

In the Matter of

**FROM THE WILDERNESS, INC. dba
From the Wilderness Publications
and Michael Ruppert as employer proxy,**

Case No. 39-08

Final Order of Commissioner Brad Avakian

Issued September 16, 2009

SYNOPSIS

The Agency established by a preponderance of credible evidence that Respondent, through its proxy Michael Ruppert, subjected Complainant to offensive and unwelcome sexual conduct that created a hostile and intimidating work environment, in violation of ORS 659A.030(1)(b), then discharged Complainant in retaliation for her complaint about the sexual conduct, in violation of ORS 659A.030(1)(f). The forum concluded that Respondent was liable for Ruppert's sexual harassment and awarded Complainant \$2,713.42 in back wages and \$125,000 for emotional and mental suffering damages. ORS 659A.030; 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 June 23, 24, and 25, 2009, at the Oregon Employment Department office located at 119 N. Oakdale Avenue, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. Lindsay Gerken ("Complainant") was present throughout the hearing and was not represented by counsel. Respondent From the Wilderness, Inc. ("FTWI") and was represented by Michael Ruppert, FTWI's authorized representative, who was present throughout the hearing.

The Agency called the following witnesses: Complainant; Eric Yates, senior investigator, BOLI Civil Rights Division (telephonic); Mike Reinert and Steve Crews, Complainant's friends; Ryan Spiegl, Complainant's former co-worker (telephonic); Rebecca Jones, Complainant's mother (telephonic); Stephen Jones, Complainant's stepfather (telephonic); and Michael Ruppert, Respondent's president.

Respondent called the following witnesses: Michael Ruppert, Respondent's president; Scott McGuire, freelance writer and horticultural advisor; and Jamie Hecht, Ruppert's professional colleague.

The forum received into evidence:

a) Administrative exhibits X-1 through X-78 (submitted or generated prior to hearing) and X-79 (submitted at hearing);

b) Agency exhibits A-1 through A-27 (submitted prior to hearing), and A-40 (submitted at hearing);

c) Respondent exhibits R-7 and R-10 (submitted prior to hearing). Exhibits R-3, R-4, R-5, consisting of affidavits of Brendan Flanagan, Zach Evans, and Spencer Merkel, were offered but not received because the affiants were not made available for cross examination after the Agency requested cross examination of them at least 10 days before the hearing; the ALJ received the exhibits into the record as offers of proof. Exhibits R-6, R-11, R-12, R-13, R-14, and R-15 were offered but not received. Exhibits R-1 and R-2 were offered and not received and Respondent withdrew their offer.

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 13, 2006, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of FTWI. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued a Notice of Substantial Evidence Determination on October 18, 2007.

2) On August 12, 2008, the Agency issued Formal Charges alleging that:

(a) FTWI unlawfully discriminated against Complainant based on her sex through the words and actions of Ruppert, its proxy, by creating a workplace environment that was hostile, intimidating, or offensive to Complainant, in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a) & (b); and

(b) FTWI retaliated against Complainant, in violation of ORS 659A.030(1)(f), by attempting to make her sign a disciplinary notice after she complained about the sexual harassment, then terminated her when she refused to sign the notice.

The Formal Charges sought lost wages, "in an amount to be proven at hearing," and "at least \$35,000 in damages for emotional, mental, and physical suffering." The Charges were mailed to Respondent's attorney of record, Raymond D. Kohlman, in New York, and to Ruppert, FTWI's registered agent, at 655 Washington St., Ashland, OR 97520.

3) On September 4, 2008, the Agency filed a Notice of Intent to file a motion for default if FTWI failed to file an answer to the Formal Charges by September 15, 2008.

4) On September 17, 2008, an answer was filed by Raymond Kohlman, who identified himself as Michael Ruppert's attorney in the answer.

5) On September 18, 2008, the Agency moved for an order of default based on FTWI's failure to timely file an answer.

6) On September 23, 2008, Raymond Kohlman filed a "motion for pro hac vice." Kohlman represented that he is an attorney licensed to practice in Massachusetts who has been corporate counsel for FTWI and personal counsel to Michael Ruppert.

7) On September 24, 2008, Ruppert filed a letter with the forum opposing the Agency's motion for default and requesting that any default judgment be temporarily suspended until the forum allowed Kohlman to represent FTWI and himself or gave him "ample time to identify, retain and consult with local counsel."

8) On September 25, 2008, the ALJ issued an interim order denying Kohlman's motion on two grounds: (1) He did not state that he had associated himself with an active member in good standing of the Oregon State Bar; and (2) he certified to the Massachusetts Board of Bar Overseers of the Supreme Judicial Court that he was not covered by professional liability insurance.

9) On September 29, 2008, the ALJ issued an interim order denying the Agency's motion for default. Except for introductory language, the order is reprinted in its entirety below:

"The Formal Charges allege that Respondent is 'an administratively dissolved domestic business corporation' and that 'Michael Ruppert * * * was the registered agent * * * during all times of the corporation's existence in this state.' For argument's sake, the forum assumes that Respondent was a corporation and Michael Ruppert was its registered agent,ⁱ and that an answer had to be filed by 'counsel' or an 'authorized representative.' OAR 839-050-0110(1)&(2). Mr. Kohlman filed a motion to appear *pro hac vice* on September 23, 2008, and I denied that motion on September 25, 2008. Since no answer has been received except for the answer filed by Kohlman, the forum considers that Respondent has not filed an answer as of the date of this Order.

"The Agency's motion is based on Respondent's failure to file a timely answer. That failure, or lack of it, can only be ascertained by determining when the answer was due. No answer is due until service has occurred.

"OAR 839-050-0130(1) provides that a party named in Formal Charges must file an answer 'within 20 days after service' of the Formal Charges. OAR 839-050-0030(1) defines the date when service occurs:

'(1) * * * [T]he charging document will be served on the party or the party's representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:

(a) Receipt by the party or the 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.'

"In this case, the 'party' is From the Wilderness, Inc., an Oregon corporation. 'Party representative' is not defined in OAR Chapter 839, Division 50, or the Attorney General's Model Rules, OAR Chapter 137. For argument's sake only, the forum assumes that Kohlman, although not qualified to file an answer as Respondent's counsel, can be considered a 'party representative' under OAR 839-050-0030(1)ⁱⁱ as of the time that Kohlman filed an Answer in which he stated that he represented Respondent.

"The service-related notice on pages 3 and 4 of the Formal Charges show that that the Formal Charges were mailed to Ruppert at 655 Washington Street, Ashland, OR 97520. The Agency's recent motions have been mailed to Ruppert at 4269 Baldwin Avenue, Culver City, CA 90232. There is no evidence explaining this discrepancy and the Agency has not provided any documentary or testimonial evidence showing that Ruppert, Respondent's alleged registered agent, or anyone listed under ORCP 7(DD)(3)(b)(i) ever received the Formal Charges, or that they were ever mailed to Respondent's 'correct address.' The case presenter's bare representation that he spoke with Ruppert on September 11, 2008, by telephone and gave him additional time to file an Answer to the Formal Charges does not constitute proof that the Agency actually served the 'party.' Since the Agency has not established that it ever served the 'party' in this case, Respondent cannot be in default based on the theory that it has failed to file a timely answer after service upon the 'party.'

"The service-related notice on pages 3 and 4 of the Formal Charges show that that the Formal Charges were also mailed to Kohlman at the following three addresses:

Raymond D. Kohlman
Raymond D. Kohlman, Counselor at Law
300 E. 71st Street, Ste. 3H
New York, NY 10021

Raymond D. Kohlman
Raymond D. Kohlman, Counselor at Law
PO Box 3244
Attleboro, MA 02703

Raymond D. Kohlman
Raymond D. Kohlman, Counselor at Law

79 Central Avenue
Seekonk, MA 02771

The Agency's Notice of Intent to File a Motion for Default was sent to Kohlman at these three addresses. However, the Agency's Motion for Default was addressed to Kohlman at a different address:

Raymond D. Kohlman
Raymond D. Kohlman, Counselor at Law
116-6 142nd Street
Jamaica, NY 11436

"The Agency has provided no evidence showing (1) what Kohlman's correct address is; (2) when the Formal Charges were mailed to Kohlman at that address; or (3) when Kohlman actually received the Formal Charges. The forum infers that Kohlman received the Formal Charges no later than September 12, 2008, the date that appears next to his signature on the Answer received by the forum on September 17, 2008. Again assuming, for argument's sake, that Kohlman can be considered Respondent's 'party representative,' without proof of items (1) and (2), Respondent's Answer is due twenty days after September 13, 2008, at the earliest.ⁱⁱⁱ OAR 839-050-0040(3).

"As of this date, for reasons stated in this Order, the forum is unable to conclude that Respondent has not filed a timely Answer. The Agency's motion for default is **DENIED**."

10) On October 2, 2008, the Agency filed a renewed motion for default. On October 3, 2008, the ALJ issued an interim order denying the Agency's motion for default. The order is reprinted in its entirety below:

"On October 2, 2008, the Agency filed a Renewed Motion for Default in which the Agency asked the forum to issue an Order finding Respondent in default based on Respondent's failure to file a timely answer to the Agency's Formal Charges. For two separate reasons described below, the forum must deny the Agency's motion.

"The Agency attached several supporting exhibits to its argument in support of the motion. Among those exhibits was a printout from the Oregon Secretary of State, Corporations Division, showing that Michael C. Ruppert was Respondent's registered agent and that Ruppert's address on file with the Corporations Division, in his capacity as Respondent's registered agent, was '655 Washington St., Ashland, OR 97520.' Based on the signed statement of the Hearings Unit Coordinator on page 3 of the Notice of Hearing and the address listed for Ruppert on page 4 of the

Notice of Hearing, the forum takes official notice that the Formal Charges and Notice of Hearing were 'placed in the outgoing Bureau of Labor and Industries mail' to Ruppert at '655 Washington St., Ashland, OR 97520' mailed on August 14, 2008.

"ORCP 7D(3)(b)(ii) provides, in pertinent part, that:

'If a registered agent, officer, director, general partner, or managing agent cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served: * * * by mailing true copies of the summons and the complaint to the office of the registered agent or to the last registered office of the corporation or limited partnership, if any, as shown by the records on file in the office of the Secretary of State[.]'

"OAR 839-050-0030 provides, in pertinent part, that:

'(1) Except as may be otherwise provided in ORS 652.332(1) 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 a charging document is complete upon the earlier of:

'(a) Receipt by the party or the 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.'

"The Agency argues that two returned, unsigned certified mail receipts to Ruppert the above-mentioned Ashland address constitute 'certificates of mailing of the Formal Charges' that establish that Ruppert, as Respondent's registered agent, was served with the Formal Charges on August 14, 2008. The forum disagrees. OAR 839-050-0030(1)(b) states that service occurs by mailing when sent 'by registered or certified mail.' Although the Hearings Unit Coordinator mailed the Notice of Hearing and Formal Charges to the correct address, there is no evidence – for example, an affidavit statement from the Coordinator -- other than the two returned, unsigned certified mail receipts, that the Notice of Hearing and Formal Charges correspond to either receipt and that that the Notice of Hearing and Formal Charges were sent by certified mail. Without evidence to confirm that those receipts correspond to the Coordinator's mailing of the Notice of Hearing and Formal Charges to Ruppert, the forum cannot conclude that Respondent, through Ruppert, its registered agent, was served by mail on August 14, 2008.

"Even if the forum concludes that the Agency served Respondent by serving Kohlman as Respondent's 'party representative,' a second problem remains. On September 11, 2008, the Agency filed a notice of intent to file a motion for default, stating that the Agency would file a motion for default on September 15, 2008, if Respondent did not file an Answer by that date. Subsequently, in the Agency's motion for default, Patrick Plaza, the Agency case presenter, stated that he spoke with

Ruppert by telephone on September 11, 2008, and gave him “additional time” to file an Answer. Because this conversation occurred **after** the Agency’s notice that gave Respondent until September 15, 2008, to file an answer, the forum infers that the ‘additional time’ must have extended Respondent’s deadline for filing an Answer.

“When the Agency gives a respondent an extension for filing a responsive pleading past the 20-day deadline set out in OAR 839-050-0130(1), the date set out in Agency’s extension becomes the new deadline for filing an answer. The Agency case presenter has stated that, on September 11, 2008, he gave Respondent ‘additional time’ in which to file an answer. Whatever ‘additional time’ was given is the deadline Respondent was entitled to rely on. The Agency has not informed the forum of the date of the deadline given to Ruppert on September 11, 2008. Without knowing that date, the forum cannot know what date Respondent’s Answer is due. Without knowing the date that Respondent’s Answer is due, the forum cannot find Respondent in default.

“For the reasons stated above, the Agency’s motion is **DENIED.**”

11) On October 6, 2008, Oregon attorney Lee Werdell filed a letter stating that he had been retained by Michael Ruppert to represent him in Case No. 39-08. In the letter, Werdell requested a 10-day extension of time in which to file an answer to the Formal Charges and a postponement of the hearing.

12) On October 6, 2008, the ALJ conducted a prehearing conference with Pat Plaza, the Agency case presenter, and Lee Werdell regarding Respondent’s requests. Mr. Plaza did not object to Respondent’s requests and the ALJ granted Respondent’s requests for a 10-day extension in which to file an answer and reset the hearing to begin on March 10, 2009.

13) On October 16, 2008, Werdell filed an answer to the Formal Charges on FTWI’s behalf.

14) On January 5, 2009, the ALJ issued an interim order instructing both participants about fax filings and the forum’s seven-day timeline after service of motions to file a written response to those motions.

15) On January 5, 2009, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses;

identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damage calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The forum ordered the participants to submit case summaries by February 26, 2009, and notified them of the possible sanctions for failure to comply with the case summary order.

16) On February 19, 2009, Respondent filed a motion for a discovery order allowing Respondent to take the deposition of the Complainant and Patrick Plaza, the case presenter representing the agency in this case. Respondent coupled that motion with a second motion for a continuance to give Respondent the time in which to conduct those depositions. Respondent argued that both depositions were necessary, based on a lack of cooperation by the Agency and Complainant, in order to allow Respondent to obtain the discovery they are entitled to under the administrative rules and statutes related to this case. The Agency opposed Respondent's motions on the grounds that the Agency had fully cooperated with Respondent's discovery requests.

17) On February 25, 2009, the ALJ issued an interim order ruling on Respondent's requests for a discovery order and postponement. Except for introductory language, that order is reprinted in its entirety below:

“DEPOSITION OF PATRICK PLAZA

“Respondents seek to depose agency case presenter Plaza to learn the content of any conversations he has had with Complainant regarding her allegations of harassment and the merits of the case and because Plaza has not provided any notes he may have taken related to statements given to him by Complainant. Respondents assert that they are entitled to obtain Plaza's testimony because he is not entitled to a work product exception and the privileged communications relative to attorneys do not apply.

“The forum relies on an earlier decision to determine whether to grant Respondents' request. In the case of *In the Matter of Thomas Myers*, 15 BOLI 1 (1996), a Respondent sought to call the case presenter as a

witness to impeach complainant based on statements that complainant might have made to the case presenter that contradicted complainant's testimony made in the first stage of a reconvened hearing. The forum acknowledged that 'the attorney-client privilege does not exist between an Agency case presenter and a Complainant,' but denied Respondent's request based on the following policy reason:

'ORS 183.450(7) allows a state agency to be represented at contested case hearings by agency employees with the consent of the Attorney General. The Attorney General has given this consent to the Bureau, and the Bureau has designated individual employees as case presenters to perform this function. At a contested case hearings, the case presenter is authorized to perform every function related to litigation that the Attorney General would perform except presenting legal argument. ORS 183.450(8), OAR 839-50-230. An essential component of litigation is that the attorney or case presenter representing the client communicate candidly with the client regarding all facts within the client's knowledge that are relevant to the case. Here, although the client is technically the agency, the real party in interest is the Complainant. It is the Complainant who was subjected to the alleged discriminatory conduct and the Complainant who will be the beneficiary of any award of damages, not the agency. It is illogical to assume that the legislature and the Attorney General intended for an agency employee to perform all the essential functions of an attorney except for presenting legal argument and simultaneously intended to place this employee in the untenable position of being subject to examination, either by deposition or during a contested case hearings, as to the substance of any conversations between the employee and the Complainant whose case is being heard. This interpretation of the law would effectively hamstring the agency case presenter in performing the very task the legislature delegated to the case presenter to perform.' *Id* at 15-16.

"The policy reason that the forum relied on in deciding *Myers* still exists and Respondents have articulated no reason that would require the forum to overrule that decision.

