy of the transcript if a transcript is prepared.

"ALJ NOTIFICATION

"Respondent and the Agency are ordered to notify me at least seven days in advance of the date and time for the deposition."

[1] I also note that, although I inadvertently failed to include #8 in my April 12, 2013, interim order "Rulings on Respondent's Motion to Compel and Postpone Hearing," my notes from the prehearing conference on which that order was based show that I included #8 in my verbal order during that conference but inadvertently omitted it from my subsequent written order.

16) Respondent took Complainant's deposition on July 18, 2013. (Ex. X31; Statement of ALJ)

17) On July 29, 2013, the ALJ issued an interim order stating that the hearing would reconvene on October 8, 2013. The hearing reconvened on that date and concluded on October 9, 2013, on which date the record closed. (Ex. X33; Statement of ALJ)

18) During closing argument, the Agency moved to amend Formal Charges to ask $200,000 in damages for emotional distress for both cases combined. Respondent did not object and the motion was GRANTED. (Statements of Gaddis, Barnhart, ALJ)

19) On December 5, 2013, 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.

RULINGS RESERVED FOR PROPOSED ORDER

Respondent moved for a $5,000 sanction against the Agency for its delay in providing Armando's FGR records and Complainant's tax records. This motion is denied, as the forum has no authority to impose sanctions of this kind.

Respondent moved to admit exhibit R43, a copy of handwritten notes made by the Agency case presenter initially assigned to the case while interviewing Complainant. This document was inadvertently provided to Respondent in response to Respondent's interrogatories. In the usual course of events, Respondent would not be entitled to obtain this document through discovery.[2] Respondent argued that the Agency had waived any privilege as to this document by providing it. Under the circumstances, the forum finds that the Agency did not waive its work product privilege and that exhibit R43 is inadmissible.

Respondent offered exhibit R83, an exhibit that it did not provide with its case summary, that showed Complainant used the e-mail signature of dee@columbiacomponents.com during her employment with Respondent, as "impeachment" evidence. The Agency objected on the grounds that R83 was not provided with Respondent's case summary and that it was not impeachment evidence. The forum SUSTAINS the Agency's objection on both grounds. Earlier in the hearing, Complainant testified during Respondent's cross examination that she created and used that e-mail address. Consequently, R83 impeaches nothing but merely affirms what Complainant previously testified to.

[2] *See, e.g., In the Matter of Logan International, Ltd.,* 26 BOLI 254, 257-58 (2005)(in response to respondent's motion for a discovery order requiring the agency to produce copies of interviews, the ALJ ruled that the agency did not have to produce interviews specifically conducted by the agency case presenter).

As an offer of proof against the Agency's objection, Respondent elicited testimony from Complainant concerning a claim against Tyson Construction, a company formerly owned by Complainant, to show that Complainant had previously committed fraud. The Agency's objection is SUSTAINED. In these circumstances, any evidence of past fraud constitutes inadmissible character evidence. Based on this ruling, the forum also reverses its ruling admitting exhibit R77 over the Agency's objection.

The rulings reserved for the Proposed Order and made by the ALJ in the Proposed Order are hereby SUSTAINED.

RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent raised nine defenses it characterized as "affirmative" defenses in the answers it filed to the Formal Charges. Since the forum has reached a decision in favor of Respondent based on the merits, it need not rule on these affirmative defenses.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Columbia Components, Inc. ("CC") was an Oregon domestic business corporation with its primary place of business in Tualatin, Oregon that manufactured furniture and radiant flooring components. At all times material herein, Respondent engaged or utilized the personal services of one or more employees. (Testimony of M. Able; Ex. A10)

2) At all times material herein, Michael Able ("Able") was CC's corporate president and was Complainant's immediate supervisor. (Testimony of M. Able, Complainant; Exhibit A10)

3) Complainant was hired as Respondent's part-time office manager on February 4, 2008, at the starting wage of $13.00 per hour. Her job duties included answering phones, bookkeeping, shipping, and receiving, and responding to e-mails sent to Respondent's business. She received her initial training from Linda Able, Able's wife. (Testimony of Complainant)

4) Respondent's business location consisted of an office and an attached warehouse where a crew of up to 10-12 persons manufactured Respondent's products. Complainant worked in the office at a desk. Able, who typically arrived at work at 7 a.m., spent about 75 percent of his time in the warehouse, and the rest of his time in the office, where he had a desk adjacent to Complainant's. When Able was in the warehouse, Complainant worked alone in the office. (Testimony of M. Able, Complainant; Ex. R69)

5) During her employment with Respondent, Complainant worked Monday to Thursday, 8:30 until 3 or 4 p.m., averaging about 30 hours per week. Complainant worked continuously for Respondent until February 16, 2011. (Testimony of Complainant)

6) When Complainant was hired, Respondent had two computers in the office, one primarily used by Complainant and one primarily used by Able. (Testimony of Complainant)

7) During Complainant's employment, Respondent also contracted with various computer programmers who visited Respondent's office to program Respondent's CNC manufacturing process after Complainant left for the day. Until late 2010, the programmers used Complainant's computer for their work. (Testimony of M. Able, Complainant; Ex. R69)

8) During Complainant's employment, Respondent had multiple e-mail addresses. Complainant's job duties included reading all incoming e-mails sent to Respondent's business at those addresses and responding to them. (Testimony of Complainant)

