

**In the Matter of**

**WAL-MART STORES, INC. dba Wal-Mart**

**Case No. 35-01**

**Final Order of the Commissioner Jack Roberts**

**Issued September 27, 2002**

**SYNOPSIS**

Complainant suffered an on-the-job injury and applied for and used the procedures in ORS chapter 656 while in Respondent's employ. After accommodating Complainant's series of increasingly restrictive medical releases over a two-month period, Respondent terminated Complainant for violating Respondent's policy prohibiting offensive language in the workplace and did not terminate other workers who violated the same policy. The Commissioner found that Respondent's reason was a pretext for discrimination and that Respondent discharged Complainant because he invoked and used the procedures in ORS chapter 656 and awarded Complainant \$25,000 in back pay damages, \$623.50 in benefits lost, and \$7,500 in mental suffering damages. The Commissioner also found that the Agency did not establish that Respondent failed to reemploy Complainant in available and suitable work, in violation of *former* ORS 659.420. *Former* ORS 659.410(1), *former* ORS 659.420; *former* OAR 839-006-0120, *former* OAR 839-006-0105(4)(a), *former* OAR 839-006-0135.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 30-31 and November 1, 2001, in the Oregon Employment Department conference room, located at 1007 SW Emkay, Bend, Oregon.

David K. Gerstenfeld, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). William F. Masters ("Complainant") was present throughout the hearing and was not represented by counsel. Leah C. Lively, Attorney at Law, represented Wal-Mart Stores, Inc. ("Respondent"). Jeff Keys was present throughout the hearing as Respondent's corporate representative.

In addition to Complainant, the Agency called as witnesses: Rebecca and Russel Horn, Complainant's friends; Christopher Bjerke, John Leese, Tony Farkes, and James Shortreed (by telephone), former Respondent employees; Jesse Hornbeck and Jamey Osborne, current Respondent employees, and Linda Bailey, Respondent's automotive manager.

Respondent called as witnesses: Jeff Keys, Respondent's Tire/Lube Express ("TLE") store manager; Leslie Taylor (formerly Van Sant), Respondent's personnel manager; Kurt Gale (by telephone), Respondent's Redmond store manager; Liesa Holliday and Jesse Hornbeck, current Respondent employees; and Christopher Bjerke, former Respondent employee.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-14;
- b) Agency exhibits A-1 through A-14 (submitted prior to hearing) and A-15 through A-24 (submitted at hearing);
- c) Respondent exhibits R-1 through R-55 (submitted prior to hearing) and R-56 through R-88 (submitted at hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On August 18, 1999, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging Respondent had required him to work beyond medical restrictions that were in place as a result of Complainant's on-the-job injury. Complainant further alleged Respondent terminated him based on his use of the workers' compensation laws. On June 14, 2000, Complainant filed an amended

complaint that did not make any substantive changes to Complainant's initial complaint. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting Complainant's allegations.

2) On April 5, 2001, the Agency submitted to the forum specific charges alleging (1) Respondent discriminated against Complainant by terminating him based in substantial part on his application for and use of the procedures provided for in ORS chapter 656, in violation of *former* ORS 659.410(1), and (2) Respondent failed to provide Complainant available and suitable work, in violation of *former* ORS 659.420(1). The Agency also requested a hearing.

3) On April 6, 2001, the forum served on Respondent the specific charges, accompanied by the following: a) a Notice of Hearing setting forth October 30, 2001, in Bend, Oregon, as the time and place of the hearing in this matter; b) a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On May 24, 2001, Respondent, through counsel, filed a timely answer to the specific charges, denying the allegations of unlawful employment practices and alleging certain affirmative defenses.

5) On March 29, 2001, the Hearings Unit received a copy of Respondent's informal request to the Agency for the production of documents.

6) On September 10, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to

the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damage calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by October 19, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

7) On September 26, 2001, Respondent moved to postpone the hearing and included an affidavit of its counsel stating that the participants were in the midst of discovery and still coordinating out of state witnesses and that the Agency case presenter had no objection to a postponement.