"For the same reasons, this forum has previously ruled that a Respondent is not entitled to discovery of copies of interviews specifically conducted by the agency case presenter. *In the Matter of Wing Fong*, 16 BOLI 280, 283 (1998). *See also In the Matter of Logan International, Ltd.*, 26 BOLI 254, 257-58 (2005).

"Based on this precedent, Respondents' motion to depose Mr. Plaza is **DENIED**.

"PRODUCTION OF INTERVIEW NOTES WITH COMPLAINANT

“As stated above, Respondent is not entitled to copies of any interviews with the Complainant or any other witness specifically conducted by the agency case presenter. To the extent it has not already done so, **I ORDER** the Agency to produce copies of any notes made by an agency investigator of interviews with the Complainant, including any interviews conducted at the direction of Mr. Plaza or any other case presenter assigned to the case, that meet the definition of “documents” set out in Respondents’ First Request for Discovery. *Wing Fong*, at 282. **The Agency is ordered to provide any documents meeting this definition to Mr. Werdell no later than March 4, 2009.**

“DEPOSITION OF COMPLAINANT

“Respondents’ grounds for deposing Complainant rest on Complainant’s alleged inadequate response to Respondents’ interrogatories. Respondents contend that these inadequate responses leave a deposition as Respondents’ only alternative to gain the information it needs to prepare for hearing. Respondents argue that Complainant’s interrogatory responses are deficient in the two ways:

- “1. Complainant did not sign them under oath, rendering them useless to Respondent for impeachment purposes.
- “2. Complainant’s responses are nonresponsive or only partially response to Interrogatories 1-2, 5, 7, and 9.

“After reviewing the Interrogatories and Complainant’s responses, I find the following:

- “1. OAR 839-050-0200(6) requires that interrogatories ‘must be answered separately and fully in writing under oath unless it is objectionable, in which event the objecting party must state the reasons for objection and must answer to the extent the interrogatory is not objectionable.’ (emphasis added) This rule entitles Respondents to have sworn answers to Interrogatories. The Interrogatory Answers sent to Respondents are signed by Mr. Plaza, not the Complainant. Respondents are entitled, by agency rule, to receive Interrogatory Answers that are signed under oath by the Complainant.
- “2. Interrogatory #1 requests Complainant’s ‘full name, date of birth, current address and education history.’ The Agency refused to provide Complainant’s current address. Respondents seek Complainant’s address so that Respondents’ attorney can contact Complainant to discuss settlement with her. Respondent is not entitled to Complainant’s address for the purpose of contacting Complainant.
- “3. In pertinent part, Interrogatory #2 requests Complainant’s ‘employment history, excluding [her] work for the Respondent,’ including the ‘names, last known addresses, phone numbers and

dates of employment for each employer [Complainant] has worked for prior to working for Respondent and to provide the same information for any employers [Complainant] has worked for since working for Respondent.' The Agency's response objects that the request is 'overbroad and unduly burdensome and to such extent may not be calculated to lead to the discovery of admissible evidence.' The response then states that Complainant provided her employment history to Respondent when she completed her application for employment and was also provided in the investigative file 'already forwarded to counsel.' It also provides her subsequent employment history and earnings at each employer, but does not provide contact information for them. Respondents have not stated how production of Complainant's lifetime employment history is reasonably likely to produce information generally relevant to the case. Consequently, I will not order Complainant to state her employment history prior to working for Respondents beyond what has already been provided to Respondents. However, I find that the most recent contact information Complainant has for her employers between March 6, 2006, and September 2007 is reasonably likely to produce information generally relevant to the case.

"4. Interrogatory #5 asks Complainant to '[d]escribe all complaints that you have made to Evans, Speigl, Merkel or Plain, including when you made the complaints and what you complained of to them. Also describe their responses to your complaints, if any. State when was the last time that you talked to each of these three individuals and the circumstances and content of such conversations.' The Agency did not object to this Interrogatory, but the answer does not state when Complainant talked to these persons, their responses, if any, or the last time she talked to them and the content of those conversations. I find that this information is reasonably likely to produce information generally relevant to the case and that Respondents are entitled to a complete response to its Interrogatory.

"5. Interrogatory #7 asks Complainant to '[d]escribe when you first began to feel the emotional distress alleged in your Complaint and what first caused the emotional distress.' The Agency objected on the grounds that the Interrogatory is 'vague, overbroad, ambiguous, unduly burdensome, and to such extent may not be calculated to lead to the discovery of admissible evidence' and refers Respondents to Complainant's 'written statement dated May 31, 2006' previously provided to Respondents. I find that this information is reasonably likely to produce information generally relevant to the case and that Respondents are entitled to a sworn response to its Interrogatory.

“6. Interrogatory #9 asks Complainant to ‘[d]escribe all appointments, visits or counseling sessions that you have had with any counselors, medical providers or doctors relating to any emotional distress within the last ten years. Identify by name, address and phone number all treatment providers.’ The Agency objected to the request on the same bases as Interrogatory #7, but provided the names, address and phone numbers of two doctors Complainant saw for counseling after she left Respondents’ employment and described those visits with those doctors. I find that this information is reasonably likely to produce information generally relevant to the case and that Respondents are entitled to a sworn response to its Interrogatory. However, I note that Respondents’ ability to obtain any medical records from any named provider may be subject to OAR 137-003-0036. In addition, given the broad timeline encompassed by Respondents’ request, I would likely require that any medical records sought through OAR 137-003-0036 be subject to my *in camera* inspection before releasing them.

“Although Complainant has failed to adequately respond to the Interrogatories, the remedy is not a deposition. OAR 839-050-0200(3) provides:

‘Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.’

“Respondents have not demonstrated that taking Complainant’s deposition is the only alternative to obtaining the requested discovery. Respondents are not entitled to the additional information sought in response to Interrogatory #1. The additional discovery sought in response to Interrogatories 2, 5, 7, and 9 can be obtained by this forum’s requirement that Complainant respond to them completely. Accordingly, the forum **HEREBY ORDERS THE AGENCY TO PROVIDE RESPONDENTS’ ATTORNEY WITH THE FOLLOWING, NO LATER THAN MARCH 4, 2009:**

“1. A written response, under oath, to Interrogatory #2 that includes the last known addresses and phone numbers that Complainant has for her employers between March 6, 2006, and September 2007.

“2. A written response, under oath, to Interrogatory #5 that includes a description of when Complainant talked to Evans, Speigl, Merkel or Plain and the last time that Complainant talked to Evans, Speigl, Merkel or Plain and the circumstances and content of such conversations.

“3. A written response, under oath, to Interrogatory #7 that contains a specific and complete answer to that Interrogatory.

“4. A written response, under oath, to Interrogatory #9 that describes all appointments, visits or counseling sessions that Complainant had with any counselors, medical providers or doctors relating to any emotional distress from January 1, 1999, until May 31, 2006, and identifies all treatment providers by name, address and phone number.

“5. The original responses to Respondents’ Interrogatories, with Complainant’s oath affixed.

“Respondents’ motion to take Complainant’s deposition is **DENIED**.

“MOTION FOR POSTPONEMENT

“The hearing in this matter is set to begin on March 10, 2009. Respondents seek a postponement so they can complete discovery before the hearing. OAR 839-050-0150(5) provides:

‘(a) Any participant making a request for a postponement of any part of the contested case proceeding must state in detail the reason for the request. The administrative law judge may grant the request for good cause shown. In making this determination, the administrative law judge will consider:

‘(A) Whether previous postponements have been granted;

‘(B) The timeliness of the request;

‘(C) Whether a participant has previously indicated it was prepared to proceed;

‘(D) Whether there is a reasonable alternative to postponement; for example, submitting a sworn statement of a witness; and

‘(E) The date the hearing was originally scheduled to commence.

‘(b) The administrative law judge will issue a written ruling either granting or denying the motion and will set forth the reasons therefore;

‘(c) If all participants agree to a postponement, in order for the postponement to be effective, the administrative law judge will approve of this agreement. Whether the administrative law judge grants or denies such a motion for postponement, the administrative law judge will issue a written ruling setting forth the reasons therefore.’

“On October 6, 2008, Respondents moved for and were granted a postponement because Mr. Werdell had just been retained to represent Respondents and the hearing was set to begin on November 19, 2008. The motion was granted so that Mr. Werdell would have time ‘to prepare

for the hearing' and the case was reset for March 10, 2009. Mr. Werdell then filed an answer on Respondents' behalf on October 16, 2009. However, the Interrogatories and discovery request that form the basis of Mr. Werdell's motion for a discovery order were not mailed by Mr. Werdell until January 23, 2009, more than three months after this hearing was scheduled. It appears that Respondents' present need for a postponement, based on its failure to complete discovery, could have been obviated if Respondents had not waited three months before the hearing to seek discovery. Respondents have not represented that their delay in seeking discovery is attributable to the Agency, and I have fashioned an order that will give Respondents the information I find they are entitled to on March 4, 2009. If Respondents wanted the information sooner, it could have sought the requested information sooner. Respondents' delay in seeking discovery was within the control of Respondents and does not constitute 'good cause' under OAR 839-050-0020(12). The Agency has stated that it is prepared to proceed and I will not penalize the Agency based on Respondents' failure to seek timely discovery.

"Respondents' motion for a continuance is **DENIED**."

18) On February 27, 2009, the Agency filed a motion to amend the Formal Charges to name "Michael Ruppert dba FromTheWilderness.com as a respondent successor in interest" and "to increase by \$20,000 the amount of damages sought for emotional, physical and mental suffering."

19) On February 27, 2009, Respondent FTWI and the Agency filed case summaries.

20) On March 3, 2009, the Agency filed a request for cross examination in which the Agency asked that the forum require Respondent "make available for cross examination at hearing each and every author, preparer or transcriber" of any of the five affidavits submitted with Respondent's case summary that Respondent intended to offer or refer to at hearing.

21) On March 4, 2009, Respondent FTWI filed objections to the Agency's proposed amendments to the Formal Charges to add Michael Ruppert as a Respondent. Respondent Michael Ruppert also filed objections to the Agency's

proposed amendments on the basis that the Agency lacked jurisdiction over Michael Ruppert.

22) On March 5, 2009, the ALJ issued an interim order granting the Agency's motion to amend the Formal Charges to name Michael Ruppert as a Respondent successor in interest, but denying the Agency's request to increase the amount of damages sought by \$20,000 because the motion did "not include a substantive recital of any continued retaliation other than what is already set out in the Formal Charges and does not state why those allegations already set out in the Formal Charges support \$20,000 more in emotional distress damages than the amount originally plead." The Agency was ordered to reissue the Amended Formal Charges "with the amended language incorporated into it and underlined so it can be clearly identified, then to serve Michael Ruppert and Respondent From the Wilderness, Inc. with the Amended Formal Charges." The ALJ also postponed the hearing to give the Agency an opportunity to serve Respondent Ruppert. Finally, the ALJ noted that Respondent's jurisdictional objection was premature because the Agency had not yet attempted to serve Respondent Ruppert.

23) On March 6, 2009, the ALJ issued an interim order stating that, when the hearing was reset, he would issue an order requiring persons already served with subpoenas to honor that subpoena by appearing at the time, date, and place set for the rescheduled hearing.

24) On March 27, 2009, the Agency issued Amended Formal Charges and the ALJ signed a new Notice of Hearing that reset the hearing for June 23, 2009, in Medford, Oregon, and the Agency issued those Charges. However, the ALJ did not actually see the actual Amended Formal Charges until May 10, 2009.

25) On April 9, 2009, Respondent FTWI filed an amended answer and Respondent Ruppert filed a motion to dismiss the Formal Charges against him on the grounds of lack of jurisdiction.

26) On May 7, 2009, the Agency filed a motion for a protective order regarding Complainant's "medical, psychological, counseling, and therapy records" that the Agency might introduce as evidence at the hearing or that Respondent "may obtain during this contested case process."

27) On May 7, 2009, the Agency filed a Notice of Intent to File a Motion for Default against Respondent Michael Ruppert. In the Notice, the Agency stated that it intended to file a motion for default against Respondent Ruppert if he did not file an answer to the amended Formal Charges by May 18, 2009.

28) On May 13, 2009, the ALJ issued an interim order entitled "Impermissible Scope of the Agency's Amended Formal Charges." That order is reprinted in its entirety below:

"Introduction

"On March 26, 2009, the Agency issued its Amended Formal Charges. I signed an accompanying Notice of Hearing on March 27, but unfortunately did not receive a copy of the actual Amended Formal Charges until May 10, 2009, when I read them for the first time. This order is in response to the content of the Amended Formal Charges. Motions filed by the Agency and Respondents since the Amended Formal Charges were issued will be addressed in separate orders.

"The Agency's Motion To Amend And Scope Of The Order Granting The Agency's Motion to Amend

"On February 27, 2009, the Agency filed a motion to amend the Formal Charges to name Michael Ruppert dba FromTheWilderness.com as a respondent successor in interest and to increase by \$20,000 the amount of damages sought for emotional, physical, and mental suffering. On March 5, 2009, I issued an interim order granting the Agency's motion in part. Related to the Agency's motion to amend, I ordered the following:

- '1. Based on alleged facts the Agency recites in support of its motion to name Michael Ruppert as a respondent successor in interest, I find justice requires that I grant the Agency's motion to

name Michael Ruppert as a respondent successor in interest. The Agency's motion to name Michael Ruppert as a respondent successor in interest is **GRANTED**.

'2. The Agency alludes to continued retaliation as allegedly documented in the website attached to its motion to amend as the justification to amend the Formal Charges to add another \$20,000 for emotional distress damages. However, the Agency's motion to amend the Formal Charges does not include a substantive recital of any continued retaliation other than what is already set out in the Formal Charges and does not state why those allegations already set out in the Formal Charges support \$20,000 more in emotional distress damages than the amount originally plead. The Agency's motion to amend the Formal Charges to add another \$20,000 for emotional distress damages is **DENIED**.'

"The scope of my order was based on the following language taken from the Agency's motion:

'The Agency moves * * * to amend the Formal Charges issued August 14, 2008 to name, as a respondent successor in interest, Michael Ruppert dba FromTheWilderness.com and to increase by \$20,000 the amount of damages sought for emotional, physical and mental suffering.'

(* * * *

'For purposes of creating an accurate record in this contested case and obtaining a judgment against all of the proper Respondents, the Agency respectfully requests that it be allowed to amend the Formal Charges as requested to name Michael Ruppert doing business as FromTheWilderness.com as a successor respondent to From the Wilderness, Inc. dba From the Wilderness Publications based on facts occurring after Formal Charges were filed (my emphasis). Based on Respondent's continued retaliation in violation of ORS 659A.030(1)(f) the Agency seeks to increase the amount of damages sought by \$20,000 for emotional, physical and mental suffering. Respondent and Michael Ruppert should not be allowed to escape financial liability for their actions by dissolving the corporation and continuing to operate through a new entity.'

"Except for the 'continued retaliation' cited in the above paragraph and a recitation of alleged negative references on a website allegedly operated by Ruppert, set out in the context of explaining why Ruppert should be named as a successor in interest, the Agency's motion contains no reference to any retaliatory activities by Ruppert. As a result, my ruling was limited to allowing the Agency to name Ruppert as a respondent successor in interest.

“The Agency’s Amended Formal Charges

“As authorized by my March 5 interim order, the Amended Formal Charges name Ruppert as a Respondent successor in interest and set out alleged facts to support that allegation. However, the Amended Formal Charges do not stop there. On page 8, line 12, and continuing through page 11, line 9 (paragraphs 28 through 34), the Agency cites numerous actions by Ruppert, all occurring after Complainant was discharged, that appear related to the Agency’s subsequent allegation that Ruppert, as an individual, unlawfully retaliated against Complainant. Starting at page 12, line 6, and continuing through page 13, line 4 (paragraphs 39 through 41), the Agency alleges another set of new facts that appear to relate back to the new allegations contained in paragraphs 28 through 34 and charge Ruppert with unlawful retaliation, in violation of ORS 659A.030(1)(f), based on acts that occurred after Complainant’s termination. None of these allegations appear (a) in the Complainant’s complaint to the Agency filed on November 13, 2006,^{iv} (b) in the original Formal Charges; or (c) in the Agency’s motion to amend the Formal Charges. In this text, the Agency alleges that Respondent Ruppert, ‘in his individual capacity as successor in interest to Respondent FTWI dba FTWP retaliated against Complainant in violation of ORS 659A.030(1)(f)’ by actions Ruppert took after Complainant was discharged. These retaliation charges and the successor in interest charges are separate and distinct issues and do not merge in the manner suggested by the Agency. Retaliation is a form of unlawful discrimination, whereas successor in interest status relates to liability for acts of unlawful discrimination that were committed by a predecessor. The Agency did not seek to amend the Formal Charges to include retaliation charges against Ruppert individually, and permission for amendments of this nature was not granted.