9) On July 21, 2009, Complainant printed out seven e-mails sent from "'mike able' hrsinc@integra.net" to "craigslist.org" addresses that appeared to be responses to craigslist advertisements for sex. Complainant obtained these emails by searching through Able's mailbox of "sent" mail. According to the print-outs, the e-mails were all sent between July 16 and July 20, 2009. (Testimony of Complainant; Exs. A15, R33, R40)

10) During Complainant's employment, Complainant never complained to Able about any objectionable materials appearing on her computer at work. (Testimony of M. Able)

11) Linda Able and Hoyt Corbett, a business partner of Respondent, both used Complainant's computer on occasion during Complainant's employment and never saw any pop-up sex ads. (Testimony of L. Able, Corbett)

12) In early January 2011, Complainant and her husband Dean Scheper, an experienced construction contractor, watched an "infomercial" on television put on by Armando Montelongo Seminars ("Armando") that described a "Flip and Grow Rich" ("FGR") investment opportunity involving the purchase of foreclosed or damaged properties, fixing them up, and reselling them in a short period of time for a large profit. After watching Armando's infomercial, Dean Scheper concluded that he could make a lot of money by getting involved in Armando's program. At work the following Monday, Complainant spent 5-10 minutes describing the Armando's FGR presentation to Able. (Testimony of Complainant, Dean Scheper, M. Able)

13) That same week, Dean Scheper, who had met Able when Scheper visited Complainant at work, proposed to Able that they become business partners in Armando's FGR program. At that time, Scheper was also performing remodeling Able's residence. Scheper believed there was a lot of money to be made through Armando's FGR program but needed Able to provide the capital investment necessary to invest in FGR due to Scheper's lack of credit. Scheper and Able agreed to pursue the idea and

made a “deal” that Able would provide the finance, Scheper would do the work, and they would split all profits 50-50. They attended a one-day FGR seminar together on or about January 18, 2011. During the seminar, Scheper, as a registrant, paid $1,500 to Armando. Payment of this fee entitled Scheper and Able to “go farther” with FGR and attend a three-day seminar scheduled for January 28-30, 2011. On January 18, 2011, Able repaid Scheper $750 to cover half the FGR fee. (Testimony of Complainant, Dean Scheper, M. Able; Ex. R56)

14) Dean Scheper works on a race car team as a hobby. On the weekend of January 28-30, 2011, Scheper had to attend a race and Able went alone to the FGR seminar. At the conclusion of the seminar, Able signed a contract with Armando to enable Able and Scheper to “go to the next step” and used his American Express credit card to pay Armando $7,500. Able went home and shared his excitement about the Armando’s program with his wife, Linda. Linda then went on the internet and discovered that Armando’s program was a scam. Able, who felt embarrassed at being duped, immediately began taking steps to try and rescind his contract within the three-day rescission period allowed by the contract. Armando refused to rescind the contract and, several months later, American Express also told Able that they would not credit his account for the amount of the transaction with Armando. (Testimony of M. Able; Ex. R12)

15) In the meantime, Dean Scheper had done some research and also concluded that Armando’s program was a scam. However, he also concluded that he and Able could “flip” houses and make a lot of money using Armando’s FGR scheme without Armando, with Able providing the capital and Scheper providing the labor. (Testimony of Dean Scheper)

16) On Monday, January 31, 2011, Complainant came to work and immediately asked Able what had happened at Armando’s seminar that weekend and how much money he had invested. That same day, Dean Scheper also visited Able’s office and met with Able for 30 minutes to an hour to talk about the seminar. During their meeting, he told Able that he had figured out that they didn’t need Armando and could “flip” houses, using Armando's FGR system, with Scheper acting as the contractor and Able providing the capital. (Testimony of Complainant, M. Able)

17) Complainant did not work on February 1, 2011. (Testimony of Complainant; Exs. R45, R45A)

18) When Complainant returned to work on February 2, and in the remaining days that she worked for Respondent, she repeatedly asked Able how much money he spent at Armando’s seminar. Later that same week, Scheper started repeatedly calling Able and asking him if he had spent money at Armando’s seminar. Able, who was embarrassed at his poor judgment in giving Armando $7,500, deflected Scheper’s and Complainant’s questions about money spent at Armando’s seminar by not answering them, which made Scheper and Complainant both angry. (Testimony of Dean Scheper, M. Able)

19) Sometime between January 31 and February 16, 2011, Complainant found a copy of Able's contract with Armando and an attached American Express receipt in the amount of $7,500 for the transaction. Complainant copied both documents and took them home. (Testimony of Complainant; Ex. R12)

20) Sometime before February 16, 2011, Dean Scheper learned that Able had spent $7,500 at Armando's seminar. Scheper became quite angry and "totally" felt that Able had "betrayed" him by "lying" to Scheper about his additional investment with Armando. Scheper, who was still angry at Able for this reason at the time of hearing, contemporaneously shared these sentiments with Complainant. (Testimony of Dean Scheper; Observation of ALJ)

21) Prior to January 31, 2011, Complainant and Able had an amicable working relationship. Between January 31 and February 16, 2011, Complainant became progressively more hostile and negative towards Able at work. Able talked about this change in Complainant's behavior to Linda, his wife, when he went home at night. (Testimony of M. Able, Linda Able)