8) On September 26, 2001, the forum denied Respondent's motion for postponement, stating in pertinent part:

"I have considered OAR 839-050-0150(5), which says, in part:

'If all participants agree to a postponement, in order for the postponement to be effective, the administrative law judge must approve of this agreement. Whether the administrative law judge grants or denies such a motion for postponement, the administrative law judge shall issue a written ruling setting forth the reasons therefore.'

"In addition, I have considered OAR 839-050-0000 which states that one of the purposes of the hearings rules is to provide for timely hearings. Despite the Agency's agreement to postpone the scheduled hearing, I do not approve of the agreement and Respondent's motion is **DENIED** based on the following considerations.

"As Respondent points out, no previous postponements have been requested and neither participant has indicated that it was prepared to proceed. However, until this motion, neither participant had indicated that it was not prepared to proceed. In fact, by implication, the Agency indicated its readiness for a hearing by requesting a hearing date on March 7, 2001. The October 30 hearing date was originally set on April 5, 2001, with no objection from either participant in the almost six months since the hearing notice issued. According to Respondent, it is still conducting discovery and will need to coordinate the schedules of witnesses who are now living in locations other than Oregon, yet this late date is the first time Respondent has brought its case preparation issues to the forum's attention.

"Regarding the discovery issue, this forum has previously denied a respondent's motion for postponement based on failure to complete

discovery where the respondent failed to demonstrate adequate efforts to complete discovery in the months leading up to the hearing. *In the Matter of Staff, Inc.*, 16 BOLI 97, 100 (1997). In this case, Respondent does not contend there were any problems conducting discovery nor is there a record of any formal attempts to obtain discovery, *i.e.*, requests for a discovery order. By the October 30 hearing date, the participants will have had seven months, more than ample time, to complete discovery. In the same vein, Respondent has had since early April, and at least two attorneys of record at the ready, to contact witnesses and arrange for their appearance at the scheduled hearing. Moreover, any witness whose schedule is not compatible with the hearing date can give testimony either by telephone or sworn statement. Postponement is not necessary in this case given the other reasonable options. The forum finds Respondent's reasons do not constitute good cause for postponement. See OAR 839-050-0150(5)(a) and OAR 839-050-0020(10).

"Additionally, the participants agree that the only times available to reset the hearing are the weeks of February 18 and March 18, 2002. The Hearings Unit docket shows that Mr. Gerstenfeld is scheduled for another hearing on the February 18 date, leaving March 18, "or anytime thereafter," the only date the participants' representatives are available for hearing. The forum finds it manifestly unjust to expect the Complainant in this matter to wait almost one year from the date the hearing notice issued to obtain a hearing on his complaint. This matter will not be easier to try or defend with the passage of more time – fairness cannot be realized by delaying this hearing for another five months.

"The hearing will convene as scheduled on **Tuesday, October 30, 2001**, at the time and place set forth in the Notice of Hearing issued April 5, 2001.

**"IT IS SO ORDERED."**

The ruling is hereby affirmed.

9) On October 9, 2001, the Agency filed a motion for a discovery order seeking three categories of documents. The Agency provided a statement describing the relevancy of the documents sought and further stating that the same documents and information had been requested on an informal basis and not provided. Respondent did not file a response to the Agency's motion.

10) On October 16, 2001, the forum granted the Agency's motion for discovery order and ordered Respondent to provide the three categories of documents sought by the Agency.

11) On October 16, 2001, after the forum's ruling on the Agency's motion for postponement had been posted, the Hearings Unit received Respondent's "Memorandum in Response to the Agency's Discovery Order" requesting the Agency's motion be denied because the documents sought were not relevant and not likely to lead to relevant evidence. Because the response was timely, the forum considered Respondent's objections and issued a supplemental ruling on the Agency's motion on October 18, 2001. The forum affirmed its October 16, 2001, ruling in its entirety.