“In addition, I note that, should the Agency move to amend to include its post-termination allegations of retaliation by Ruppert, I would not grant the motion. With respect to complaints of employment discrimination, OAR 839-003-0040(2) provides:

‘A complaint may be amended to add a protected class only if the addition is supported by facts already alleged. New facts may not be added. If new facts are alleged, the complainant must file a new complaint meeting the standards provided in OAR 839-003-0005(4).’

“The statutory scheme found in ORS 659A.820 through 659A.850 provides that a complaint of unlawful discrimination must be filed and a finding of substantial evidence issued before the commissioner can issue formal charges. In this case, a complaint containing the post-termination allegations of retaliation that the Agency has now introduced in its Amended Formal Charges was never filed, so far as the forum is aware. Consequently, the Agency may not bootstrap these new allegations into the existing Formal Charges.

“Conclusion

“The Agency’s Amended Formal Charges exceed the scope of my interim order granting the Agency the right to amend the Formal Charges. On my motion, I am striking paragraphs 28 through 34 and 39 through 41 of the Amended Formal Charges. I am also striking the second sentence of paragraph 18 of the Amended Formal Charges, a new sentence inserted by the Agency that is unrelated to the successor in interest charges.

“IT IS SO ORDERED”

29) On May 13, 2009, the ALJ issued an interim order denying Respondent Ruppert’s motion to dismiss. Except for introductory language, that order is reprinted in its entirety below:

“On April 9, 2009, * * * Respondent Ruppert filed a motion to dismiss on the grounds of lack of jurisdiction. In his motion, Ruppert argued the following:

‘Motions to dismiss for lack of jurisdiction are brought under the provisions of OAR 839-050-0150. The motion to dismiss is analogous to an ORCP 21 motion to dismiss for lack of jurisdiction. Defendant Michael Ruppert has never made any personal appearance in this action other than to previously raise the issue of jurisdiction.

‘There are no allegations contained within the Amended Formal Charges which provide any factual allegations of any activities by Michael Ruppert that would establish sufficient activity within the state of Oregon within the requisite statute of limitations that would allow this agency to find jurisdiction.

‘Additionally, there has been no service upon defendant Michael Ruppert sufficient for jurisdiction. This failure of lawful service upon Michael Ruppert makes it impossible for the Bureau of Labor and Industries to obtain any relief against Michael Ruppert and the agency has no basis upon which any relief may be granted on June 23, 2009, which is the date that this agency has set for hearing in this matter.

‘Until there has been lawful service upon Michael Ruppert and a determination that Michael Ruppert has engaged in activities over which the agency has jurisdiction, there can be no hearing relating to Michael Ruppert personally.’

“The Agency filed a timely response to the Respondent’s motion in which it asserted that Michael Ruppert had been properly served and that the forum has jurisdiction to hear the Amended Formal Charges.

“For reasons stated below, Respondent’s motion to dismiss the Amended Formal Charges against Michael Ruppert is **DENIED**. As explained below, the part of Respondent’s motion that impliedly addresses the allegations of continued retaliation has been rendered moot by another ruling I have issuing today entitled ‘Impermissible Scope of the Agency’s Amended Formal Charges.’

“Continued Retaliation

“Respondent’s motion to dismiss is based in part on the lack of activity by Michael Ruppert in the state of Oregon that would allow the forum to find jurisdiction. To the extent that Respondent’s motion addresses the allegations of ‘continued retaliation’ by Michael Ruppert, the motion is moot. I have issued another interim order today entitled ‘Impermissible Scope of the Agency’s Amended Formal Charges.’ In that order, I have stricken all of the Agency’s allegations related to continued retaliation and a resultant violation of ORS 6590A.030(1)(f) by Michael Ruppert for reasons stated in detail in that order. As a result, Michael Ruppert’s potential liability in this matter is limited to any liability that may accrue based on the Agency’s allegation that he is a successor in interest to Respondent FTWI.

“Successor in interest

“The Agency amended its Formal Charges to name Michael Ruppert as a Respondent successor in interest after first seeking and obtaining permission from the forum to do so. To begin, I note that successor in interest is a basis for liability for acts of unlawful discrimination that were committed by a predecessor. There is no dispute that FTWI was an Oregon employer, that Michael Ruppert operated FTWI in Oregon at times material, that Complainant was employed by FTWI, and that Complainant’s entire employment with Respondent FTWI took place in Oregon. As to Respondent Ruppert, the only relevant facts related to his individual liability concern whether or not his activities make him a successor in interest to FTWI. The fact that he does not currently reside or conduct business in Oregon does not require a conclusion that he is not a successor in interest. The question of successorship is up to the Agency to prove. Whether or not the Agency can prove it will be decided at hearing. Since the alleged unlawful discrimination only involves actions alleged to have taken place in Oregon, Respondent Ruppert’s argument that the Agency cannot acquire jurisdiction over him because he did not engage in any of the alleged unlawful activities in Oregon fails. To acquire jurisdiction, the Agency only need serve Respondent Ruppert in a manner consistent with the provisions of OAR 839-050-0030.

“Respondent Ruppert Has Been Served With The Amended Formal Charges

“OAR 839-050-0030 provides that service of charging documents is done in the following manner:

'(1) Except as otherwise provided in ORS 652.332(1) 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 a charging document is complete upon the earlier of:

'(a) Receipt by the party or the 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.'

"The Agency's response to Respondent Ruppert's motion to dismiss includes documentary evidence that the Amended Formal Charges were mailed, by certified mail, to Michael Ruppert on April 14, 2009, at 4269 Baldwin Avenue, Culver City, CA 90232-3201. The forum infers that this is Ruppert's correct address based on Ruppert's letter to the forum dated September 24, 2008, titled 'Opposition to Motion for Default,' in which Michael Ruppert signed and listed his address as the Baldwin Avenue address stated above. The Agency also included documentary evidence showing that Michael Ruppert was personally served with the Amended Formal Charges on April 18, 2009, at the same Baldwin Avenue address. Both types of service are authorized by OAR 839-050-0030.

"The Agency argues that the filing of a motion to dismiss by Ruppert's attorney is further proof that Ruppert was served. The Agency is incorrect on this point. Mr. Werdell, Ruppert's attorney, also represents Respondent FTWI and, as such, was served with the Amended Formal Charges in his capacity as Respondent FTWI's counsel. On March 5, 2009, I held a prehearing conference with Mr. Plaza and Mr. Werdell. During that conference, Mr. Plaza specifically asked Mr. Werdell if he would accept service on behalf of Michael Ruppert, and Mr. Werdell stated that he would not. Under these circumstances, the mere fact that Mr. Werdell filed a motion to dismiss on Respondent Ruppert's behalf does not establish that Respondent Ruppert was served as required under OAR 839-050-0030.

"Finally, I note that the Agency is correct in its assertion that, even if service has not been accomplished, it is premature to dismiss the Amended Formal Charges before hearing based [sic] due to lack of service.

"Conclusion

"For reasons stated above, Respondent's motion to dismiss the Amended Formal Charges against Michael Ruppert is **DENIED.**"

30) On May 13, 2009, the ALJ issued an interim order stating that Respondent Ruppert risked being held in default with respect to the Amended Formal Charges if he did not file an answer to them.

31) On May 13, 2009, the ALJ issued an interim order in response to the Agency's request for cross examination reminding Respondents that failure to make the authors, preparers or transcribers of any of the five affidavits submitted with Respondent's case summary available for cross examination at hearing could result in the exclusion of those exhibits. The ALJ also noted that it was Respondents' responsibility to arrange for the appearance of those persons at such time as the Agency was prepared to cross examine them.

32) On May 15, 2009, the ALJ issued an interim order requiring Respondent Michael Ruppert to submit a case summary by June 12, 2009. The ALJ also ordered the Agency and Respondent FTWI to submit supplemental case summaries, should they choose to present the testimony of witness and offer witnesses not listed or included in their original case summaries, by June 12, 2009.

33) On May 18, 2009, the ALJ issued a Protective Order covering all "individually identifiable health information pertaining to Complainant that the Agency provides in its case summary or offers as evidence at the contested case hearing currently set in this matter for June 23, 2009, as well as any medical, psychological, counseling and therapy records of Complainant that Respondents obtain during this contested case process."

34) On May 21, 2009, Respondent Ruppert filed an answer to the Amended Formal Charges.

35) On May 28, 2009, Respondent Ruppert faxed and mailed a motion for partial summary judgment to the ALJ. The faxed copy was missing page two of the motion and the "sworn answer to Claimant's interrogatories" that Respondent cited in paragraph one of its motion as supporting the motion. The copy mailed to the Hearings

Unit was missing pages two and three of the motion and the “sworn answer” referred to in the previous sentence.

36) On June 1, 2009, Respondent Ruppert faxed all six pages of its motion for partial summary judgment to the Hearings Unit.

37) On June 2, 2009, the ALJ issued an interim order reminding Respondents of the forum’s filing requirements. The ALJ issued a second interim order stating that the Agency’s response to Respondent Ruppert’s motion for partial summary judgment, should it choose to file one, “would be due seven days from the date that: (1) Respondent files its motion, complete with ‘the sworn answer to Claimant’s interrogatories’ referenced in the first paragraph of Respondent’s motion; or (2) Respondent files a statement that Respondent does not intend to rely on ‘the sworn answer to Claimant’s interrogatories’ in support of its motion.”

38) On June 4, 2009, the ALJ issued an interim order requiring witnesses previously served with subpoenas to compel their appearance on the date originally set for hearing to honor that subpoena on the reset hearing date. The ALJ ordered that notice “of the duty of each witness to comply with the previously served subpoena on this new hearing date shall be given to each witness by means of Respondent and the Agency sending a copy of this ruling by regular mail to the witness’s mailing address.”

39) On June 11, 2009, the Agency filed a response to Respondent Ruppert’s motion for partial summary judgment and a supplemental case summary.

40) On June 15, 2009, the ALJ issued an interim order ruling on Respondent Ruppert’s motion for partial summary judgment. That ruling is **HEREBY AFFIRMED** and is reprinted below in its entirety:

“Introduction

“On June 2, 2009, Respondent Ruppert (‘Ruppert’) filed a motion for partial summary judgment, contending that it is not possible for the Agency to meet its burden of proof in support of its allegation that Ruppert

is a successor in interest to Respondent From the Wilderness, Inc. ('FTWI') and that the charges against him as an individual should be dismissed. The Agency responded by way of objection to Ruppert's motion.

"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.

"The 'record' considered by the forum consists of: (1) The Formal Charges and Respondent FTWI's answer; (2) The Amended Formal Charges and Respondents' answers; (3) Ruppert's motion and attached response to the Agency's interrogatories; and (4) The Agency's response to Respondent's motion that was authored and signed by the Agency case presenter, and Exhibit A-27, pages 1-3, that was submitted with the Agency's case summary.

"The Issue

"Ruppert has not been charged, as an individual, with an unlawful employment practice. Rather, his status as a Respondent rests on the allegation in the Agency's amended Formal Charges that he is a successor in interest to Respondent FTWI. If found to be a successor in interest, Ruppert faces potential liability if the forum concludes that FTWI committed an unlawful employment practice alleged in the Amended Formal Charges. If Ruppert is not proven to be a successor in interest, the Charges will be dismissed against him, regardless of the outcome against FTWI.

"Successor In Interest

"The Agency has the burden of persuasion to establish that Respondent Ruppert is a successor in interest to FTWI. The test for determining whether Ruppert is a successor in interest is set out in OAR 839-005-0050. It reads as follows:

'An employer's liability for unlawful discrimination under ORS 659A.030 and OAR 839-005-0010 to 839-005-0045 extends to a

successor employer. Determining whether a respondent is a successor employer involves a nine-part test. Not every element of the test need be present to find an employer to be a successor; the facts must be considered together to reach a determination:

'(1) Whether respondent had notice of the charge at the time of acquiring or taking over the business;

'(2) The ability of the predecessor to provide relief;

'(3) Whether there has been a substantial continuity of business operations;

'(4) Whether the respondent uses the same plant as the predecessor;

'(5) Whether respondent uses the same or substantially the same work force as the predecessor;

'(6) Whether respondent uses the same or substantially the same supervisory personnel as the predecessor;

'(7) Whether under respondent the same jobs exist under substantially the same working conditions as under the predecessor;

'(8) Whether respondent uses the same machinery, equipment and methods of production as the predecessor;

'(9) Whether respondent produces the same product as the predecessor."

In the following discussion, the forum evaluates the record with regard to each of these elements.

"Analysis

"A. Did Ruppert have notice of the charge at the time of acquiring or taking over the business?"

"In its Amended Formal Charges, the Agency alleges that 'Respondent Ruppert had notice of the Formal Charges at the time he began using the website and blog to conduct the business of the now-defunct entities, Respondent FTWI dba FTWP.' Ruppert denies this allegation in his answer. The original Formal Charges were issued on August 13, 2008. The Agency does not allege a specific date that Ruppert 'began using the website and blog to conduct the business' of FTWI, but alludes to an article written by Ruppert dated September 17, 2008, which the Agency contends is evidence that Ruppert was conducting FTWI's business as a successor in interest. September 17, 2008, is the earliest date in the record considered for purposes of this motion for which there is any evidence that Ruppert conducted business as FTWI's successor in interest. Even though the forum did not accept the answer filed on FTWI's behalf by New York attorney Raymond Kohlman dated September 12,

2008, Kohlman's statement that, as attorney for 'Michael Ruppert,' he was authorized to answer the complaint filed in the case of 'In the Matter of FROM THE WILDERNESS INC., Case 39-08' shows that that Ruppert had knowledge of the Formal Charges before September 17, 2008.

"Ruppert argues that the notice requirement is not met because he 'did not in fact take over the business of From the Wilderness, Inc. From the Wilderness, Inc. simply went out of the business and there was no successor of any kind.' Ruppert's argument begs the question.

"Because evidence in the record shows that Ruppert may have first engaged in carrying on FTWI's business as a successor on September 17, 2008, and he knew of the Formal Charges no later than September 12, 2008, the forum concludes there is a genuine issue of material fact as to whether the notice requirement of the Agency's successor in interest test has been met.

"B. The ability of FTWI, the alleged predecessor, to provide relief.

"In its Amended Formal Charges, the Agency alleges that 'Respondent From the Wilderness, Inc. is an administratively dissolved domestic business corporation that * * * was administratively dissolved on June 1, 2007.' Ruppert admits this allegation in his answer. FTWI admitted this allegation in its original answer. In its answer to the Amended Formal Charges, FTWI incorporated a sworn declaration by Ruppert in that included a statement referring to FTWI as '[t]he defunct corporation * * * is not currently in business and has not been in business since sometime in 2006.'

"The Agency seeks monetary relief in this case. Viewing the evidence in a manner most favorable to the Agency, I find there is a genuine issue of material fact as to whether FTWI has any ability to provide any monetary relief to Complainant.

"C. Is there substantial continuity of business operations?

"This test focuses on the lapse of time between the date an alleged predecessor stops operations and the date the alleged successor commences operations. It is undisputed that FTWI ceased operations in December 2006 or early January 2007 and that it was administratively dissolved on June 1, 2007. In the record, there is no evidence to show that Ruppert may have initiated continuance of FTWI's business before September 17, 2008. That is a lapse of 20 months and indicates a lack of continuity. I find there is no genuine issue of material fact as to whether there is "substantial continuity of business operations" between the cessation of FTWI's business and the business Ruppert is alleged to be currently engaged in.

"D. Does Ruppert use the same plant as FTWI?

"Undisputed evidence in the record shows that FTWI's business consisted of publishing and posting written material on an internet website

and selling books on the website and that this work was done by FTWI's employees from an office building located in Ashland, Oregon. Neither the Agency nor Respondents assert that the business conducted by Ruppert in his alleged capacity as successor in interest to FTWI is conducted anywhere in Oregon, much less in the same office in Ashland, and there is no evidence from which to draw such a conclusion. In his sworn declaration, Ruppert denies that the existing website *Fromthewilderness.com* is anything but an archival website, and that no business is or has been done since 2006 from that site. Even if FTWI's website, archival or otherwise, is considered part of its 'plant,' Exhibit A-27, without an accompanying declaration or affidavit explaining and authenticating it, is insufficient to raise a genuine material issue of fact. I find there is no genuine issue of material fact as to whether Ruppert uses the same plant as FTWI in the business Ruppert is currently alleged to be engaged in.