22) In 2011, one of Complainant's job duties was to prepare and issue W-2s to Respondent's employees. In conjunction with that duty, she submitted an electronic request for verification of the Social Security numbers of Respondent's employees with the Social Security Administration ("SSA") on January 13, 2011. SSA's electronic response showed that five out of seven of Respondent's employees "failed." Complainant told Able that one of the employees, Balthazar Naranjo, had a Social Security number that could not be valid because it started with a "9." Able told Complainant he would take care of it. Several days later, he brought a new Social Security card for Naranjo to Complainant. (Testimony of Complainant; Ex. R10)

23) Complainant issued the W-2s to Respondent's employees by January 31, 2011, the date they were required by law to be issued. (Testimony of Complainant)

24) On February 8, 2011, Complainant decided to submit a second electronic request for verification of the Social Security numbers of Respondent's employees with the SSA, using the SSA's SSNVS,[3] to see if Naranjo's new Social Security number was valid. The SSA's response stated that five out of seven of Respondent's employees, including Naranjo, "failed" because their names did "not match DOB." (Testimony of Complainant; Ex. R13)

25) Following the guidelines set out by the SSA, Able, with Linda Able's assistance, prepared letters for all five employees who "failed" that stated as follows:

> "Please Note -- We have been informed by the Social Security Administration that they are unable to verify your Social Security number as we have recorded in your employee personnel file. In order to resolve this is recommended that

[3] "SSNVS" is an acronym for the SSA's online Social Security Number Verification System.

you check with any local Social Security Administration (SSA) office to resolve this issue. Once this is completed, please immediately inform the Office Manager, so our records can be adjusted to resubmit the corrected data.

"This notice does not imply that you intentionally provided incorrect information."

Able gave these letters to the workers on February 12, 2011. At that time, Able believed he had fully complied with the SSA's verification requirements and it was up to the SSA to let Respondent know if there was a problem regarding the Social Security numbers of Respondent's workers. (Testimony of M. Able, L. Able; Exs. R14, R19)

26) In Complainant's last week of work, she told Hoyt Corbett, one of Able's business partners who is responsible for about 80 percent of Respondent's business, that she was leaving Respondent's employment. When Corbett asked why, Complainant told him that her husband and Able were making a joint investment, that Able had invested money against her husband's advice, and that she felt Able was not honest and did not want to work for him any longer for that reason. (Testimony of Corbett)

27) On the morning of February 16, 2011, Complainant seemed especially angry at work and Able confronted her and asked her what her problem was. Complainant told Able that he was "unworthy" to be in the same room with Complainant because he was a "liar and a cheat." Able then left to help load a truck, telling Complainant to restrict her job duties to answering the phone. When he returned, Complainant told Able she was going to "expose something" to Hoyt Corbett, adding "you don't know what I have." Complainant also said several times "Why don't you fire my fucking ass and get it over with!" Just before 1 p.m., Able told Complainant that her attitude needed to change and instructed her to leave work and come back when her attitude had changed. Complainant told Able she would not change her attitude and left. (Testimony of Complainant, M. Able; Respondent Answer)

28) Complainant concluded she had been fired since she believed she did not need to change her attitude towards Able,. (Testimony of Complainant)

29) Complainant was earning $13.78 per hour when she left Respondent's employment. (Testimony of Complainant)

30) Complainant called the SSA after her last day of work and questioned an SSA representative about her potential liability for providing false Social Security numbers to the SSA through issuing W-2s or making SSA verification requests. Complainant did not disclose Respondent's identity. The SSA representative told Complainant that she faced no liability based on her actions. (Testimony of Complainant)

31) The procedure Complainant understood that was to be used if an SSA verification request showed that a particular Social Security number failed to verify,

published on the internet at the SSA's website under the heading of "Social Security Number Verification Service (SSNVS) Handbook," describes two possible unlawful acts related to the verification of Social Security numbers of workers, set out below:

> "Anyone who knowingly and willfully uses SSNVS to request or obtain information from SSA under false pretenses violates Federal law and may be punished by fine, imprisonment or both.
>
> "NOTE: if you rely only on the verification information SSA provides to justify adverse action against a worker, you may violate State or Federal law and be subject to legal consequences."

(Testimony of Complainant, M. Able; Entire Record; Ex. R14)

32) There is no other evidence in the record to suggest that Complainant or Respondent faced any potential liability or legal consequences for her actions related to her filing W-2s or use of the SSNVS system. (Testimony of Complainant, M. Able; Entire Record; Ex. R14)

33) Since Complainant's termination, Dean Scheper has not been able to "flip" houses by himself because he lacks the necessary credit. (Testimony of Dean Scheper)

34) On February 17, 2011, Complainant sent an e-mail to Able at 12:51 p.m. with a subject line of "Laws" that read:

> "If an employee is discharged, the final paycheck is due not later than the end of the next business day. *ORS 652.140(1)*
>
> > "**Example:** If an employee is discharged on Saturday, the check is due on Monday by the end of the day. If an employee is discharged on Monday, the check is due by the end of the day on Tuesday."

At 3:41 p.m., Able sent a responsive e-mail to Complainant that read:

> "Thanks for the information. To clarify, I did not 'let you go'. As no words of 'being fired' were ever mentioned by me in our conversation yesterday. As you call [sic], I offered you the afternoon off to cool down and hopefully change your attitude. You told me you would 'not change' and walked off.
>
> "I need to know your exact status. So I can move forward."

