

In the Matter of

NES COMPANIES LP

Case No. 21-02

Final Order of Commissioner Jack Roberts

Issued October 9, 2002

SYNOPSIS

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

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing commenced on June 25, 2002, in Hearings Room 1004, Portland State Office Building, Portland, Oregon. Closing arguments were made by telephone on June 27, 2002. The hearing reconvened on August 1, 2002, in Hearings Room 1004 to retake the testimony of Michael Helmer.

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

hearing for the purpose of assisting Respondent's case pursuant to OAR 839-050-0150(3)(d).

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

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

The forum received into evidence:

- a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing), and X-12 through X-15 (submitted at or after the hearing);
- b) Agency exhibits A-1 through A-25 (submitted prior to hearing), and A-26 (submitted at hearing);
- c) Respondent exhibits R-1 through R-15 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

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

2) On April 25, 2002, the Agency issued Specific Charges alleging that Respondent discriminated against Complainant in violation of *former* ORS

659.476(1)(d) by discharging him because of his absence from work to care for his three-year-old daughter, who had head lice and required home care, and who had no other family member other than Complainant to care for her.

3) On April 25, 2002, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth June 25, 2002, in Portland, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

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

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

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

7) At the start of the hearing, the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. The agency case presenter waived the ALJ's recitation of the manner in which objections may be made and matters preserved for appeal.

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

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

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

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

12) On June 26, 2002, the ALJ held a telephone conference with Mr. McSwain and Ms. Lively to discuss Respondent's request to brief two issues and schedule closing arguments. Respondent's request to file a brief on two issues was granted, and Respondent and the Agency were ordered to file briefs by July 12, 2002. The two

issues to be covered in the briefs were: (a) If Respondent was not Complainant's actual employer for 180 days prior to Complainant's discharge on October 30, 2000, is Respondent still potentially liable as a successor-in-interest under OFLA? (b) Under OFLA, must the Agency prove that Respondent intentionally discriminated against Complainant in order to establish liability, and if so, the standard the forum should apply in determining if Respondent intentionally discriminated against Complainant. Closing argument was set for 2:30 p.m. on June 27 by telephone conference.

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

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

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

Lively and McSwain, both of whom agreed that the ALJ's summaries of Carter and Sellon's testimony accurately reflected their testimony.

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

17) On August 26, 2002, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed exceptions on August 28, 2002. Those exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

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

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

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

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

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

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

"2) Employees should notify their supervisor as far in advance as possible whenever they are unable to report for work, know they will be late, or must leave early. The notice should include a reason for the absence and an indication of when the employee can be expected to report for work. If the supervisor is unavailable, notification should be made to the Personnel Department.

“3) * * * Failure to notify the Company properly of any absence may result in loss of compensation during the absence and may be grounds for disciplinary action.

“* * * * *

“9) Unauthorized or excessive absences or tardiness will result in disciplinary action, up to and including termination. An absence is considered to be unauthorized if the employee has not followed proper notification procedures or the absence has not been properly approved. Generally, absences in excess of those allowed in Short-Term Absences, and Leaves of Absence, and tardiness or early departure more than three times in a three-month period are grounds for discipline.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20) Complainant did not call Respondent on October 26.

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

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

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

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

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

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

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

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

29) Jory told Complainant that he was discharged.

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

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

32) Jory had been trained on Respondent's policy on OFLA/FMLA leave, but was not aware of OFLA's "sick child leave" provision before discharging Complainant,

and would not have recognized Complainant's need to stay home with his sick child as OFLA leave.

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

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

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

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

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

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

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

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

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

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

CREDIBILITY FINDINGS

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

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

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

46) Complainant's testimony regarding a key event -- the date he took his daughter Cher'ee to Coleman and learned she had head lice -- was filled with internal inconsistencies, improbabilities, and conflicted with statements made earlier to the agency investigator. In February 2001, he told the agency investigator that he arranged childcare for October 25 with Jennifer Coleman on the previous evening, and that he first noticed Cher'ee had head lice on the morning of October 25. During direct examination, he repeated that story. He added that he took Cher'ee to Coleman's apartment at 6:30 a.m. on October 25, expecting to be at work at 7 a.m., and brought Cher'ee back to his apartment before 7 a.m., after Coleman told him Cher'ee had head lice, that he should get a product to treat the lice, and that she was unwilling to babysit until the lice and nits had disappeared. Complainant testified that he called Mike Helmer at 7 a.m. and said his daughter had head lice, he had no childcare, and he would be back to work in 7 days based on the treatment indicated on the label of the lice medication.ⁱ He testified further that he had left Cher'ee with Coleman on only one occasion before October 25, when he and Trachsel had gone on a fishing trip. On redirect, he testified he was "sure" that Coleman watched Cher'ee on October 24, explaining that he had gone to look for his ex-girlfriend's mother that day. He also claimed he may have known Cher'ee had head lice on the night of October 24 and that he didn't recall the exact date he learned she had head lice.ⁱⁱ These are major