"E. Does Ruppert use the same or substantially the same work force as FTWI?"

"Ruppert testifies in his sworn declaration that FTWI employed eight persons, including him; that he does not employ any of these persons; and that the only thing he is doing that is at all related to FTWI is operating a blog named <http://www.mikeruppert.blogspot.com>. Ruppert further testifies that this blog is not a business, has no bank accounts, no income, no employees, and has one unpaid moderator, Jenna Orkin, who was not a prior employee of FTWI. I find there is no genuine issue of material fact as to whether Ruppert uses the same or substantially the same work force as FTWI in the business Ruppert is currently alleged to be engaged in.

"F. Does Ruppert use the same or substantially the same supervisory personnel as FTWI?"

"In its Amended Formal Charges, the Agency alleges that Ruppert was the registered agent, founder and sole owner of FTWI at all material times. Respondents admit that allegation in their answers. However, the Agency does not specifically allege, and Respondents do not specifically admit, that Ruppert was Complainant's supervisor or a supervisor at FTWI. Looking at this evidence in a manner most favorable to the Agency, it is possible to infer that Ruppert was a supervisor at FTWI.^Y Ruppert's sworn declaration in response to the Agency's interrogatories also establishes that Ryan Spiegl, an employee of FTWI, was FTWI's 'IT manager.' Looking at this evidence in a manner most favorable to the Agency, it is also possible to infer that Spiegl was a supervisor at FTWI. In Ruppert's sworn declarations, he states that the operation that the Agency contends is a successor business is merely a blog -- <http://www.mikeruppert.blogspot.com> -- that he operates and that it has no employees. In order to have supervisory personnel, a business must first have employees. The Agency has provided no evidence to show that

Ruppert has any employees. With no evidence in the record that Ruppert is operating a business that has any employees, I find there is no genuine issue of material fact as to whether Ruppert uses the same or substantially the same supervisory personnel as FTWI.

“G. Under Ruppert, do the same jobs exist under substantially the same working conditions as under FTWI?”

“In the Amended Formal Charges the Agency alleged and Respondents admitted or do not deny that:

- Complainant worked as a staff/writer/assistant at Respondent’s office in Ashland, Oregon.
- FTWI had a shipping and receiving area.
- Complainant had a desk.

Relevant to this issue, Ruppert testifies as follows in his sworn declarations:

- FTWI had eight employees, including an IT manager.
- Ruppert has no employees, but uses his girlfriend as an unpaid moderator on his website.
- While FTWI operated as an online business, it was edited and published by Ruppert and Spiegl, its IT manager.
- FTWI sold books on its website by means of FTWI’s employees taking orders, receiving cash, credit cards and checks for deposit to banks or credited in bank accounts of FTWI.
- FTWI maintained the books it sold at its Ashland office and sold, packaged, and shipped them from Ashland to purchasers. No books have been sold from the archival website.

Without employees, it is impossible for the same jobs to exist. Based on Ruppert’s sworn declaration that he has no employees and the Agency’s failure to provide any evidence to the contrary, I find there is no genuine issue of material fact as to whether Respondent’s alleged successor business has the same jobs under substantially the same working conditions as existed under FTWI.

“H. Does Ruppert use the same machinery, equipment and methods of production as the predecessor?”

“In its Amended Formal Charges, the Agency asserts that ‘[t]he similarities between the business conducted by Respondent FTWI dba FTWP and that currently conducted by Respondent Ruppert would dictate the same or similar machinery, equipment and methods of production.’ Ruppert denies this allegation in his answer. In his sworn declaration, he states that he no longer sells books directly from his website. The Agency case presenter’s arguments to the contrary are insufficient to raise a

material issue of fact. Given that Ruppert publishes a blog, the forum can reasonably infer that he uses a computer, which the forum also infers that Ruppert used at FTWI to carry out FTWI's business. Given Ruppert's declaration that FTWI maintained the books it sold at its Ashland office and sold, packaged, and shipped them from Ashland to purchasers, the forum also infers that FTWI used some type of equipment to ship books. There is no evidence that Ruppert uses any of this same machinery or equipment as FTWI. Although Ruppert's 'method of production' for posting articles on his blog may be similar to FTWI's method of posting its newsletter online, in that they both involve interaction with an internet website, this is insufficient evidence, considering the entirety of FTWI's business, to raise a genuine issue of material fact regarding whether Ruppert uses the same machinery, equipment and methods of production as FTWI.

"I. Does Ruppert produce the same product as FTWI?"

"In its Amended Formal Charges, the Agency alleges that 'Ruppert essentially produces the same product as [FTWI] in the form of commentary on government cover-ups and conspiracies and by providing a forum for peak oil issues.' Ruppert argues that FTWI's 'product' was 'the taking of orders, processing of orders and shipping of books and articles, which included books and writings authorized by Michael Ruppert' and denied the Agency's allegation in his answer. As an aside, the forum notes that there is a material difference between the business of writing books and the business of selling them.

"It is undisputed that FTWI published an online newsletter and sold books, including those written by Ruppert, that it advertised and sold on its website. Ruppert currently produces a blog, and neither Ruppert nor the Agency produced any evidence to show the similarity – or lack of similarity – of Ruppert's blog to FTWI's newsletter. In Ruppert's sworn declaration, he testifies that he does not directly sell books, that he has not sold any books on the *Fromthewilderness.com* website since January 2007, and that Ruppert's books are sold by his publisher through *Amazon.com*. The Agency's only evidence to the contrary is Exhibit A-27, referred to earlier, and the Agency's argument that Ruppert continues to produce the same product. Although Ruppert's name appears frequently on pages 1-3 of A-27, A-27 also corroborates his assertion that his books can only be purchased through *Amazon.com*. The Agency bears the burden of persuasion on this issue, and has not met the burden of showing there is a genuine issue of material fact as to whether or not Ruppert's alleged successor business is in the business of direct book sales. However, since neither the Agency nor Respondent has produced any evidence pointing out the difference, if any, between FTWI's newsletter and Ruppert's blog, the forum concludes that there is a genuine issue of material fact as to whether they are the same product.

"Conclusion

“A genuine issue of material fact exists with regard to three of the nine factors contained in the Agency’s test used to determine whether a respondent is a successor. Although not every element of the test need be present to find an employer to be a successor, in this case the Agency has failed to raise sufficient genuine material issues of fact to survive Ruppert’s motion for partial summary judgment.

“In passing, the forum notes that the Agency appears to view Ruppert’s motion for summary judgment as a preliminary skirmish, instead of a procedural matter that carries with it the potentiality and weight of a final order. The following quote from the Agency’s response is illustrative of this point:

‘Since the filing of its case summary, the Agency has uncovered additional facts in support of its successor in interest theory against Ruppert and that evidence will be disclosed at hearing, at the appropriate time for proving the elements of its case.’

This statement completely misses the target. Argument and a reference to undisclosed evidence is not evidence. If the Agency had additional evidence in support of its successor in interest theory, its response to Respondent’s motion for partial summary judgment was the ‘appropriate’ time to present enough evidence to cast reasonable doubt on Respondent’s sworn statements, instead of arguing that this is an inappropriate time to disclose that evidence.

“Based on this ruling, the Agency cannot prevail on its allegation that Ruppert is a successor in interest to FTWI. As the Agency has alleged no other legal theory for naming Ruppert as a respondent, the charges against Ruppert as an individual respondent are hereby dismissed.

“This interim order will become part of the Proposed Order that is issued subsequent to the hearing.”

“IT IS SO ORDERED”

41) On June 22, 2009, Lee Werdell filed a written notice with the forum stating that he was withdrawing as attorney for Respondent FTWI and that Michael Ruppert would appear at hearing on behalf of Respondent FTWI.

42) At hearing, the ALJ required Michael Ruppert to write and sign a statement giving himself to the authority to represent Respondent FTWI at hearing as its authorized representative.

43) At the start of the hearing, the ALJ orally advised the Agency and Ruppert of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

44) During the hearing, Respondent asked to call Ryan Spiegl as a witness in support of its case in chief. The Agency objected on the basis that Respondent had not listed Spiegl as a witness in its case summary, and the ALJ sustained the Agency's objection on that basis. At the time he made his ruling, the ALJ instructed Ruppert that during Respondent's case in chief he could make an offer of proof as to what he believed Spiegl's testimony would have been, had Respondent been allowed to question him.

45) On August 28, 2009, 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) Ruppert is a former Los Angeles policeman who has been an investigative journalist for a number of years and was in his mid-50s in 2006. He is a solidly built man of average height who weighed approximately 200 pounds in the spring of 2006. He began publishing *From the Wilderness* magazine in 1998 as a monthly newsletter that was available by mail and online, operating out of Sherman Oaks, California. In time, his business grew from 68 monthly copies to an online bookstore. The newsletter focused on "peak oil" and "sustainability" issues. In February 2006, Ruppert moved to Ashland, Oregon, continuing his same business in an office building in Ashland.

2) On April 5, 2006, Ruppert's business was incorporated in Oregon as From the Wilderness, Inc. ("Respondent"), with Ruppert as the sole shareholder. At that time, Respondent employed at least four persons, including Complainant.

3) Once in Ashland, Ruppert began looking for an editor to help him. Up to that time, he had been doing all the editorial work for his business and needed help with the workload. Complainant's neighbor told him about Complainant, who had journalistic experience, a bachelor's degree in English and a master's degree in writing, and was living in Ashland. Ruppert thought she had the qualifications he was looking for in an editor, and told the neighbor to ask Complainant to submit an application.

4) On February 27, 2006, Complainant sent a letter, resume, and writing samples to Ruppert. On March 3, 2006, she completed an application for employment with Ruppert, and Ruppert interviewed Complainant and offered her a job, which Complainant accepted.

5) Complainant, who was working at a realty management company at the time, looked at the job as an opportunity to get into professional journalism and publishing and thought the job could be a starting point for her career. In addition, Complainant was interested in the issue of sustainability, and Ruppert offered her a larger salary than Complainant had earned at any other job. From a "professional standpoint," Complainant believed it was the ideal job for her. At that time she was 25 years old, of average height, and slender.

6) Complainant started work on March 6, 2006, as a staff writer and editor at the salary of \$500 per week. Her primary job duties were to format news stories for Ruppert's webmaster, edit and format stories received from freelance writers, and edit and format Ruppert's hard copy newsletter. Throughout her employment, Ruppert was her immediate supervisor.

7) On March 11, 2006, the *Ashland Daily Tidings* published an article about Ruppert's business that described Ruppert and his business and included the following statement:

“From the Wilderness’ now employs six people including Ruppert. Two came with him from Los Angeles and four more have been hired locally since he arrived. He even hired a young writer, Lindsay Gerken, to cover local sustainability issues.”

8) During her employment, Complainant generally started work at 10 a.m. and left work between 6 and 9 p.m. Sometimes she arrived late at work.

9) Throughout her employment, Complainant liked the type of work she performed for Respondent, as her passion was writing and the job involved writing. As her employment continued, she was torn between working in an uncomfortable work environment and performing work that she liked very much.

10) Complainant and Ruppert often worked late together after all other employees had left for the day so they could work without interruption.

11) Near the beginning of her employment, Complainant got a bad sunburn on her shoulders while rock climbing. When she came to work, she asked Ruppert if he would put some aloe on her shoulders, which he did. A few days later, Ruppert told Complainant how much he had enjoyed putting the aloe on her shoulders and touching her at that time. This made Complainant feel uncomfortable.

12) Soon after the aloe incident, Complainant was rubbing tiger balm into her forearms while at work. Ruppert reached out and touched her arm and said he would rub it in for her. Complainant pulled her arm away and told him no. This made her feel uncomfortable.

13) In Complainant’s first few weeks of employment, she came into the office wearing a skirt that stopped just above the knee. Ruppert looked her up and down and Complainant responded “It’s just a skirt.” Complainant felt this was “chauvinistic.”

14) While working for Ruppert and Respondent,^{vi} Complainant wore “G-string” underwear. Once, she bent over to write a note on the editorial board and the back of her underwear became exposed. Ruppert, who was nearby, commented “thank you.”

Complainant did not realize why he was saying “thank you” until she noticed that some of her bare side was showing, at which point she stood up and kept writing. Ruppert’s comment made Complainant feel very uncomfortable. No evidence was presented to show the date on which this incident occurred.

15) One day, Complainant wore a shirt to work with a decorative bow on the back of it. A friend came to meet Complainant for lunch. In Ruppert’s office, in front of Complainant’s friend, Ruppert asked Complainant in a joking manner -- “What happens if I pull that bow?” Complainant was shocked, taken aback, and felt uncomfortable. She responded “Nothing, it’s just decorative.” Complainant complained to Reinert about this incident. No evidence was presented to show the date on which this incident occurred.

16) During her employment with Ruppert and Respondent, Complainant also complained to Crews that Ruppert was “coming on to her.”

17) Ryan Spiegl worked for Respondent from May 2004 to June 2006 as webmaster/programmer/IT manager. He worked from 8 a.m. to 4 or 5 p.m. Complainant was attracted to Spiegl and, shortly after she was hired, asked Ruppert if it was appropriate for her to pursue a relationship with a co-worker. Ruppert assured her it was fine. Complainant then learned Spiegl was in a committed relationship. They remained friends, but Complainant did not pursue the relationship on a romantic level.

18) The “subject of sex and sexuality” came up often in discussions between Complainant and Ruppert as topics related to their work, particularly with regard to the works of Stan Goff, Ruppert’s veteran’s affairs writer, who had just finished his most recent book, entitled *Sex and War*. In one discussion involving Goff’s work, Ruppert told Complainant that he views pornography. Complainant told Ruppert that she had also seen some pornography but, but did not appreciate “XXX films that degrade

women.” “More towards the beginning or middle” of Complainant’s employment, Ruppert told Complainant he had created a “personal disk” he wanted to give to her. Complainant, who did not know the contents of the disk, told him “fine.” The next day, he said he had decided not to give the disk to her because he valued their friendship and he wouldn’t want giving the disk to Complainant to disturb their friendship. Complainant concluded from this statement that the disk contained materials she might have found offensive.

19) Ruppert called Complainant into his office many times to talk. Towards the end of her employment, Ruppert asked Complainant “a few times” what her sexual preferences were and brought up pornographic websites on his computer monitor during their conversation. Although Ruppert did not ask Complainant “to come around the desk and look,” Complainant was able to see the monitor screen “with a glance” from where she sat.

20) Complainant’s work was “good” between mid-April and mid-May 2006, and on several occasions, Ruppert talked with Complainant about promoting her to assistant editor. Ruppert considered promoting Complainant based on her skills with the English language^{vii} and because he did not know if he could find another person in the Rogue Valley who could replace her skill and experience.

21) Towards the end of Complainant’s employment, Ruppert gave Complainant a letter that he characterized as a “mentoring document.” In the letter, Ruppert counseled Complainant. In pertinent part, it read:

“I thought it might be better if I wrote to you because we — above most other mice — are able to communicate well with anything.

“I’m going to talk to you as a boss and a friend — as someone who actually cares about you deeply.

“There is nothing wrong with you but you. The same thing almost always applies to me to — the only thing wrong with me is me. When I

point a finger out at someone or something, I fail to notice that there are four pointing back at me.

“Please take these words not as a lecture but as words of experience, offered out of selfishness (to see you become a better manager) and out of affection.

“I see you reacting to a lot of pressure. But almost every bit of your pressure is self-created and not imposed by an outside source. If you view your pressures as all originating from outside then you are both a victim and powerless to change anything; which leads to a perception of panic, crisis and breakdown. Example: It was you that insisted on having a new sub-only story every day. I knew it would be too much and I was right. You jumped into publisher and told us what you needed as if you would have no problem shouldering the additional work. I didn't order you to do that and I've been waiting for you to come to me and say, ‘Mike, with the newsletter stuff, I find that I can't keep up so we need to figure something out.’ That would have been a sure sign that you were getting ready to manage other people. But no one is capable of managing other people until they have demonstrated they're able to manage themselves. That's where you're a little weak.

“[This is not about being right or wrong, it's about learning and growing. We are all weak in places and all still growing and learning.]

“You stepped up to the plate beautifully this week but I think you bit off too much.