(Testimony of M. Able; Ex. R29)

35) On February 24, 2011, Able mailed a letter to Complainant that read:

> "This is notification that your employment with Columbia Components has been terminated as of today 2/24/2011.

"The reason for the termination is job abandonment which is in violation of Company policy as referenced in Employee Handbook, Section 2-08.

"Enclosed is your final paycheck."

(Testimony of Complainant, Able; Ex. A11)

36) Complainant filed her sexual harassment complaint with BOLI on March 17, 2011. On April 7, 2011, Able mailed a letter to Complainant that read:

"Dear Dee:

"We have received a copy of the complaint you filed with the Oregon Bureau of Labor and Industries and we are in the process of preparing a response. Although we disagree with any of the assertions in the complaint, we will address those disagreements through the investigation process.

"Our reason for writing to you is to confirm that your former position of employment is available for you. This is an unconditional offer to reinstate you to your former position at Columbia Components. You do not need to need to drop or settle your claim with the Bureau of Labor and Industries. You will be immediately reinstated at your former duties, same shift, same rate of pay and all other conditions of employment.

"This offer will remain open to you for a week of the date of this letter; after that will need to make other arrangements to cover those duties. To accept it, please respond in writing to Columbia Components, Inc. directly at the following address:

Mike Able
Columbia Components, Inc.
11085 SW Industrial Way, Building 4
Tualatin, OR 97062

"Your written response must be received by April 15, 2011, at 5:00 p.m.

"We will be able to place you on the schedule as soon as we hear from you."

(Testimony of Complainant, Able; Exhibit R30)

37) On April 15, 2011, Complainant sent an e-mail to Able that read as follows**:**

"Dear Mike,

> "This Letter is in response to your letter delivered by Email, Overnight Mail, and Mail dated April 7, 2011. This response will be delivered by e-mail.
>
> "In the letter you sent on April 7, 2011, you mentioned the Complaints I have filed with the Oregon Bureau of Labor and Industries, and the pending investigations in respect to these claims that are in the process of being investigated.
>
> "Additionally, in a letter you sent you made an offer to reinstate my employment position with Columbia Components Inc. In review of the claims investigation process at the Bureau of Labor and Industries and after reviewing the Unemployment Hearing held on 4/5/2011, I find good cause not to accept your offer. I find both your actions and statements you made on 2/16/2011, and 4/5/2011 to be contradicting and inconsistent to this reinstatement offer.
>
> "It would be a reasonable conclusion that my employment at Columbia Components Inc. would interfere and inhibit the claims process, and the ongoing investigation by the Bureau of Labor and Industries. I decline to accept your offer due to good cause."

(Testimony of Complainant; Ex. R31)

38) In June 2011, Complainant was offered a regular job as a bookkeeper in McMinnville that paid a similar wage and had comparable hours to her job with Respondent. At that time, Complainant had just started working at a temporary, part-time job at Nike through Kelly Services and turned down the McMinnville job offer. Complainant worked three months at Nike and has not been employed since then. (Testimony of Complainant)

CREDIBILITY FINDINGS

39) Complainant's lack of credibility was reflected in both her testimony and demeanor. The forum addresses these issues separately.

Under direct examination, Complainant was a confident witness, responding directly to questions while facing the ALJ and Agency's chief prosecutor. In marked contrast, her testimony during cross examination and direct examination by Respondent's counsel was often evasive, as she turned sideways in her chair for extended periods of time, facing the wall while testifying and conspicuously avoiding facing anyone in the hearing room. Later, while sitting next to the Agency's chief prosecutor after she finished testifying, all her reticence vanished as she repeatedly reacted to any testimony that disagreed with hers by making theatrical facial expressions.

Complainant's testimony regarding the alleged sex harassment was unconvincing. She claimed that her computer was bombarded for three years by objectionable e-mail previews related to sexual solicitation that "popped up" when she

arrived at work and activated her monitor, that they were all in her “inbox,” and that she printed out “two inches” of them by July 2009, by which time there were “so many” that she couldn’t keep printing them out. However, at hearing she only produced seven e-mails, all of them from one week in July 2009, and all of them “sent” e-mails. During direct examination by the Agency, she testified that all of these "sent" e-mails popped up on her computer monitor, but later testified that there was no preview for “sent” e-mails on her computer and that the only way she knew of to make a copy of an e-mail in another person’s “sent” box was to go into that box, find the e-mail, and print it out. She also claimed that pop-up sex ads regularly appeared on her computer throughout her employment, but only provided six as evidence, one dated July 28, 2008, and the remaining five printed out between February 1 and February 9, 2011. Two of the five were printed on February 1, 2011, a day that Complainant did not even work. In addition, the forum notes that February 1-16, 2011, happens to coincide with the time in which Complainant and her husband were angry at Able for his “betrayal” with respect to Armando’s FGR scheme.

Complainant's testimony about her post-termination mitigation efforts was disingenuous. She received a fulltime job offer with hours and pay comparable to her job with Respondent after she had just started her temporary job at Nike and turned it down. However, she did not disclose this in discovery, on direct examination, or during cross examination, only revealing this fact when Respondent called her as an impeachment witness after conducting a discovery deposition midway through the hearing.