inconsistencies in Complainant's testimony and suggest his willingness to alter his testimony to bolster his credibility. Two improbabilities further degrade his credibility. First, Complainant was scheduled to be at work at 7 a.m. on October 25. He gave no reason for his alleged return to Coleman's apartment between 6:30 and 7 a.m. that morning after he had presumably begun his drive to work. Second, Complainant testified that he called Mike Helmer at 7:00 a.m. on October 25, told Helmer about the head lice problem, and said he would be off work for seven days based on the length of treatment printed on the head lice medication. He did not explain how he acquired the head lice medication so as to be able to read from its label. The forum finds it improbable that Complainant would have purchased head lice medication in the short span of time between leaving Coleman's apartment and calling Helmer a few minutes later, at 7:00 a.m., and does not believe this testimony.

There were additional inconsistencies in Complainant's testimony regarding his dates of absence from work in the week of October 16-20 and concerning a phone call made to Respondent on October 27. Complainant testified on direct that Monday in the week prior to October 25 was the first day he missed work, that he missed work on October 16 and 17 because Tami didn't show up to pick up Cher'ee on the night of October 15, and that he missed work every day that week. On cross-examination, he testified that he couldn't recall for sure the days he missed work that week. On redirect, when presented with Respondent's attendance records, he testified that the first day he missed work was October 18. On direct, he testified that he did not call Respondent on October 27. During cross examination, he testified both that he did not call Respondent on October 27 and that he did call and talk to someone at Respondent's workplace on October 27 in response to a phone message left by one of Respondent's employees. He was unable to recall who he talked to.

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

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

48) Ed Jory left Respondent's employ about a year before the hearing and testified only because of the subpoena he received. His testimony was internally consistent and consistent with statements he made to the Agency's investigator in April 2001. He was not impeached on cross-examination and the forum has credited his testimony in its entirety. (Testimony of Jory; Exhibit A-20)

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

testimony that he knew Complainant's daughter had head lice before he fired Complainant, and that he learned of this fact from either Helmer or Sellon. The forum did not believe Helmer's testimony on this issue, but has credited the remainder of his testimony.

ULTIMATE FINDINGS OF FACT

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

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

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

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

5) Complainant obtained childcare starting October 25. He took his daughter to the babysitter that morning before work and returned in the afternoon to pick up his daughter. At the time he left his daughter, he did not know she had head lice or any other health condition. Complainant did not go to work on October 25 and did not call in

to say he would be absent from work. When Complainant picked up his daughter that afternoon, the babysitter told him his daughter had head lice, she needed treatment, and that the babysitter would not care for his daughter until the lice and nits were gone.

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

1) *Former* ORS 659.040 provided:

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

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. *Former* ORS 659.492(2); *former* ORS 659.010 *et. seq.*, ORS 659A.800 to ORS 659A.850.

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

“The requirements of ORS 659.470 to 659.494 apply only to employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken.”

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

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

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

“All employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659.476(1)(b) to (d) except:

“(a) An employee who was employed by the covered employer for fewer than 180 days immediately before the date on which the family leave would commence.

(b) An employee who worked an average of fewer than 25 hours per week for the covered employer during the 180 days immediately preceding the date on which the family leave would commence.”

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

“‘Eligible employee’ means an employee employed in the State of Oregon on the date OFLA leave begins.

“* * *

“(b) For purposes of taking all other types of OFLA leave [except parental leave], * * * an employee must be employed by a covered employer for an average of at least 25 hours per week during the 180 calendar days immediately preceding the date OFLA leave begins.

”(A) In determining that an employee has been employed for the preceding 180 calendar days, the employer must count the number of days an employee is maintained on the payroll, including all time paid or unpaid. If an employee continues to be employed by a successor in interest to the original employer, the number of days worked are counted as continuous employment by a single employer.”

Complainant was an “eligible employee.”

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

“‘Child’ for the purposes of parental and sick child leave, means a biological, adopted, foster or stepchild of the employee, for whom the employee has parental rights and duties, as defined by law, and is responsible to provide care and nurturance, or a child with whom the employee is or was in a relationship of in loco parentis. The child must be:

“(a) Under the age of 18[.]”

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

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

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

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

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

Former ORS 659.478(1) provided:

“Except as specifically provided by ORS 659.470 to 659.494, an eligible employee is entitled to up to 12 weeks of family leave within any one-year period.”

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

“(1) An eligible employee is entitled to as much as 12 weeks of family leave in any one-year period except that [no exceptions apply].

“* * * * *

“(7) Sick child leave need not be provided to an eligible employee by a covered employer if another family member, including a non-custodial biological parent, is willing and able to care for the child.”