“You don't have to worry about impressing me. You have already won my heart, mind and earned my professional respect. I'm not breathing down your neck. Now if you could just get a little personal rhythm and self-discipline, I believe almost all of these problems would disappear. I would drive myself crazy with a different set of hours every day. The rest of us get our personal lives tended to without needing to have a reason to deviate daily.

“Sure, you have discipline, you got your degree, etc. [LOUD APPLAUSE]. But in other areas you have very little.

“But it seems that you bit off more than you could chew again. Example: getting the speeding ticket. No one asked that you run and get the DVD. And if you thought that getting it before Stan had to leave might risk a traffic ticket then good judgment wouldn't have volunteered in the first place. How much did I — as your employer — gain from having you get the DVD vs. how much did I lose by not having you back at all in the office after lunch when I needed to collaborate and work with you? (I took care of getting the Goff story up.) No offense but I don't need that kind of help. ;-)

“I waited late in the office for you to come back. How thoughtful or managerial was it to leave me sitting here and not tell me you

weren't? I have to wonder if you would manage your subordinates that way. If I had to offer an opinion I'd say that Lindsay's out of office life gets her so sideways that it leaves her off-balance when she gets to the office and that much of the time in the office is spent straightening out other issues from outside.

"No one is even remotely suggesting that you not have a personal life. First, it would destroy your amazingly beautiful personality and secondly, your work would suffer. But a professional (take me, Stan and Monica as examples) starts from having everything about the workplace become the clock, rhythm and meter of your life. Every life needs a rhythm. Work is as good a rhythm as anything, perhaps better because it happens regularly and occupies most of our waking time. Logically speaking the tree has to exist before it bears fruit. Work is the tree. The fruit is the money that you have and the time that you have and the satisfaction that you derive from your job. When you stay with the rhythm you become more, not less, powerful.

"You already have a firm place here. So don't tell me that you think I'm adding all these burdens. Yes, I've said that a promotion has to wait until you've finished Rubicon but I didn't put a clock on it did I. When you have finished Rubicon you will tell me two things.

"First, you will tell me that you are familiar enough with the material to make sound judgments based upon it.

"Second, and perhaps more importantly, you will have shown me that you can prioritize your life, manage your time, focus on and achieve a medium-term goal.

"Ryan kind of implied that I ought to pay for your ticket. I think that you, already understand why that would be a horrible idea.

"Actions produce consequences. We are all responsible for the consequences of our own actions.

"If you need to lighten up in some work areas, come to me and we'll talk about it. I will not shame you for being human. I will love and respect you for being mature enough to come to me. But come to me with (even partial) solutions and suggestions. I am neither a mind reader nor a slave driver. I'm your boss and your friend and someone who deeply cares about you, your future and (yes) even your happiness.

"If I were to ask you to sit down and seriously think for a while about one question, I already know what the answer would be.

"The question is, 'What are you mad at?' The answer is, yourself.

"Now, to make this all really irritating this is just the process of seasoning and maturation that I wanted you to go through. It's not over

all at once, but this is the way it works for every human being who becomes a successful, happy, professional adult.

“Surprisingly, all the fun and good times that your head tells you will go away from becoming stable, do not go away. They get better and deeper and reveal truer and more substantial emotional and personal payoffs.

“No need to respond. I just thought maybe you were ready to listen to this.

“Love,
Mike”

This letter made Complainant feel upset and “really creeped out” because she felt Ruppert was trying to keep tabs on her personal life. Ruppert’s signature “Love” made her feel “belittled.” She also felt “belittled” by Ruppert’s references to her lack of personal discipline about her attendance, as her absences were primarily caused by her numerous medical appointments.

22) Neither Ruppert nor Respondent had a written sexual harassment or attendance policy during Complainant’s employment.

23) Ruppert was physically attracted to Complainant. In his words, she “tempted” him and this was a “form of torment.” In contrast, Complainant was never romantically interested in Ruppert and never expressed any romantic interest in him.

24) One evening in mid-May when Complainant and Ruppert were alone in the office, Ruppert began complaining that he had a story he needed to get out, that he needed to free himself, and that it would be great if he could just run around the office naked for a minute to get out his “writer’s block.” Shortly afterward, Complainant was typing at her desk and Ruppert came to her open door, standing in his underwear in a “wide legged stance” with a “big smile.” Ruppert stood there for 10 seconds before returning to his office, where he put his clothes back on. This shocked Complainant. Later that same evening, Ruppert asked Complainant if she had seen his appendix

scar. Complainant said no and Ruppert pulled up his shirt and displayed his scar. This frightened Complainant.

25) Complainant complained to Spiegl that Ruppert had appeared before her in his underwear. Spiegl advised that she should communicate her discomfort to Ruppert.

26) In early May, Ruppert confronted Spiegl and Complainant and demanded to know if they were sleeping together, then attempted to physically restrain Spiegl. Spiegl pulled away and said he quit. Later, Ruppert apologized and asked him not to quit. On or about May 18, Spiegl gave two weeks' notice that he was quitting.

27) In May 2006, Ruppert had a note on Respondent's office bulletin board that read "Days Without Drama," referring to the number of days since Complainant had engaged in disruptive behavior. On one of the days between May 22 and May 26, the note read "Days Without Drama – 2."

28) On May 20, 2006, a Saturday, Complainant called Ruppert and he invited her to come to his house. Complainant came to Ruppert's house, wearing a low cut sleeveless tank top blouse. Ruppert took a photo of her sitting on his couch, smiling.

29) Late in the day on May 26, 2006, the Friday before Memorial Day weekend, Ruppert told Complainant that he had something to tell her and said they should go into the shipping area. Once there, Ruppert started talking to Complainant about their writers' relationship, and how he would mentor her into being a great journalist. He then started talking to himself, saying "No, Mike, you're beating around the bush; just spit it out." He then said "Since you started working here, I've had sexual thoughts about you and I know you feel the same. I think of you sexually and romantically and I know you feel the same." He then said he was "in love" with Complainant and told her he was willing to have a "sexual relationship" with

Complainant "if that's what she wanted." Complainant felt shocked and scared. Complainant told him he should be concentrating on the women who want to be with him, not those who don't, then left the room. Ruppert's statements were unwelcome to Complainant and made her feel distraught because she realized that his attentions were personally directed to her.

30) Complainant left work and went rock climbing all weekend with Reinert and Crews. She told them about the situation and asked their advice. Complainant also called her parents and asked for their advice, as well as calling a lawyer and asking for advice. Everyone told her to confront the situation.

31) On Tuesday, May 30, 2006, the day after Memorial Day weekend, Complainant found a CD marked "personal" in her locked desk when she arrived at work. The CD was placed there by Ruppert and contained "legal" pornography that he had downloaded from the internet. Because only Complainant and Ruppert had a key to open her desk, Complainant assumed the CD had been placed there by Ruppert. She also believed that it contained "inappropriate" content, namely, pornography. Deciding to return it to Ruppert, she did not listen to or view its contents. She called Spiegl and asked his advice, and Spiegl advised her to confront Ruppert about it. Complainant decided to work until the end of the day before confronting Ruppert.

32) During the workday on May 30, 2006, Ruppert came into Complainant's office and told her he had been thinking of giving her a raise. Complainant told Ruppert she needed a few more months of work and experience in formatting the newsletter before she deserved a merit raise. Ruppert did not disclose the amount of the proposed raise.

33) At the end of the workday on May 30th, Complainant went into Ruppert's office and told him she needed to talk with him. Complainant told Ruppert she got the

CD, that she was returning it to him, and that she thought giving it to her was “unprofessional.” Complainant also told him that, although he said his comments in the shipping department the previous Friday “did not require a response,” she wanted to respond. She told him that she did not think about him sexually and that she had no emotional feelings towards him. She added she was sorry if that hurt his feelings, but that she needed to know if their relationship could continue on a professional level. Ruppert said that was “fine,” that he would take back the CD, and that they could continue working on a professional level. Ruppert also said that he wished that she had kept the knowledge of the CD just between them. At this same time, unbeknownst to Complainant, Spiegl was trying to text Complainant on her cell phone. Ruppert also made a “deliberately egregious comment to Complainant” which might have been something about “fisting.” Spiegl then walked into Ruppert’s office. Complainant assured Spiegl that things were fine. Ruppert asked what they were talking about. Complainant told Ruppert that Spiegl was aware that she had returned his inappropriate CD, and she had just let Spiegl know that Ruppert had taken back the CD and had assured her that they could continue to work together on a professional level. Ruppert became extremely angry and started yelling, accusing Complainant of calling him a “flasher” because of the underwear incident, and seemed embarrassed and upset that Complainant had told Spiegl about his behavior. After Ruppert left, Complainant told Spiegl that she had just lost her job. (Testimony of Complainant, Spiegl, Ruppert)

34) Prior to May 31, 2006, Ruppert gave Complainant no written warnings regarding her attendance, performance, or her attire at work other than the “mentoring” letter. Prior to May 31, 2006, Complainant was not counseled that her job was in jeopardy.

35) On the morning of May 31, 2006, Complainant looked on Craig's List, where most jobs in the Rogue Valley are posted, and saw her own job posted. Based on that, Complainant concluded she was going to be fired.

36) In response to seeing her job advertised on Craig's List, Complainant wrote a five-page, single-spaced document detailing "what specific incidents during my brief, three-month employment have led me to feel sexually harassed by my employer." Her hope was to state "in writing and in detail the incidents that had occurred that led up to the incident where I gave back the CD." That same day, Complainant emailed the finished document to Spiegl, Psomas, her parents, and her grandfather, who is an attorney, in an attempt to "authenticate it" by the date she wrote it.

37) After writing her five-page note, Complainant called in late to work and talked with Ruppert. Ruppert was angry and yelled at her and told her she was fired. Ruppert said that if she wanted her job back, she needed to come into the office and he would tell her what she needed to do. Complainant was fearful of going into the office alone and did not go to work that day. She was a member of an Ashland conservation commission that had a meeting scheduled for that night, and Ruppert told her "I'll get you off that commission so fast it will make your head spin." This upset Complainant because of the threat and because she had gone to a lot of effort to be appointed to that commission.

38) Between the time Ruppert left work after the May 30 confrontation with Complainant and Spiegl and June 1, Ruppert prepared a probationary agreement for Complainant to sign. Fully expecting that she would refuse to sign it, he also prepared a termination notice.

39) On the morning of June 1, 2006, Complainant obtained counsel from a local attorney before reporting to work. At work that day, Ruppert, in the presence of

Monica Psomas, another employee, gave Complainant two documents. One was entitled "PROBATIONARY CONDITIONS OF EMPLOYMENT." The second was entitled "NOTICE OF TERMINATION." When Complainant read the probationary notice, she believed that Ruppert was trying to transfer the blame for his actions to her. Ruppert told Complainant if she did not want to sign the first document, then she was fired and she should sign the termination slip. Based on the advice of the local attorney she had consulted that morning, she did not sign the termination slip.

40) The probationary notice stated:

"EMPLOYEE: Lindsay Gerken

"DATE/TIME THIS REPORT: May 31, 2006/1200 hrs

"As a result of disruptive behavior which has threatened the ongoing operations of the company, poor time management skills, excessive unscheduled absences, late shows and dramatic incidents and outbursts you are hereby placed on 30-day probation subject to the following terms and conditions. It is understood by both FTW Publication and the employee that violation of any of these condition will be grounds for immediate dismissal without further consultation.

"1. Your daily start time is 10:00 AM. Being more than 10 minutes late without prior approval will constitute a violation.

"2. Excluding lunch hours, your daily work schedule is to include at least eight hours of work. Since you are in a salaried position you will be required — as are all salaried employees — to occasionally work overtime without extra compensation.

"3. Your lunch breaks are to be exactly one hour and no more unless prior approval is given for things like medical appointments and other essential personal business.

"4. You are to refrain from exceeding the authority vested in your position and are charged with following the corporate chain of command.

"5. You are to cease and desist from any form of disruptive behavior, office gossip about your personal life or the personal lives of fellow staff members, or the creation of any conflict between staff members or between the staff and yourself.

"6. You are to complete all work assignments in a timely, professional manner.

"7. As much as possible you are to keep personal problems and issues out of the office.

"8. At all times while at work, your clothing, regardless of whether you are standing, sitting or bending over shall completely cover your buttocks and underwear.

"I have read acknowledge and understand these terms. I accept these terms and have been given a copy for my own records."

41) The termination notice stated:

"EMPLOYEE: Lindsay Gerken

"DATE/TIME THIS REPORT: May 31, 2006/1200 hrs

"DATE/TIME TERMINATION: Immediately upon issuance of this notice.

"Effective immediately your employment with FTW Publication, Inc. is terminated.

"CAUSE OF ACTION: Excessive unscheduled absences, excessive late shows at work, poor time management, engaging is [sic] disruptive, manipulative behavior affecting the entire office staff and endangering the successful operations of the company."

42) June 1, 2006, was also Spiegl's last day of work for Respondent.

43) Complainant believed she had been fired because she told Spiegl about Ruppert's sexual harassment.

44) Complainant became very upset when she was fired, and called her mother and told her she had been fired. Complainant thought she "was on her way with her career" and being fired was a "big blow" to her.

45) On June 6, 2006, Complainant visited her primary care physician because she was very depressed and distraught over the loss of her job. Complainant, who was 25 years old while employed by Respondent, had bouts of depression when she was a teenager, but her depression and anxiety had been controlled for a number of years before she began work for Respondent. When she was fired, her anxiety snowballed and she started having panic attacks. Her doctor prescribed the generic form of Xanax, a drug used to treat panic attacks, to be taken as needed. Subsequently, Complainant had this prescription refilled once.

46) When she was fired, Complainant also feared retaliation by Ruppert, in part because the handguns that he possessed.

47) Ruppert is a firearms expert. There have been two documented attempts on his life in the past. When Ruppert went to visit Pat Tillman's mother in San Jose in early May while working on the Tillman exposé, he took two Smith & Wesson pistols with him, one as a backup gun. He brought a traveling case with him for the guns. In a staff meeting, he showed the guns and waved one around the room. Every employee knew that Ruppert kept one of the pistols in a folder in his desk in the event any violence occurred, for the protection of his company and his employees. After her termination, Complainant was afraid of Ruppert, in part because he had told everyone he kept a concealed weapon with him. Complainant bought window locks for her house and asked all her neighbors to let her know if Ruppert was in the neighborhood.

48) Except for reading Ruppert's website, Complainant had no communication with Ruppert from the date of her termination until the hearing.

49) Ruppert never made any threats to physically harm Complainant; he only made threats to harm her professionally.

50) Complainant had never been fired before. Losing her job was a major blow to her self esteem, and she began to second guess her work ethic and ability to create a positive work experience with her employer.

51) After Complainant was fired, she wanted to get a job that did not have a male manager. It took her a few months to be comfortable working for an employer with a male in authority.

52) At the time she was fired, Complainant lived in an apartment that rented for \$495 a month. After she was fired, she could no longer afford that amount of rent and moved in with a friend who rented a room to her.

53) In June 2006, Complainant started work on a limited part-time basis at the same job she held when hired by Respondent. In mid-July, she obtained additional part-time work at a graphics company. She had to spend all \$5,000 of her life savings that she had earned while working for her prior employer and had to ask her mother and stepfather for financial help for a few months.

54) On July 18, 2006, Ruppert left the United States and relocated to Venezuela. There is no evidence that Respondent continued operating after that date.

55) Had she not been terminated by Respondent, Complainant would have earned \$3,300 in gross wages between June 1 and July 17, 2006 (June 1 through July 17 = 33 days = 6 weeks + 3 days @\$500 per week).^{viii} In June 2006, she earned \$457. In the first half of July 2006, she earned \$129.57 gross wages working for the same employer, for a total of \$586.57. Her gross lost wages total \$2,713.42 (\$3,300 - \$586.57 = \$2,713.42).

56) Shortly after Complainant was fired, someone emailed a copy of the five-page document described in Finding of Fact 36 – The Merits to Victor Thorn, Ruppert’s “sworn internet enemy” and rival. On June 15, 2006, Ruppert responded by sending Thorn a three-page email that included the following statements:

“ * * * * *

“Since you refused to answer whether or not you were going to publish the name of the individual referenced in your email dated June 12th, I am at a legal handicap in my ability to respond fully and completely. * * *

“As the former employer of the individual in question there are things that I cannot disclose unless and/or until that individual either files a legal action of [sic] identifies herself publicly and affirms the statement. Accordingly, all documents furnished herewith have been redacted to exclude this individual’s name. If you reveal it, then the onus and legal liability will be on you.