Finally, it was apparent from testimony by Complainant, her husband, and Able that Complainant harbored a non-work related grudge against Able related to Armando’s FGR program and Able’s “betrayal” of her husband.

In conclusion, the forum has only credited Complainant's testimony when it was corroborated by other credible evidence. In addition, the forum has credited Able’s testimony whenever it conflicted with Complainant’s. (Testimony of Complainant; Observation of ALJ)

40) For a number of reasons, the forum finds that Dean Scheper was not a credible witness. First, his prejudice due to his failed business relationship with Mike Able and his resultant hostile feelings towards Able. Second, he had a marked selective inability to recollect significant facts. On direct examination by the Agency, his testimony was straightforward and he had no trouble answering the chief prosecutor’s questions. On cross examination by Respondent and when Respondent called him on direct examination as a hostile witness, Scheper’s memory seemed to fail him as he answered more than 50 questions, many of which the forum believes he should have been able to answer, with the statement “I don’t recall.” His inability to recall was particularly pronounced whenever it involved his and Complainant’s personal finances, and he was vague and evasive in response to a number of questions that he did answer. Third, his testimony was inconsistent. For example, he testified that he recollected no communications whatsoever with Mike Able in January or February 2011

but also testified that he went to Armando's seminar with Able in January 2011 and had extensive discussions with Able about becoming his business partner in that time period. He testified that Complainant didn't do any bookkeeping for his company, then backtracked after being shown his company's payroll records and acknowledged she had done that work for his company. Finally, the forum has difficulty comprehending how, after Complainant had allegedly complained to him for three years about sexual harassment by Able,[4] that Scheper asked Able to become an equal partner with him in a business venture. The forum has only credited Scheper's testimony when it was corroborated by other credible evidence. (Testimony of Dean Scheper)

41) Tiffany Pine, Complainant's daughter, was a credible witness. However, the forum has not relied on any of Pine's testimony about what Complainant told her about events at Respondent's workplace for the reason that Complainant herself was not a credible witness. (Testimony of Pine)

42) Although Mike Able, CC's president, faces no direct personal liability from this proceeding, his testimony made it apparent that his livelihood depends on CC's financial well-being. He was also named as the perpetrator of the alleged harassment and the person who fired Complainant. While testifying he was not particularly articulate and was somewhat awkward in his speech. However, the forum did not interpret this as evasiveness because he attempted to respond directly to the questions put to him. Despite his bias, the forum finds that he was a credible witness and credits his testimony whenever it conflicted with Complainant's testimony. (Testimony of M. Able; Observation of ALJ)

43) Linda Able had an inherent bias because she is married to Mike Able and because she will be directly affected by a judgment against Respondent. However, she was not impeached by any credible evidence and the forum has credited her testimony in its entirety. (Testimony of L. Able)

44) Lloyd Perez, Agency investigator, and Lori Peterson, Respondent's insurance broker, were both credible witnesses. (Testimony of Perez, Peterson)

45) Hoyt Corbett, Jr., has done extensive business with Respondent during the last eight years. He owns the patent on a product that Respondent manufactures for him and owns several pieces of machinery that Respondent uses to manufacture his product. These financial relationships with Respondent gave him an inherent bias. However, he was not impeached by any credible evidence and the forum has credited his testimony in its entirety. (Testimony of Corbett)

[4] He testified that Complainant cried a lot, that she changed emotionally, that she would come home upset saying "you can't believe it" with respect to what she observed on her work computer, that she had a hard time sleeping, that she couldn't stop thinking about it, and over her last six or seven months of work "it was getting worse and worse and worse" and she would come home crying, and that he was "disgusted" with Able.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Columbia Components, Inc. was an employer as defined in ORS 659A.001(4) that employed Complainant Durga Scheper.

2) The actions, statements and motivations of Michael Able, Columbia Components' president, are properly imputed to Respondent Columbia Components.

3) Respondent did not subject Complainant to sexual harassment in violation of ORS 659A.030(1), OAR 839-005-0021, or OAR 839-005-0030.

4) Respondent did not violate ORS 659A.230(1), ORS 659A.199(1), OAR 839-010-0100(1), OAR 839-010-0100(2) or OAR 839-010-0140(1) by terminating Complainant's employment.

5) 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 practices found. ORS 659A.800 to ORS 659A.865.

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

OPINION

This case involves two sets of Formal Charges. In the first, the Agency alleges that Respondent sexually harassed Complainant by subjecting her, throughout her employment, to a continuous stream of sexually explicit e-mails and "pop-up" ads for sex on her work computer. In the second, the Agency alleges that Respondent fired Complainant because of her whistleblowing to the SSA.

SEX HARASSMENT

The Agency's case is based on the "hostile environment" theory of sexual harassment. OAR 839-005-0030(1)(b) defines this form of sexual harassment as:

> "Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment."

The conduct must be sex-based. OAR 839-005-0030(1). The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." OAR 839-005-0030(2). *In the Matter of Crystal Springs Landscapes, Inc.,* 32 BOLI ___ (2012).

The Agency's prima facie case in a hostile environment case consists of the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Respondent, through its proxy Able, engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Complainant's work performance or creating a hostile, intimidating or offensive work environment for Complainant; and (6) Complainant was harmed by the unwelcome conduct. *See, e.g., In the Matter of Charles Edward Minor,* 31 BOLI 88, 100 (2010).