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

Former ORS 659.480 provided, in pertinent part:

“(1) Except as provided in subsection (2) of this section, a covered employer may require an eligible employee to give the employer written notice at least 30 days before commencing family leave. * * *

“(2) An eligible employee may commence taking family leave without prior notice under the following circumstances:

“* * * * *

“(b) An unexpected illness, injury or condition of a child of the employee that requires home care[.]

“(3) If an employee commences leave without prior notice under subsection (2) of this section, the employee must give oral notice to the employer within 24 hours of the commencement of the leave, and must provide the written notice required by subsection (1) of this section within three days after the employee returns to work. The oral notice required by this subsection may be given by any other person on behalf of the employee taking the leave.”

“(4) If the employee fails to give notice as required by subsections (1) and (3) of this section, the employer may reduce the period of family leave

required by ORS 659.478 by three weeks, and the employee may be subject to disciplinary action under a uniformly applied policy or practice of the employer.”

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

“(1) Except in situations described in sections (2) and (3) of this rule, a covered employer may require an eligible employee to give 30 days written notice, including an explanation of the need for leave, before starting OFLA leave. When an employee is able to give advance notice and requests leave, an employer may request additional information to determine that the leave qualifies for designation as OFLA leave. The employee is not required to specify that the request is for OFLA leave.

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

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

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

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

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

Complainant had actual knowledge of Respondent’s notice requirement and did not meet that requirement on October 25, 26, or 27, 2000. Respondent disciplined Complainant for violation of Respondent’s notice requirement. Respondent relied on its uniformly applied policy and practice in disciplining Complainant by discharging him on

October 30, 2000. Complainant's discharge was consistent with Respondent's discipline for similar violations of comparable rules.

Former ORS 659.492 (1) provided:

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

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

5) Pursuant to ORS 659A.850(3), the commissioner shall issue an order dismissing the formal charges against any respondent not found to have engaged in any unlawful practice alleged in the complaint.

OPINION

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

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

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

The Agency established, by a preponderance of the evidence, that Cher'ee was Complainant's daughter and that no other family member was available to care for her

on October 25th, 26th, and 27th. The Agency also proved that Cher'ee had pediculosis during that time period and that pediculosis is a condition that requires home care because of its communicable nature and an Oregon administrative rule excluding children with pediculosis from school and daycare.

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

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

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

RESPONDENT WAS ENTITLED TO DISCIPLINE COMPLAINANT FOR HIS OFLA NOTICE VIOLATION

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

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

One more analytical hurdle remains. In addition to the uniform application and consistency restrictions placed on an employer’s ability to discipline an employee who has not complied with OFLA’s notice requirement, *former* OAR 839-009-0250(4)(b)

imposed two more restrictions. It prohibited an employer from taking disciplinary action unless the employer had posted BOLI's OFLA notice "or the employer can otherwise establish that the employee had actual knowledge of the notice requirement." No evidence was presented to show that Respondent had or had not posted BOLI's OFLA notice, so the forum may not conclude that the notice was posted. The second restriction requires the forum to determine the meaning of the words "notice requirement." In doing so, the forum must arrive at an interpretation that is plausible and consistent with the wording of the former rule itself, its context, and the former statute. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994).

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

notice requirements, one oral and one written, that apply at different times relative to the leave.

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

Next, the forum examines the specific language of the rule in question. If the employer had not posted BOLI's OFLA notice, *former* OAR 839-009-0250(4)(b) requires an employer to prove that an employee "had actual knowledge of the notice requirement" before the employer can discipline an employee for violating the employer's "uniformly applied policy or practice" pursuant to *former* OAR 839-00900250(4)(a). This implicit reference to subsection (4)(a), along with the specific reference to BOLI's OFLA leave notice in (4)(b), leads the forum to conclude that the "actual knowledge" requirement in (4)(b) refers to an employee's actual knowledge of OFLA's notice requirements or the employer's notice requirements. Finally, had the Agency intended the "notice requirement" in (4)(b) to refer only to an employee's actual knowledge of OFLA's notice requirement, it could have easily done so by appending the

qualifying phrase “contained in OFLA” to the last sentence of that rule. This interpretation is consistent with the wording of the former rule itself, its context, and the former statute. Complainant had actual knowledge of Respondent’s notice requirement, did not follow it, and was fired after he failed to call in or report to work for three days. As noted earlier, his belated call to Respondent on October 27 also did not meet OFLA’s 24-hour notice requirement.ⁱⁱⁱ

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

THE AGENCY’S EXCEPTIONS

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

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

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

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the Complaint and Specific Charges filed against Respondent NES Companies, LP, are hereby dismissed according to the provisions of ORS 659A.850(3).

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

ⁱⁱ His specific testimony was “by Wednesday I knew she had head lice, possibly Tuesday night; I don’t recall the exact date.”

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