“I am also putting you on legal notice that, per se, any defamation which involves sexual conduct is libelous. * * * By all legal standards you must make sure that this alleged fact is accurate. If it is, in fact, the same document I have seen, it contains inflammatory and retaliatory allegations from - as you will see - an individual who is obviously a disgruntled former employee.

“ * * * * *

“Basically, this is a very troubled individual whom I believe is in need of help, which I sincerely hope she gets. She was terminated for cause on June 1st and is not eligible for rehire. A redacted copy of her termination is attached, as is a ‘probationary’ employment contract which would have served as written notice to correct deficiencies had she accepted it. * * *

“Very little of this dispute has to do with me personally. Attached you will find three signed statements from *FTW* office staff. A fourth witness, a female, is not available today to respond in time to meet your deadline. None of them corroborates, or will corroborate, what you or she will apparently be alleging.

“Shortly after being hired, the individual in question engaged in a sexual relationship with an employee here who was already involved in a committed relationship (according to him) with another woman in California. The woman who was terminated, after starting this relationship with my employee, used an *FTW*-owned cell phone to place 103 telephone calls to our male employee during the course of her last month of employment alone. Why this was necessary is unknown since her office and his were next to each other. This was a direct violation of our stated policy, agreed to by her verbally, when the phone was issued.

“How many people call others 103 times in one month? Of course I have the records to prove this. That much I can disclose. Many of these calls were made during hours when she was supposed to be working.

“Shortly after commencing the sexual relationship with our employee, the same individual, who you are basing your article on, made inappropriate sexual advances, overtures, and remarks to another male *FTW* staff member who is married. He strenuously objected at the time. His statement is attached.

“This second male staff member became concerned and attempted to warn the first male staff member who was apparently disinclined to listen. This ultimately resulted in a physical altercation involving the now-fired female employee, the second male staff member and the first male staff member on the evening of Sunday, April 2nd. After the altercation the young woman hurried to my home at 10:30 at night in a state of high drama which seems to be, for lack of a better term, her drug of choice. This resulted in the first counseling session with the young woman in front of witnesses.

“Not long after that, the now-terminated employee, engaged in a loud, abusive verbal assault on a third male employee of *FTW* * * *. In that case the young woman used loud, abusive language, strong profanity and personal insults. This was all complicated by the fact that this third male employee did not work for the young woman and was not under her supervision, or even in her department.

“This resulted in a second intense counseling session with the young woman wherein she started talking about hiring and firing people. I am the

only one who hires and fires at *FTW*. Because we all had hopes that she could [sic] be saved and her writing skills honed and developed, it was decided not to terminate her then. I deeply regret that decision.

“Finally, after the first male employee (with whom the young woman had remained romantically involved), gave sudden and dramatic two-week notice - I now suspect as a result of manipulation by the young woman - I noticed that the woman's work performance was suffering enormously. The same woman had been making inappropriate sexual advances, remarks and comments to me for several weeks and at one point I had stridently emphasized that this was not the way I wanted the relationship to work.

“Sadly, this young woman is extremely bright and has an enormous potential to be a successful writer/editor someday, if she can acquire control of her personal life and conduct.

“ * * * * *

“It is best that all cards in all hands be placed on the table now to prevent this person from harming more people's lives than she already has. The only way that can happen is if this former employee files a legal action which will untie my hands.

“Therefore, it is my express wish that she file a legal action against me at the earliest possible moment. At that time I will be freer to disclose substantial additional evidence which will completely and utterly destroy her credibility and leave WNG TV well out on a very long, libelous and creaky limb. That would constitute an early Christmas present for me.”

Complainant became aware of and read this email for the first time sometime between November 13, 2006, and October 18, 2007, during Yates's investigation of her complaint. When she read it, it embarrassed her because it portrayed her as promiscuous. She felt that her career was threatened because the email was potentially available through the internet. She also felt that Ruppert had written it to intimidate her, knowing she would read it.

57) On or about June 25, 2006, Respondent's office was burglarized and vandalized. All of Respondent's computers were destroyed. On June 28, 2006, Ruppert emailed a statement to the Ashland city police that implied, among other things, that Complainant was involved in the burglary and had thrown raw eggs and a quart of chocolate milk at the front of his house.

58) After the burglary, Complainant was considered a suspect by the Ashland police, who contacted her three times in a two week period, came to her apartment, questioned her, and searched her apartment. This upset her considerably. She eventually took a "CVSA," a voice stress test administered by the police, and passed the test.

59) On August 25, 2006, the *Ashland Daily Tidings* published an article about Ruppert's move to Venezuela that was written by Robert Plain, an employee of the *Tidings*. In the article, Plain stated that Ruppert believed that a former female employee whom he had fired had burglarized his office and that Ruppert suspected the employee of trying to use his shipping department to smuggle methamphetamine. Plain quoted Ruppert as stating that "her behavior was entirely consistent with meth addiction." Plain's article also raised issues about Ruppert's "mental well-being," based on a statement of friend of Ruppert's, and concluded that "government plots against him have been one of the most consistent aspects to [Ruppert's] career as a writer." Complainant read Plain's article. The statements attributed to Ruppert upset her and made her feel "embarrassed" and "like a criminal." The article also made her reluctant to attend Ashland conservation commission meetings.

60) On August 16, 2006, Ruppert posted an article on the internet entitled "By the Light of a Burning Bridge – A Permanent Goodbye to the United States." Several lengthy paragraphs, quoted below, referred specifically to Complainant.

"It is almost certain that the burglary was perpetrated, at minimum, based upon inside information provided by recently fired or resigned FTW staff members. * * *

"The burglary followed on the heels of my humiliation of the perpetrator of a feeble and stupidly executed sexual blackmail plot that began when a newly-hired staff writer (with a clean record and a Master's degree in English) began a torrid (and not very discrete) sexual affair with my long-term IT manager. The IT manager was, at the time, involved in a committed relationship with a woman in Los Angeles. The same female

employee also made simultaneous direct sexual advances to my Operations Manager who is married. These included her showing naked photographs of herself to both men in our offices, something which they kept from me until later.

“Eventually the sexual intrigue resulted in an altercation between the three which wound up on my doorstep late on a Sunday night in April. It seems no one involved in the altercation was capable of telling the whole truth. It was also clear that my IT manager - who was known for his appetites - had fallen hopelessly in the grasp of an attractive sexual smorgasbord that was fulfilling his every wish. This is what he said to people in phone conversations who later told me about them. He reportedly described her as a ‘sexual demon.’ * * *

“After all of the previous attempts to sink FTW over the years I was well-prepared when the same woman started making advances to me. How dumb did they think I was? I concealed a tape recorder in my office as she directed me, after regular office hours, to pornographic web sites and continually tried to tempt me with scanty outfits, G-strings and hints of sexual delights including descriptions of her private parts. She was doing all this at a time when she made 103 cell phone calls in one month to my IT Manager on a cell phone that FTW was paying for. I got the bills. Most of the calls were made during business hours. The second month's bill was just as bad when it arrived after she had been fired. My IT Manager had been my most trusted employee and a close friend. I may never be able to forgive his betrayal even if the Siren's song had overwhelmed him. In previous years FTW computers had been sabotaged, our web site had been hacked, and several attempts had been made to financially sabotage our operations. Being fully aware that he was likely revealing our sensitive proprietary information, including account access codes, I had but two choices.

“I could fire the young woman. But if I did so she would be angry outside the company and still have the IT Manager as helpless as Ulysses' crew in her vindictive grasp. Or, I could keep her close, play along with her games, prepare myself against the blackmail I knew would come, and try to find out what kind of damage she was intent on doing and head it off. When she could not compromise me sexually, she turned the IT Manager against me, and he gave sudden notice. That was damaging enough. His last day of work was to be June 1st. I decided immediately that that would be her last day of work too, and so it was.

“As June 1 approached I baited her with actions I knew would force her to show her hand. She did on May 29th and that's when I let it be known how I had protected myself. * * *

“Her allegations of sexual harassment against me fell flat on their faces, and she was publicly humiliated. She had also been showing highly

erratic emotional behavior consistent with drug use in her last two weeks of work. * * *

Complainant, who was continuing to read Ruppert's latest internet postings, read this article. When she read it, she felt that her freelance writing career was being slandered, believing it was obvious to anyone who had read Plain's August 25th article that "the woman" and "female employee" in Ruppert's article referred to Complainant. Complainant felt that if people believed Ruppert's statements, she would not only be unable to get a job in the Ashland area, but not get a date, either. She felt "extremely embarrassed and mortified" about Ruppert's comments that she showed naked photographs of herself to Ruppert and other men in the office.

61) On January 31, 2007, Ruppert published an internet article entitled "*From Me To You – A Personal Message from Michael C. Ruppert – A Tribute to Gary Webb and a Message of Hope*" in which he described his life circumstances in the previous eight months. With regard to Complainant, he wrote:

"And one former employee waited five months until November to charge me with sexual harassment, not in a civil court or with the police department but with the Department of Labor in Oregon. That charge was filed at a time when it wasn't clear at all whether I would get out of Venezuela alive, let alone in time to respond. But respond we did, with documentation that demolishes her allegations. We believe we have beaten that case but should it go to a hearing we will go to Ashland with additional documentation and evidence that will put that matter to rest forever."

Complainant read this article and believed that Ruppert's statement was designed to intimidate her.

62) On August 21, 2007, Ruppert sent an email to Detective Randy Snow of the Ashland Police Department regarding the June 25, 2006, burglary of Respondent's office. In the email, Ruppert again accused Complainant of the burglary. He also accused her of having sexual relationships with Bob Plain, the *Ashland Daily Tidings's* columnist, Zach Evans, and Ryan Spiegl. Additionally, he stated that "[s]ex was the oly

[sic] tool in Gerken's toolbox." Snow gave Complainant a copy of Ruppert's email.^{ix} When Complainant read it, she considered Ruppert's accusations to be "outlandish" because they implied that Plain only wrote an article that was critical of Ruppert because Complainant had provided Plain "with sexual favors."

63) On October 24, 2007, Ruppert sent another email to a Detective Snow regarding the burglary case. In the email, Ruppert speculated as to the identity of the father of Complainant's child and added that "[s]omeone was running [Complainant] and telling her what to do." Snow described Ruppert's statements to Complainant and told Complainant it was extremely inappropriate for Ruppert to bring up the parentage of Complainant's child in the context of a burglary investigation."

64) Complainant saw a mental health counselor in May 2008 and discussed this case with the counselor.

CREDIBILITY FINDINGS

65) Eric Yates is an experienced investigator who is employed with BOLI's Civil Rights Division. Except for authenticating documents, his testimony consisted of reading typed interview notes taken or documents received from in the course of his investigation, as he had no independent recollection of his interviews or the contents of those documents. The forum has credited his testimony in its entirety.

66) Mike Reinert and Complainant are friends who met in or around 2004 while both were attending Southern Oregon University and who frequently went rock climbing together when Complainant was employed by Respondent. After Complainant's termination, Reinert continued to climb rocks with Complainant and helped her find a new living situation and move there. Reinert answered questions on direct and cross examination directly, without hesitation. Despite his friendship with Complainant, he did not exaggerate or speculate when asked to describe what

Complainant told him about Ruppert's behavior, and he did not volunteer any information that he thought might be helpful to Complainant. The forum has credited his testimony in its entirety.

67) Steve Crews and Complainant are good friends who met in 2003 and were rock climbing partners. Like Reinert, Crews answered questions on direct and cross examination directly, without hesitation, he did not exaggerate or speculate when asked to describe what Complainant told him about Ruppert's behavior, and he did not volunteer any information that he thought might be helpful to Complainant. The forum has credited his testimony in its entirety.

68) Rebecca Jones had a natural bias as Complainant's mother. Her testimony was limited to what Complainant told her, what she and her husband told Complainant, and the financial assistance they gave Complainant after she was fired. Regarding Complainant's termination, she testified that Ruppert had offered Complainant a promotion, then fired her because she refused to accept the promotion. The forum did not believe this statement because no one else testified to this version of the facts. However, the forum has credited the rest of her testimony because it was consistent with other credible evidence in the record.

69) Stephen Jones had a natural bias as Complainant's stepfather. His testimony was limited to what Complainant told him, what he told Complainant, and a statement about the financial assistance he and his wife gave Complainant after she was fired. He was not impeached in any way and the forum has credited his testimony in its entirety.

70) Jamie Hecht was a former writer for Respondent and self-described "colleague" of Ruppert who was called as an impeachment witness. In his testimony, he was boastful, pompous, and self-righteous. For example, he identified himself as

“Dr. Jamie Hecht” based on his 1995 PhD in English and American Literature. He volunteered gratuitous statements that he apparently thought would assist Respondent’s case. For example, he stated “I do not stand in judgment upon it” when referring to a conversation he had with Complainant. When asked on cross examination why he had perceived Complainant to be “flirtatious” during a conference call when Hecht was in Los Angeles and Complainant was in Oregon, he stated “the tone of her voice; I remember feeling that her word choice was part of it; though I don’t recall her word choice. It’s difficult to put one’s finger on, but I certainly felt as though I was in the presence of a woman being seductive. * * * Sex addiction is a grievous illness which affects millions of people. That’s what I felt I was dealing with.” In addition, under direct and cross examination, he was unresponsive to many questions and kept volunteering information after he thought he had answered the question, despite being counseled not to do so. The forum has discredited all his testimony that was in any way relevant to the Agency’s charges or Respondent’s defenses.

71) Scott McGuire described himself as a friend of Ruppert who first met Ruppert when Ruppert moved his office to Ashland. As a freelance writer, he has written articles for Ruppert and been paid for them. In his testimony, he described Ruppert as a “celebrity” in the “peak oil/sustainability movement” and “a person of rare integrity,” clearly showing his admiration of Ruppert. In contrast, he painted Complainant as “more common.” He testified in detail about an event that allegedly occurred on May 18, 2006, in which he was speaking on a panel on sustainability in Jackson County, claiming that he observed Complainant and Ruppert sitting next to one another, with Complainant clinging to Ruppert and engaging in “overly affectionate, lovey dovey, huggy kissy type behavior” and Ruppert doing all he could to avoid Complainant’s “romantic body language.” This was the first time since Complainant’s

termination that this incident was ever mentioned, and Ruppert himself did not testify about it or ever mention it in his extensive pre-hearing writings about Complainant's alleged sexual behavior. Due to McGuire's bias and the fact that Ruppert never mentioned the alleged May 18 incident before the hearing, the forum does not believe any of McGuire's testimony on that subject.

72) Ryan Spiegl, whom Respondent alleged to be Complainant's lover, answered questions directly and without hesitation. With one principal exception, his testimony was consistent with testimony of Complainant that the forum has found credible. That exception was his testimony that he never saw Complainant wearing a "G-string" or "thong" in Respondent's office, whereas Complainant testified that she wore "G-string" underwear while she worked for Ruppert and Respondent. Given Complainant and Spiegl's friendship and Complainant's acknowledgment that Ruppert saw her underwear on one occasion when she bent over, the forum finds it unlikely that Spiegl would not have been aware of her choice of underwear. In addition, he testified that Complainant once told him that Ruppert had told her he had some feelings for her that involved Ruppert masturbating to her, and that Ruppert told Complainant he thought she might have reciprocal feelings. The forum has not credited this testimony because Complainant never mentioned it in her extensive pre-hearing writings about Ruppert's alleged sexual behavior and did not testify about it. Except for those two issues, the forum has credited his testimony in its entirety.