There is no dispute that the Agency has met its burden of proof with regard to the first three elements of the Agency's prima facie case. However, the Agency's case fails on the fourth element. Simply put, there is no credible evidence to support Complainant's allegations of sexual harassment. Complainant herself was not believable and the only e-mails she produced as evidence were "sent" e-mails that, by her own admission, could not have been "pop-ups" because she could only have seen them after searching for and finding them in Mike Able's "sent" box. There is also an open question as to whether they were even sent by Able.[5] Finally, the e-mails she produced are all dated July 2009 and, as such, are outside the statute of limitations. Complainant explained her dearth of documentary evidence at hearing by saying she had collected a two inch thick file of objectionable e-mails and pop-ups by July 2009 but decided to destroy them based on her conclusion that there was nothing she could do to stop them from appearing. She also claimed she had shown the whole pile to her daughter Tiffany and her husband Dean. However, Tiffany testified that she only remembered being shown "at least 30 pages" sometime in the first 18 months of Complainant's employment and looked at "only a few," and Dean only recalled that Complainant brought home only three pages for him to look at some time in 2010.

As to the "pop-up" sex ads, there is no evidence, aside from Complainant's testimony, that they appeared on her work computer or that they were printed on Respondent's printer. Two of the five ads presented in evidence were printed on a day that Complainant was not even at work. There is no evidence that Respondent did anything to send them to Complainant. It is also telling that the ads were all printed after Complainant's husband's FGR deal with Able fell through, at a time when things were heating up between Complainant, her husband, and Able. In addition, both Linda Able and Hoyt Corbett credibly testified that they used Complainant's computer on occasion and never saw any pop-up sex ads.

As to Able's awareness of the alleged continuous pop-up sex ads appearing on Complainant's work computer, there is no credible evidence that any pop-up sex ad

[5] Complainant had access to all Respondent's e-mail accounts and documentary evidence established that she sent out in an e-mail under Mike Able's signature in 2008. Based on Complainant's testimony that she kept all Respondent's passwords written down underneath her computer keyboard, presumably any of the number of the "after-hours" computer programmers used by Respondent could have done the same.

ever appeared on that computer. Complainant alleged that Able was standing next to her on one occasion when a pop-up related to sex appeared on her computer monitor and she exclaimed -- "What is this!" – and his only response was to remark -- "Oh that's on my computer all the time" – before walking away. However, Complainant did not testify as to the contents of the pop-up or its date of occurrence, other than it was sometime in 2010.

Based on the Agency's failure to prove the fourth element of its prima facie case by a preponderance of the evidence, the forum finds that Respondent did not sexually harass Complainant.

WHISTLEBLOWING

In its Formal Charges, the Agency alleges six counts of discrimination in violation of Oregon's whistleblowing statutes and administrative rules. All six counts are based on the same alleged facts. Summarized, those alleged facts are as follows:

- On or about February 15, 2011, Complainant became aware that at least one of Respondent's employees was using an invalid Social Security number.

- Mike Able did not want Complainant to correct this issue with the SSA because he did not want to get into trouble.

- Complainant had a good faith belief that either the submission of the invalid information or the failure to correct the invalid information was a violation of state or federal law, rule, or regulation.

- Complainant had a good faith belief that the SSA had jurisdiction over Respondent and the ability to sanction Respondent.

- On February 16, 2011, Complainant told Mike Able that she was correcting an employee's W-2 form online at the SSA website. Able told Complainant to stop the activity, demanded her keys, and terminated her employment.

The forum evaluates the different counts of discrimination in the order that they appear in Formal Charges.

DISCRIMINATION FOR REPORTING IN GOOD FAITH ACTIVITY COMPLAINANT BELIEVED TO BE CRIMINAL: DISCHARGE

The Agency alleges that Respondent discharged Complainant in violation of ORS 659A.230(1) and 839-010-0100(2) because Complainant, acting in good faith, "filed or attempted to file corrected Social Security information" with the SSA. ORS 659A.230(1) provides:

"(1) It is an unlawful employment practice for an employer to discharge * * * an

> employee * * * for the reason that the employee has in good faith reported criminal activity by any person * * *."

OAR 839-010-0100(2) provides, in pertinent part:

> "(2) ORS 659A.230 prohibits any employer with one or more employees in Oregon from discriminating or retaliating against an employee because the employee has in good faith, or the employer believes the employee has:
>
> "(a) Reported to any person, orally or in writing, criminal activity by any person;
>
> "(b) Reported to any person, orally or in writing, any activity the employee believed to be criminal * * *[.]"

The Agency's prima facie case consists of the following elements: (1) Respondent was an employer as defined by statute; (2) Respondent employed Complainant; (3) Complainant, in good faith, reported criminal activity or activity she believed to be criminal; (4) Respondent discharged Complainant; (5) Respondent discharged Complainant because she, in good faith, reported criminal activity. *See In the Matter of Cleopatra's, Inc.,* 26 BOLI 125, 132 (2005).

Elements of (1) and (2) are undisputed. Element (3) has two distinct parts. First, Complainant must make a "report." Second, the Complainant must in "good faith" believe that the activity she is reporting is criminal activity or activity she believes is criminal or her employer must believe that she reported activity she "believed to be criminal." OAR 839-010-0100(2)(b).