73) In previously written statements introduced as evidence at the hearing and his testimony about the articles and books he has written, Ruppert showed himself to be a highly articulate, productive investigative journalist who is capable of writing at great length and in great detail. When those prior statements are compared to his testimony related to Complainant's employment, the alleged sexual harassment, and incidents

that occurred after Complainant's termination, numerous inconsistencies surface. Ruppert also testified extensively about specific incidents of sexual behavior by Complainant that he had never mentioned previously, despite his uncontested writing ability and extensive pre-hearing writings on that subject. These inconsistencies and "new" evidence cast a deep shadow on his credibility. It is also telling that he failed to call Evans, Flanagan, or Psomas, all former employees whom he alleged had witnessed egregious sexual behavior by Complainant, as witnesses to support his case. A few examples of the evidence that leads the forum to question Ruppert's credibility follow:

- Although never mentioning these behaviors before the hearing, Ruppert testified that Complainant told him she was bisexual, that Complainant engaged in "lesbian" activity in his office, that Complainant had a favorite lesbian pornography website, that Complainant suggested he take off his shirt so she could walk on his aching back, and that Complainant discussed sexual activities such as "fisting" with him at work. He testified that he did not mention these behaviors sooner because he believed the complaint would be dismissed and he was "trying not to go with the sleaze factor." In contrast, after firing Complainant, he told a local reporter that he suspected Complainant of burglarizing his office and being a methamphetamine user; and wrote in articles published on the internet that Complainant was "the perpetrator of a feeble and stupidly executed sexual blackmail plot," "showed naked photographs of herself to both men in our offices," and that she "directed [Ruppert], after regular office hours, to pornographic web sites and continually tried to tempt me with scanty outfits, G-strings and hints of sexual delights including descriptions of her private parts"; and that she showed "highly erratic emotional behavior consistent with drug use in her last two weeks of work." He also told a police detective that the identity of the father of Complainant's child should be investigated and that he suspected Complainant of engaging in sexual relationships with Zach Evans, Ryan Spiegl, and Robert Plain. In light of Ruppert's pre-hearing writings, the forum finds his excuse of "trying not to go with the sleaze factor" to be unbelievable and has disbelieved all of Ruppert's testimony regarding Complainant's sexual behavior that he did not mention prior to hearing.
- Ruppert testified that "[t]here were so many instances * * * of [Complainant] engaging in overtly sexual behavior not only with me but with Mr. Evans, Mr. Spiegl * * * had I listed them all, it would have been, you know, maybe an inch thick." In the forum's view, this demonstrates Ruppert's propensity for exaggeration and casts further doubt on his credibility.
- During direct examination by the Agency, Ruppert testified that Complainant's last day was May 31, and Spiegl gave notice on May 17. He also dated Complainant's probationary agreement and termination "May 31, 2006." In

contrast, on June 28, 2006, he told the Ashland City Police that Spiegl gave notice on May 18 and that Complainant's last day of work was June 1. Earlier, on June 24, 2006, he sent out an email that also stated that Complainant was fired on June 1.

- Ruppert testified that he told Complainant on Memorial Day 2006 or the Saturday or Sunday before Memorial Day that, "in light of her continued sexual advances I thought it might be possible to have a sexual relationship if that's what she wanted." On June 28, 2006, he told the Ashland City Police that this occurred on May 30, which was the Tuesday **after** Memorial Day.
- Ruppert testified that his motivation for appearing in his underwear before Complainant was to provide "comic relief" for his writer's block and that it was an "editorial statement" to make light of things. In contrast, he told the Ashland City Police on June 28, 2006, that "I played along with her sexual games to the point of stripping down to my underwear once (something she had discussed) hoping to learn if she would try to blackmail me."

The forum has not credited any of Ruppert's testimony about Complainant's sexual behavior that he did not mention prior to hearing and has only credited the other parts of his testimony that were corroborated by other credible evidence or uncontested.

74) Complainant, though lacking Ruppert's experience, is also a highly articulate, productive writer who is capable of writing at great length and detail. On May 31, 2006, she wrote a five page, single-spaced letter^x that she prefaced with the unequivocal statement – "I will explain now what specific incidences during my brief, three-month employment have led me to feel sexually harassed by my employer." Her testimony about those incidences at hearing was consistent with her May 31 statement, and much of her testimony was corroborated, although given a different twist, by Ruppert. Complainant testified passionately, with great conviction, about the "G-string," "underwear," and "CD" incidents, as well as her termination and the emotional and financial impact of Ruppert's actions. She also testified credibly that she was not involved in a sexual relationship with Spiegl. Ruppert asks the forum to believe that Complainant's numerous cell phone calls to Spiegl show that Complainant was involved in such a relationship, but the forum declines to draw that inference, as they are equally consistent with a friendship. At hearing, Complainant also testified that Ruppert

described his sexual experiences with other women in detail and this offended her. The forum did not believe this statement because she did not mention it in her in her detailed contemporaneous written statement or in her investigative interview, and there was no mention of it in her initial complaint or in the Formal Charges. Except for that statement, the forum has credited her testimony in its entirety.

ULTIMATE FINDINGS OF FACT

1) In February 2006, Michael Ruppert moved to Ashland, Oregon, from California and continued his business of publishing *From the Wilderness* magazine as a monthly newsletter that was available by mail and online in an office building in Ashland. On April 5, 2006, Ruppert incorporated his business in Oregon under the name of From the Wilderness, Inc., with Ruppert as the sole shareholder. At that time, Respondent employed at least four persons, including Complainant.

2) On March 6, Ruppert hired Complainant as a staff writer and editor at the salary of \$500 per week. Throughout her employment, Ruppert was her immediate supervisor.

3) Throughout her employment, Complainant enjoyed the type of work she performed for Respondent. As her employment continued, she was torn between working in an uncomfortable work environment and performing work that she enjoyed.

4) Near the beginning of her employment, Complainant got a bad sunburn on her shoulders while rock climbing. When she came to work, she asked Ruppert if he would put some aloe on her shoulders, which he did. A few days later, Ruppert told Complainant how much he had enjoyed putting the aloe on her shoulders and touching her at that time. This made Complainant feel uncomfortable.

5) Soon after the aloe incident, Complainant was rubbing tiger balm into her forearms while at work. Ruppert reached out and touched her arm and said he would

rub it in for her. Complainant pulled her arm away and told him no. This made her feel uncomfortable.

6) In Complainant's first few weeks of employment, she came into the office wearing a skirt that stopped just above the knee. Ruppert looked her up and down and Complainant responded "It's just a skirt." Complainant felt this was "chauvinistic."

7) Once, when Complainant bent over to write a note on Respondent's editorial board, the back of her underwear and her bare side became exposed. Ruppert, who was nearby, commented "thank you" in response. This comment made Complainant feel very uncomfortable.

8) One day, Complainant wore a shirt to work with a decorative bow on the back of it. In Ruppert's office, in front of Complainant's friend, Ruppert asked Complainant in a joking manner -- "What happens if I pull that bow?" Complainant was shocked, taken aback, and felt uncomfortable.

9) Early in Complainant's employment, Complainant and Ruppert were discussing a staff writer's recent work entitled "*Sex and War*." In that discussion, Ruppert told Complainant that he views pornography. Complainant told Ruppert that she had also seen some pornography but did not appreciate films that degrade women. Later, Ruppert told Complainant he had created a "personal disk" he wanted to give to her. Complainant, who did not know the contents of the disk, told him "fine." The next day, he said he had decided not to give the disk to her because he valued their friendship and he wouldn't want giving the disk to Complainant to disturb their friendship. Complainant concluded from this statement that the disk contained materials she might have found offensive.

10) Towards the end of her employment, Ruppert asked Complainant “a few times” what her sexual preferences were and brought up pornographic websites on his computer monitor in her presence.

11) Towards the end of Complainant’s employment, Ruppert gave Complainant a letter that he characterized as a “mentoring document” in which he stated, among other things, that he cared deeply and affectionately for Complainant, and that she had an “amazingly beautiful personality.” Ruppert signed it “Love, Mike.” This letter made Complainant feel belittled, upset, and “really creeped out.”

12) Ruppert was physically attracted to Complainant. In his words, she “tempted” him and this was a “form of torment.” In contrast, Complainant was never romantically interested in Ruppert and never expressed any romantic interest in him.

13) One evening in mid-May 2006 when Complainant and Ruppert were alone in the office, Ruppert began complaining that he had a story he needed to get out, that he needed to free himself, and that it would be great if he could just run around the office naked for a minute to get out his “writer’s block.” Shortly afterward, Complainant was typing at her desk and Ruppert came to her open door, standing in his underwear in a “wide legged stance” with a “big smile.” Ruppert stood there for 10 seconds before returning to his office, where he put his clothes back on. This shocked Complainant. Later that same evening, Ruppert asked Complainant if she had seen his appendix scar. Complainant said no and Ruppert pulled up his shirt and displayed his scar. This frightened Complainant.

14) Late in the day on May 26, 2006, the Friday before Memorial Day weekend, Ruppert told Complainant that he had something to tell her and said they should go into the shipping area. Once there, Ruppert told her “since you started working here, I’ve had sexual thoughts about you and I know you feel the same. I think

of you sexually and romantically and I know you feel the same.” He then said he was “in love” with Complainant and told her he was willing to have a “sexual relationship” with Complainant “if that’s what she wanted.” Complainant felt shocked and scared and told him he should be concentrating on the women who want to be with him, not those who don’t, then left the room. Ruppert’s statements were unwelcome to Complainant and made her feel distraught because she realized that his attentions were personally directed to her.

15) On Tuesday, May 30, 2006, the day after Memorial Day weekend, Complainant found a CD marked “personal” in her locked desk when she arrived at work. The CD was placed there by Ruppert and contained “legal” pornography that he had downloaded from the internet. Because only Complainant and Ruppert had a key to open her desk, Complainant assumed the CD had been placed there by Ruppert and that it contained “inappropriate” pornographic content. Deciding to return it to Ruppert, she did not listen to or view its contents and determined to confront Ruppert about it at the end of the day. She also called Spiegl and told him about the CD.

16) The conduct by Ruppert described in Finding of Facts 11-15 18-20, 24, 29, 31, and 33 – The Merits was directed in part or in whole towards Complainant because of her sex and was offensive and unwelcome to Complainant.

17) During the workday on May 30, 2006, Ruppert came into Complainant’s office and told her he had been thinking of giving her a raise. He considered promoting complainant based on her skills and did not think he could find another person in the Rogue Valley who could replace her skill and experience.

18) At the end of the day on May 30, Complainant went into Ruppert’s office and told him she needed to talk with him. Complainant told Ruppert she got the CD, that she was returning it to him, and that she thought giving it to her was

“unprofessional.” Complainant also told him that she did not think about him sexually and had no emotional feelings towards him. She added she was sorry if that hurt his feelings, but that she needed to know if their relationship could continue on a professional level. Ruppert said that was “fine,” that he would take back the CD, and that they could continue working on a professional level. He also said that he wished that she had kept the knowledge of the CD just between them, and made a “deliberately egregious comment to Complainant” which might have been something about “fisting.” Spiegl then walked into Ruppert’s office. Complainant assured Spiegl that things were fine, and Ruppert asked what they were talking about. Complainant told Ruppert that Spiegl was aware that she had returned his inappropriate CD, and she had just let Spiegl know that Ruppert had taken back the CD and had assured her that they could continue to work together on a professional level. Ruppert became extremely angry and started yelling, accusing Complainant of calling him a “flasher” because of the underwear incident, and seemed embarrassed and upset that Complainant had told Spiegl about his behavior.

19) The next morning, Complainant’s job was posted on Craig’s List.

20) Prior to May 31, 2006, Ruppert gave Complainant no written warnings regarding her attendance, performance, or her attire at work other than the “mentoring” letter, and she was not counseled that her job was in jeopardy.

21) On May 31, 2006, Complainant called in late to work and talked with Ruppert. Ruppert was angry and yelled at her and told her she was fired. He also told her that if she wanted her job back, she needed to come into the office and he would tell her what she needed to do. Complainant was fearful of going into the office alone and did not go to work that day.

22) After Complainant left work on May 30, Ruppert prepared a probationary agreement for Complainant to sign. Fully expecting that she would refuse to sign it, he also prepared a termination notice.

23) On the morning of June 1, 2006, Ruppert gave Complainant the probationary document to sign when she came to work. When she refused to sign it, he gave her the termination notice.

24) Neither Ruppert nor Respondent had a written sexual harassment policy during Complainant's employment.

25) At the time of and after her termination, Complainant experienced substantial emotional and mental suffering as a result of Ruppert's sexual harassment, being fired for opposing that sexual harassment, her fears of Ruppert's retaliation, and because of Ruppert's published internet statements and to the Ashland City police about her. She continued to experience emotional distress as late as 2008.

26) On July 18, 2006, Ruppert left the United States and relocated to Venezuela, and Respondent ceased operations. Had she not been terminated by Respondent, Complainant would have earned \$3,300 in gross wages between June 1 and July 17, 2006. Between June 1 and July 17, she earned \$586.57 in gross wages. In total, she lost \$2,713.42 in gross wages that she would have earned, had she not been fired.

CONCLUSIONS OF LAW

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

3) The actions, statements and motivations of Michael Ruppert, Respondent's sole shareholder and Complainant's immediate supervisor, are properly imputed to Respondent. OAR 839-005-0030(3).

3) 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.

4) Respondent, through its proxy Ruppert, subjected Complainant to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe to alter her work conditions and create a hostile, intimidating, and offensive work environment. By doing so, Respondent committed an unlawful employment practice based on Complainant's sex in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a) and (b).

5) Respondent discharged Complainant in retaliation for opposing unlawful sexual harassment, committing an unlawful employment practice in violation of ORS 659A.030(1)(f).

6) 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's unlawful employment practice and to award money damages for emotional and mental suffering sustained and to protect the right of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

In this case, the Agency alleges that Respondent, through its proxy Ruppert, sexually harassed Complainant, then retaliated against her by firing her when she complained of the harassment.

SEXUAL HARASSMENT

To establish sexual harassment, the Agency is required to prove 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, 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 creating a hostile, intimidating or offensive work environment; and (6) Complainant was harmed by the unwelcome conduct. *In the Matter of Gordy's Truck Stop, LLC*, 28 BOLI 200, 210 (2007).

A. Respondent was an employer and employed Complainant, a female.

There is no dispute that Respondent From the Wilderness, Inc. was an employer subject to ORS 659A.001 to 659A.030 and employed Complainant, a female. The evidence also established that Respondent did not exist as a legal entity until April 5, 2006. Effective that date, Ruppert incorporated the business that he had previously been operating as a sole proprietorship. Until April 5, 2006, Ruppert, not Respondent, was Complainant's employer.

B. Respondent, through its proxy Ruppert, engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex.

Ruppert, Complainant's immediate supervisor and Respondent's sole shareholder, engaged in numerous instances of unwelcome conduct, both verbal and physical, directed at Complainant because of her sex. The forum concludes that the conduct was unwelcome based on Complainant's credible testimony that it made her "uncomfortable," "shocked," "taken aback," "distracted," "belittled," "upset," and "frightened" and because of her complaints to others about the conduct. The forum concludes that the unwelcome conduct detailed below was due to Complainant's sex because of its very nature and the fact that there is no evidence that Ruppert behaved similarly towards male employees.

As Respondent's sole shareholder, Ruppert's conduct is properly imputed to Respondent and Respondent is strictly liable for any unlawful harassment found herein. See OAR 839-005-0030(3)("[a]n employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer").

Since Respondent did not become Complainant's employer until April 5, 2006, Respondent cannot be held liable for any harassment by Ruppert that occurred before April 5, 2006.^{xi} The forum therefore divides Ruppert's specific instances of unwelcome conduct into two categories – (1) conduct that occurred before April 5, 2006, and conduct for which no date of occurrence was established; and (2) conduct that occurred after that date (the "actionable conduct.")

Pre-April 5, 2006, conduct and conduct for which no date of occurrence was established

- The "aloe" incident^{xii}
- the "tiger balm" incident^{xiii}
- the "skirt comment"^{xiv}
- the "G-string/thank you" incident^{xv}
- the "decorative bow" incident^{xvi}
- the "personal disk" incident^{xvii}

Conduct on or after April 5, 2006

- the questions about "sexual preferences" and "pornography websites" incidents^{xviii}
- the "mentoring document" incident^{xix}
- the "underwear" incident^{xx}
- the "appendix scar" incident^{xxi}
- the "sexual thoughts," "I'm in love," and "sexual relationship" comments^{xxii}
- the "pornographic CD" incident^{xxiii}

- the “fisting” comment.^{xxiv}

C. Ruppert’s unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work 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. *Gordy’s at 212*; OAR 839-005-0030(2).

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. *Id.*

Nature of the conduct and its context – Complainant was 25 years old, working at her first professional job, whereas Ruppert was not only Complainant’s boss, but a former Los Angeles policeman, an experienced investigative journalist, and a “celebrity” in his field. While the half dozen pre-April 5, 2006, incidents do not, as a matter of law, constitute unlawful sexual harassment because the Agency did not charge Ruppert, Respondent’s predecessor, as an employer who engaged in sexual harassment during that time period, Ruppert’s unwelcome sexual conduct towards Complainant before that date is relevant to show context.

Frequency – While the frequency cannot be calculated with exactness, all the incidents occurred within a three-month time span and the six incidents of actionable conduct occurred between April 5 and May 30, 2006.

Severity – The actionable conduct included exposure to internet pornography, questions about sexual preference, a comment about a specific sexual practice, written romantic expression, spoken romantic expression, semi-naked exposure, a

pornographic CD, and a proposal for a sexual relationship. It was intensified by the fact that most of it occurred when Ruppert and Complainant were working alone.

Physically threatening or humiliating – Complainant credibly testified that two specific incidents of the actionable conduct “frightened” or “scared” her – Ruppert’s exposure of his appendectomy scar and his statement to Complainant that he was ready to have a sexual relationship with her if she was willing. Both incidents occurred when Ruppert and Complainant were working alone at Respondent’s office. Complainant was also aware that Ruppert kept a handgun in his desk, although she did not testify that she feared him using it against her at any time during her employment.

Unreasonable interference with Complainant’s work performance – Complainant credibly testified that she liked her work very much because writing was her chosen field, she was excited by the subject matter, and it was a possible stepping stone in the writing career she hoped to have. Ruppert’s harassment made it more difficult for her to do her work.

Based on the above, the forum concludes that Ruppert’s actionable conduct was sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment from the objective standpoint of a reasonable person in Complainant’s particular circumstances, and that the conduct created a hostile, intimidating or offensive working environment for Complainant.

D. Complainant was harmed by Ruppert’s sexual harassment.

At the time the harassment occurred, Complainant experienced the emotions of being “uncomfortable,” “shocked,” “taken aback,” “distracted,” “belittled,” “upset,” and “frightened.” This fulfills the “harm” element of the Agency’s prima facie case.

E. Conclusion.

The Agency proved the elements of its prima facie case by a preponderance of the evidence and the forum concludes that Respondent, through its proxy Ruppert, violated ORS 659A.030(1)(b) by sexually harassing Complainant.

RETALIATION

ORS 659A.030(1)(f) makes it an unlawful employment practice for an employer to “discharge * * * any person because that * * * person has opposed any unlawful practice[.]” 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. *See 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).

In this case, the opposition occurred on May 30, 2006. The precipitating incidents that led to Complainant’s opposition were Ruppert’s proposal of a sexual relationship on May 26 and the pornographic CD that she found in her desk drawer on the morning of May 30. At the end of the day on May 30, 2006, Complainant confronted Ruppert and complained that she did not appreciate the pornographic CD and, with regard to his proposal, she had no sexual feelings towards him. By doing this, she engaged in behavior protected by ORS 659A.030(1)(f). At some point during the conversation, Spiegel came into the room and she assured him that everything was “fine.” Ruppert asked them what they were talking about. Complainant told Ruppert that Spiegel was aware of the CD Ruppert had left for her, and that she had just let Spiegel know that Ruppert had taken back the CD and had assured her that they could continue to work together on a professional level. Ruppert reacted to this information by

becoming extremely angry, accusing Complainant of calling him a “flasher” because of the underwear incident, and appearing embarrassed and upset that Complainant had told Spiegl about his behavior.

The next morning, Complainant wrote a lengthy letter detailing Ruppert’s sexual harassment and emailed it to her parents and grandfather, Spiegl, and Psomas, then called in late to work. Ruppert was angry, yelled at her, and told her she was fired. He added that, if she wanted her job back, she needed to come into the office and he would tell her what she needed to do. Complainant was fearful of going into the office alone and did not go to work that day. In the interim, Ruppert prepared a probationary agreement for Complainant to sign. Fully expecting that she would refuse to sign it, he also prepared a termination notice. When Complainant arrived at work on June 1, Ruppert gave her a notice containing “PROBATIONARY CONDITIONS OF EMPLOYMENT” and told her she was fired if she refused to sign it. When Complainant refused, he gave her a termination slip and told her she was fired.

Respondent contends that Complainant was fired based on her longstanding performance issues, and Ruppert had been planning to fire her the same day as Spiegl’s last day. The forum finds this argument pretextual for several reasons. First, except for the “mentoring” letter, Ruppert gave Complainant no written warnings regarding her attendance, performance, or her attire at work before May 30, 2006, and she was never counseled that her job was in jeopardy. Second, Ruppert had a discussion with Complainant on the morning on May 30 about promoting her. Third, Ruppert’s immediate, negative emotional response upon learning that Complainant had told Spiegl about the CD and underwear incidents. Finally, the fact that Ruppert decided to terminate Complainant within hours after his meeting with Complainant and Spiegl, as shown by the fact that her job was posted on Craig’s List the next morning

and his statement to Complainant on May 31 that she was fired. Under these circumstances, the forum does not believe Ruppert's excuse that Complainant's performance had been poor all along, and that he was merely waiting to fire her until Spiegl's last day in order to minimize possible sabotage to his company.

In conclusion, a preponderance of the evidence shows that Complainant opposed unlawful sexual harassment by Ruppert on May 30, 2006; that Respondent, through Ruppert, fired Complainant; and that Respondent, through Ruppert, fired Complainant because of her opposition to Ruppert's unlawful employment practice in violation of ORS 659A.030(1)(f).

DAMAGES

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 Executive Transport, Inc.*, 17 BOLI 81, 96 (1998). 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. *See, e.g., In the Matter of Gordy's Truck Stop, LLC*, 28 BOLI 200, 213 (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).

In this case, the duration of Complainant's back pay is limited by the fact that Respondent ceased doing business on or about July 17, 2006, when Ruppert moved to Venezuela, and there is no evidence that Respondent employed anyone after that date.^{xxv}

Respondent paid Complainant a salary of \$500 per week. Had she continued to work for Respondent until Ruppert left for Venezuela, she would have earned an additional \$3,300 in gross wages between June 1 and July 17, 2006. After Complainant was fired, she promptly sought work and earned \$586.57 in gross wages while working at two limited, part-time jobs. In total, she suffered a net loss of \$2,713.42 in gross wages as a result of being fired by Respondent and is entitled to a back pay award in that amount.

B. “Out-of-Pocket Expenses” and “Lost Benefits”

The Agency seeks reimbursement for Complainant’s “out-of-pocket” expenses and “lost benefits.” This forum has consistently held that 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. *In the Matter of Trees, Inc.*, 28 BOLI 218, 251 (2007). *See also In the Matter of Southern Oregon Subway, Inc.*, 25 BOLI 218, 242 (2004).

The “out-of-pocket” expense for which the Agency seeks reimbursement is the \$5,000 in life savings that Complainant testified that she had to spend to meet living expenses after she was fired. In the past, the forum has awarded damages for expenses such as travel expenses incurred in obtaining alternative employment,^{xxvi} medical expenses that would have been covered by a respondent’s insurance policy, had the complainant not been fired,^{xxvii} added costs incurred because of loss of use of an employee discount card,^{xxviii} and moving costs attributable to an unlawful act involving real property.^{xxix} In contrast, the forum did not award damages for expenses such as costs for professional recertifications,^{xxx} and debts incurred while employed by respondent that complainant had trouble paying off after her discharge.^{xxxi} The common thread running through all these cases is that any award for out-of-pocket expenses

must be supported by evidence showing it is a direct result of a respondent's unlawful practice. In this case, Complainant spent her life savings of \$5,000 because she no longer had Respondent's income to meet her living expenses. However, her lost income from Respondent only amounted to \$3,300. The forum has awarded compensation for that loss in its back pay award, less her interim earnings, and awarding Complainant additional damages for her "out-of-pocket" loss would be a double award for the same loss. Although Complainant is not entitled to any additional compensation for "out-of-pocket" expense based on the expenditure of her life savings, the forum notes that this issue is relevant to an award of damages for emotional and mental suffering.

No evidence of "lost benefits" was presented at the hearing, and the forum awards no damages for them.

C. Emotional, mental, and physical suffering.

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. *Emerald Steel Fabricators*, 27 BOLI at 278 (2006), *appeal pending*. It also considers the type and duration of the mental distress and the vulnerability of the Complainant *In the Matter of State Adjustment, Inc.*, 23 BOLI 19, 32-33 (2002), *amended* 230 BOLI 67 (2002). The actual amount depends on the facts presented by each complainant. *Gordy's*, at 214. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id.*

From April 5 through June 1, 2006, Complainant was subjected to a variety of types of verbal and physical sexual harassment by Ruppert, culminating in her discharge on June 1, 2006, that she reasonably believed was caused by her opposition to that harassment. The harassment itself, while ongoing, made her feel

“uncomfortable,” “shocked,” “taken aback,” “distraught,” “belittled,” “upset,” and “frightened.” When she was fired, she became very upset, and called her mother. Complainant thought she “was on her way with her career” and being fired was a “big blow” to her. Her anxiety snowballed, and she experienced almost immediate panic attacks, for which she visited a doctor and was prescribed the generic form of Xanax. Subsequently, she had to have the prescription refilled.

Ruppert’s threat to have Complainant removed from the Ashland conservation commission and his concealed handgun reasonably caused Complainant to fear retaliation by Ruppert before he left for Venezuela, despite the fact that he made no actual physical threats towards her. After she was fired, she bought window locks for her house and asked all her neighbors to let her know if Ruppert was in the neighborhood.

Complainant had never been fired before, and losing her job caused a large blow to her self esteem, causing her to begin to second guess her work ethic and ability to create a positive work experience with an employer. She became distrustful of working with a male supervisor, and it took her a few months to be comfortable working for an employer with a male in authority.

Complainant’s job loss also caused her significant financial distress. She had to move from her apartment because she could no longer afford the rent and move in with a friend who rented a room to her. When she began work for Respondent, she had saved \$5,000 from her last job. After being fired, she had to spend all of it to meet living expenses. Although the part of this expenditure that was attributable to her discharge will be potentially recouped by Complainant as a back pay award, the emotional impact on Complainant of having to spend that portion of her life savings is also an element of an award for emotional suffering. In addition, Complainant had to ask her mother and

stepfather for financial help for a few months. Finally, as late as May 2008 Complainant saw a mental health counselor and discussed this case with the counselor.

The duration of Complainant's emotional distress was extended by Ruppert's subsequent communications to the Ashland City Police, Victor Thorn, the *Ashland Daily Tidings*, and Ruppert's internet blog. These communications continued into October 2007. In them, Ruppert: (1) described Complainant as a troubled and disgruntled employee and attractive sexual smorgasbord who engaged in sexual blackmail and showed naked photographs of herself to male co-workers; (2) accused her of burglary, vandalism, being a meth addict and facilitating the use of Respondent's office to smuggle meth; (3) stated she was having sexual affairs with two employees and a writer for the *Daily Tidings*; and (4) questioned who was the father of her child. Complainant became aware of these communications at different times between late June 2006 and October 2007. She reasonably believed that the articles published in the *Ashland Daily Tidings* and on the internet would be read by the public and would affect the public's perception of her as a person and potential employee. They embarrassed and mortified her and made her feel "like a criminal." Complainant felt that her career was threatened and that Ruppert was attempting to intimidate her. Although these communications did not occur during the time period encompassed by the unlawful practices pleaded in the Agency's Formal Charges and proved by the Agency at hearing, they constitute a basis for part of the forum's award of damages for emotional and mental suffering because they arose directly out of Complainant's employment and served as a constant reminder to Complainant of those unlawful practices.

In its Formal Charges, the Agency asked for damages for Complainant's emotional, mental, and physical suffering "in the amount of at least \$35,000." To summarize the evidence supporting those damages, Complainant was sexually

harassed at her first professional job, fired in retaliation for complaining about the harassment, suffered serious emotional distress that required medical consultation and treatment, had to move out of her apartment, and was portrayed by Ruppert in the media, on the internet, to the police, and to Ruppert's internet rival as sexually promiscuous, a sexual blackmailer, and a criminal over the 17-month period following her discharge. Because the Agency sought "at least \$35,000" (emphasis added) in the Formal Charges, the forum is not limited to an award of \$35,000. Under the egregious facts and circumstances that were presented at hearing in this case, the forum finds that \$125,000 is an appropriate award to compensate Complainant for her mental and emotional suffering.

ORDER

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

- 1) TWO THOUSAND SEVEN HUNDRED THIRTEEN DOLLARS AND FORTY-TWO CENTS (\$2,713.42), less lawful deductions, representing income lost by Lindsay Gerken between June 1 and July 17, 2006, as a result of Respondent's unlawful practice found herein; plus,
- 2) Interest at the legal rate on the monthly accrual of wages lost between June 1 and July 17, 2006;

- 3) Interest at the legal rate on the sum of \$2,713.42 from July 18, 2006, until paid;
plus
- 4) ONE HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS (\$125,000),
representing compensatory damages for mental distress Lindsay Gerken suffered as a
result of Respondent's unlawful practice found herein; plus,
- 5) Interest at the legal rate on the sum of \$125,000 from the date of the Final Order
until Respondent complies herein; and,
- 6) Cease and desist from discriminating against any employee based upon the
employee's gender.

ⁱ At this time, the forum may not conclude as a matter of law that these allegations are true because (1) the Agency has provided no documentary evidence to support them and (2) Respondent may still have an opportunity to deny them, depending on what evidence may or may not be produced after this Order is issued to show when Respondent was served or the extension of time granted to Ruppert on September 11, 2008. The forum disregards the substantive responses in Kohlman's Answer because it was not filed by "counsel" as defined in OAR 839-050-0020(9).

ⁱⁱ Other than the statement that Kohlman was served with the Formal Charges, the Agency has provided no evidence in support of its motion to show that it had any reason to believe that Kohlman was Respondent's "party representative" at the time it issued the Formal Charges.

ⁱⁱⁱ The Answer may be due later. The Agency's Notice Of Intent To File A Motion For Default, which was filed on September 4, 2008, gives Respondent an extension of time until September 15, 2008, to file an Answer. However, the Agency's Motion For Default, filed September 18, 2008, states that the Agency case presenter spoke with Ruppert on September 11, 2008, and gave him "additional time to file an Answer." The motion does not state the amount of additional time granted to Ruppert. Since the Agency had given Respondent an extension until September 15 only one week earlier, the forum infers that the Agency gave Ruppert an extension to some date after September 15.

^{iv} This document is Exhibit A-2 of the Agency's case summary.

^v See, e.g., *In the Matter of WINCO Foods, Inc.*, 28 BOLI 259, 300 (2007) (evidence includes inferences).

^{vi} Complainant was Ruppert's employee until Ruppert incorporated his business on April 5, 2006.

^{vii} In Ruppert's words, Complainant "had gifts with the English language that were absolutely priceless."

^{viii} No evidence was presented showing the amount of Complainant's last pay check or what time period it covered, and the forum infers that Complainant was paid in full through May 31, 2006, but did not receive any other pay.

^{ix} There was no evidence to show the date when Snow gave the email to Complainant.

^x Exhibit A-1, pages 5-9.

^{xi} To hold Respondent liable for Ruppert's pre-April 5, 2006, conduct, the Agency would have had to name Ruppert as the respondent employer for the first month of Complainant's employment and name From the Wilderness, Inc. as a successor employer to Ruppert. This could have been accomplished by the Agency naming Ruppert as a respondent in the initial complaint, or by amending Complainant's

original complaint, within one year after November 13, 2006, the date on which the complaint was filed, to name Ruppert as a respondent.. OAR 839-003-0040(1).

^{xii} See Finding of Fact 11 – The Merits.

^{xiii} See Finding of Fact 12 – The Merits.

^{xiv} See Finding of Fact 13 – The Merits.

^{xv} See Finding of Fact 14 – The Merits.

^{xvi} See Finding of Fact 15 – The Merits.

^{xvii} See Finding of Fact 18 – The Merits.

^{xviii} See Finding of Fact 19 – The Merits.

^{xix} See Finding of Fact 21 – The Merits.

^{xx} See Finding of Fact 24 – The Merits.

^{xxi} See Finding of Fact 24 – The Merits.

^{xxii} See Finding of Fact 29 – The Merits.

^{xxiii} See Finding of Fact 31 – The Merits.

^{xxiv} See Finding of Fact 33 – The Merits.

^{xxv} See Finding of Fact 54 – The Merits.

^{xxvi} *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).

^{xxvii} *In the Matter of Body Imaging, P.C.*, 17 BOLI 162, 175, 191 (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).

^{xxviii} *In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 65 (2003).

^{xxix} *In the Matter of Strategic Investments of Oregon, Inc.*, 8 BOLI 227, 250 (1990).

^{xxx} *In the Matter of Trees, Inc.*, 28 BOLI 218, 252 (2007)(expenses to renew commercial pesticide applicator and certified arborist licenses not recoverable when there was no evidence showing that respondent's unlawful demotion of complainant caused him to incur those expenses).

^{xxxi} *In the Matter of Southern Oregon Subway, Inc.*, 25 BOLI 218, 242-43 (2004)(evidence did not show that respondent's actions caused complainant to initially incur those debts).