The Agency contends that Complainant's filing of Respondent's W-2s and subsequent use of the SSNVS system to determine if Social Security numbers purportedly held by Respondent's employees were valid constitutes a "report" of "criminal activity."[6] It is undisputed that Complainant questioned Able about the validity of one worker's Social Security number and conducted a second SSNVS verification check on February 8, 2011. Able credibly testified that he believed he had fully complied with the SSA's verification requirements as of February 12, 2011, and it was up to the SSA to let him know if there was a problem regarding the Social Security numbers of Respondent's workers. There is no other evidence in the record to show that Able believed that CC's employees' Social Security problems was criminal activity. Consequently, the forum is unable to conclude that Able believed Complainant was reporting activity that she "believed to be criminal."

Assuming, arguendo, that Complainant's use of the SSNVS constitutes making a "report," there is no credible evidence to support a conclusion that Complainant herself had a good faith belief that she was reporting "criminal activity." The Agency has cited

[6] Complainant also testified that she called the SSA to discuss the "failed" social security numbers. The forum does not analyze whether this constitutes a report because she made the call **after** February 16, 2011, when she had already decided not to return to work.

no law, rule, or regulation that makes Complainant's report of "failed" Social Security numbers a crime by Complainant or Respondent, and Complainant did not testify as to any reasonable grounds that she relied on for that alleged belief. Complainant testified she believed that she could be prosecuted based on information she read on the SSA's website but the Agency produced no evidence, other than Complainant's unreliable testimony, to prove that the SSA published such a statement on its website. Finally, the Agency has alleged that the "straw that broke the camel's back" was Complainant's February 16, 2011, attempted use of the SSNVS in a further attempt to validate Naranjo's Social Security number. The only evidence supporting that allegation is the Complainant's own testimony, which the forum does not believe for the reasons set out at length in Finding of Fact #39.

Finally, as described in the Findings of Fact, the forum has concluded that Respondent did not discharge Complainant. Rather, Complainant was asked to leave work on February 16, 2011, after she displayed an increasingly hostile attitude towards Able from January 31, 2011, until her last day of work. Complainant's attitude was rooted in the failed business relationship between Able and her husband and culminated when Complainant told Able several times "Why don't you fire my fucking ass!" and threatened to make unspecified damaging revelations to Hoyt Corbett, Able's business partner. Able finally asked Complainant to leave work and come back when she changed her negative attitude. In response, Complainant told him that she did not need to change her attitude and that Able was a "liar" and a "cheat" with respect to his business dealings with her husband. After she did not report to work for a week, she was discharged for job abandonment. The forum also notes Corbett's unrebutted testimony[7] that Complainant told him, in her last week of work, that she was leaving Respondent's employment because she felt Able was not honest and did not want to work for Able any longer.

In conclusion, the forum finds that Respondent did not violate ORS 659A.230(1) or OAR 839-010-0100(2) with respect to Complainant's termination.

DISCRIMINATION FOR REPORTING IN GOOD FAITH ACTIVITY COMPLAINANT BELIEVED TO BE CRIMINAL: RETALIATION

As an alternative to "A," the Agency alleges that Respondent violated ORS 659A.230(1) and OAR 839-010-0100(2) by discharging Complainant in retaliation for Complainant's good faith act of filing or attempting to file "corrected Social Security information" with the SSA. For the same reasons as set out in the above analysis of the Agency's first charge, the forum finds that Respondent did not unlawfully retaliate against Complainant in violation of ORS 659A.230(1) or OAR 839-010-0100(2) with respect to Complainant's termination.

[7] Complainant was not called as a rebuttal witness to rebut Corbett's and Mike Able's testimony about her attitude during her last two weeks of employment.

DISCRIMINATION FOR INITIATING IN GOOD FAITH A CIVIL PROCEEDING: DISCHARGE

The Agency's next theory is that that Respondent discharged Complainant in violation of ORS 659A.230(1), OAR 839-010-0100(2), and OAR 839-010-0140(1) because Complainant, acting in good faith, "filed or attempted to file corrected Social Security information" with the SSA, thereby "initiating in good faith a civil proceeding." Again, Complainant's filing of Respondent's W-2s and subsequent use of the SSNVS to determine if Social Security numbers purportedly held by Respondent's employees were valid constitute the actions that the Agency alleges come under the umbrella of "initiating in good faith a civil proceeding." As relevant to this charge, ORS 659A.230(1) provides:

> "It is an unlawful employment practice for an employer to discharge * * * an employee * * * for the reason that the employee * * * has in good faith brought a civil proceeding against an employer * * *."

OAR 839-01-0100(2) provides, in pertinent part:

> "(2) ORS 659A.230 prohibits any employer with one or more employees in Oregon from discriminating or retaliating against an employee because the employee has in good faith, or the employer believes the employee has:
>
> "* * * * *
>
> "(e) Brought a civil proceeding against an employer[.]"

OAR 839-010-0140(1) provides:

> "Under ORS 659A.230 and these rules, an employee is protected in activities related to civil proceedings. A civil proceeding, as used in ORS 659A.230 and these rules, includes a proceeding before an administrative agency or a court. The employee is protected under the statute if:
>
> "(1) The employee has brought, in good faith, a civil proceeding against an employer.
>
> "(a) Bringing a civil proceeding, as used in ORS 659A.230 and the rules, includes filing complaints to or cooperation with administrative agencies as well as courts.
>
> "(b) An employee is considered to have initiated a civil proceeding when the employee has contacted an administrative agency the employee believes in good faith to have jurisdiction and the ability to sanction the employer.
>
> "(c) The employer against whom a civil proceeding is filed or initiated need not be the employee's current employer."

Previous Commissioner's Final Orders have held that the phrase "brought a civil proceeding," in the context of Oregon's whistleblower statutes, encompasses both (1) "good faith complaints made by employees against their employers that result in an administrative agency bringing a civil proceeding against that employer"[8] and (2) a good faith complaint to or cooperation by an employee with a regulatory agency that has the authority to initiate enforcement action such as license revocation, civil penalties, or injunctive relief against the employer, regardless of whether a formal contested case hearing or civil court action is held.[9]

Assuming, arguendo, that Complainant "complained" to or "cooperated" with the SSA and that the SSA had the ability to sanction Respondent, the Agency still cannot prevail because her employment with Respondent was severed for reasons unrelated to her use of the SSNVS. As stated earlier, she was discharged for job abandonment after she chose not to return to work rather than meet Able's condition of changing her negative attitude towards him that was rooted in the failed business relationship between Able and her husband. In conclusion, the forum finds that Respondent did not violate ORS 659A.230(1), OAR 839-010-0100(1), or OAR 839-010-0140(1) with respect to Complainant's termination.

DISCRIMINATION FOR INITIATING IN GOOD FAITH A CIVIL PROCEEDING: RETALIATION

As an alternative to "C," the Agency alleges that Respondent violated ORS 659A.230(1), OAR 839-010-0100(2), and OAR 839-010-0140(1) by discharging Complainant in retaliation for Complainant's good faith initiation of a civil proceeding by filing or attempting to file "corrected Social Security information" with the SSA. For the same reasons set out in the immediately preceding paragraphs, the forum finds that Respondent did not unlawfully retaliate against Complainant in violation of ORS 659A.230(1), OAR 839-010-0100(2), or OAR 839-010-0140(1) with respect to Complainant's termination.

DISCRIMINATION FOR IN GOOD FAITH REPORTING INFORMATION THAT EMPLOYEE BELIEVES IS EVIDENCE OF A VIOLATION OF LAW, RULE OR REGULATION: DISCHARGE

The Agency's next charge is that Respondent discharged Complainant "for in good faith reporting information" that she believed was "evidence of a violation of law, rule, or regulation" by "fil[ing] or attempt[ing] to file corrected Social Security information with the Social Security Administration," thereby violating ORS 659A.199(1) and OAR 839-010-0100(1). ORS 659A.199(1) provides, in pertinent part:

[8] *In the Matter of Earth Science Technology, Inc.,* 14 BOLI 115, 124 (1995); *affirmed without opinion, Earth Science Technology, Inc. v. Bureau of Labor and Industries,* 141 Or App 439, 917 P2d 1077 (1996).
[9] *In the Matter of Vision Graphics and Publishing, Inc.,* 16 BOLI 21, 25 (1997).

> "(1) It is an unlawful employment practice for an employer to discharge * * * an employee * * * for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."

OAR 839-01-0100(1) provides, in pertinent part:

> "(1) ORS 659A.199 prohibits any employer with one or more employees in Oregon from discharging * * * an employee * * * for the reason that the employee has in good faith reported information to anyone that the employee believes is evidence of a violation of any state or federal law, rule or regulation."

Again, the forum has already concluded that Complainant's termination was caused by her hostile attitude towards Able, her strident unwillingness to change her attitude, and her ultimate abandonment of her job based on her unwillingness to change. Correspondingly, Complainant's communications with Able regarding employee's Social Security numbers and the SSA were not a substantial factor in her termination. OAR 839-005-0010(1)(d)(B)(i)(ll).

In conclusion, the forum finds that Respondent did not violate ORS 659A.199(1) or OAR 839-010-0100(1) with respect to Complainant's termination.

DISCRIMINATION FOR IN GOOD FAITH REPORTING INFORMATION THAT EMPLOYEE BELIEVES IS EVIDENCE OF A VIOLATION OF LAW, RULE OR REGULATION: RETALIATION

As an alternative to "E," the Agency alleges that Respondent violated ORS 659A.199(1) and OAR 839-010-0100(1) by discharging Complainant in retaliation "for in good faith reporting information" that she believed was "evidence of a violation of law, rule, or regulation" by "fil[ing] or attempt[ing] to file corrected Social Security information with the Social Security Administration." For the same reasons set out in the immediately preceding paragraphs, the forum finds that Respondent did not unlawfully retaliate against Complainant in violation of ORS 659A.199(1) and OAR 839-010-0100(1) with respect to Complainant's termination.

ORDER

NOW, THEREFORE, as Respondent has been found not to have violated ORS 659A.030(1), OAR 839-005-0021, OAR 839-005-0030, ORS 659A.230(1), ORS 659A.199(1), OAR 839-010-0100(1) & (2), or OAR 839-010-0140, the complaints and Formal Charges against Respondent Columbia Components, Inc. are hereby dismissed according to the provisions of ORS 659A.850(3).