12) On October 19, 2001, the Agency and Respondent filed case summaries.

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

14) At the start of hearing, the Agency and Respondent clarified and confirmed the material facts they stipulated to in their case summaries. Additionally, the Agency and Respondent stipulated that Complainant made \$1,503.30 in purchases between October 16, 1998, and May 24, 1999, using his employee discount card, which qualified him for a 10% discount on those purchases.

15) During the hearing, the Agency and Respondent stipulated that the medical notes in the record form the basis of Complainant's work restrictions and his time off work.

16) During the hearing, the Agency and Respondent stipulated that Complainant did not work on May 30 or May 31, 1999.

17) At the conclusion of the hearing, the Agency and Respondent stipulated to the admission of the Agency investigator's contact reports, exhibits A-19, A-20, R-84 through R-86, as impeachment evidence.

18) The ALJ issued a proposed order on August 14, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency did not file exceptions. Respondent filed a timely exception, which is addressed in the Opinion section of this Final Order.

### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Wal-Mart Stores, Inc. was a foreign corporation operating retail establishments under the assumed business name Wal-Mart (“Respondent”), and was an Oregon employer utilizing the personal services of six or more persons.

2) On September 23, 1998, Respondent employed Complainant as a “Tire/Lube Technician” in its Redmond, Oregon, store’s Tire/Lube Express (“TLE”) department.

3) When he was hired, Complainant reviewed and signed a “Wal-Mart Stores Matrix of Essential Job Functions,” on which he indicated that he had “the ability to perform all of the [listed] functions with or without a reasonable accommodation.” According to the matrix, the essential functions of Complainant’s technician job included: automotive service and repair; completing accounting records and forms; customer assistance; inputting and retrieving information; maintaining records and logs; preparing, mailing, and filing routine paperwork; pricing merchandise; stocking and setting displays; unloading trucks and checking in merchandise; lifting medium heavy objects occasionally; and moving some objects with assistance. Complainant’s job functions also included repetitive hand and foot action, basic reading and writing, bending, twisting, squatting and “fine manipulation.” Complainant’s job performance also required sitting, standing, and walking.

4) At times material herein, the TLE department included an office/reception area and an automotive shop that were separated by a low divider. The service areas

in the shop were called “bays” and each bay included a “pit” that enabled TLE technicians to service cars from the underside. The pit was called the Lower Bay and the service area above the ground floor was called the Upper Bay. When the Lower Bay was not in use, a metal grate that weighed about 25 pounds covered it. To gain access to a car from the Lower Bay, technicians had to lift the grate slightly and slide it sideways in its track. The technicians typically drove the cars to be serviced into the Upper Bay and onto a railed platform that lowered and raised the cars over the Lower Bay. Technicians typically changed oil filters, lubricated chassis, checked and filled, if necessary, washer, transmission, power steering, and differential fluids, and checked and replaced, if necessary, headlamps, signal lights, taillights and brake lights, tire pressure, wiper blades, and air filters. The technicians also vacuumed carpeting and changed tires as part of their automotive service. Lubricating a chassis and checking and filling transmission and differential fluids took place in the Lower Bay. Depending on the type of vehicle, most of the other services were performed in the Upper Bay. Except for changing tires, none of the services required lifting over 10 pounds. Some bending at the waist was required for vacuuming and changing the oil on some types of vehicles.

5) In the TLE office/reception area, a technician could perform work as a “greeter” by greeting customers, writing up service orders, and making sales. The greeter job was considered “light duty” that Respondent made available to workers who were temporarily physically restricted from performing their regular job duties. Depending upon the extent of a worker’s physical restrictions, a greeter’s duties could include some Upper Bay work.

6) At times material herein, Jeff Keys was the TLE store manager and was Complainant’s supervisor. Keys was responsible for assigning shifts and making the

weekly schedule. He assigned two workers to open the department in the morning and two workers to close up each evening. Another worker came in mid-day to supplement the opening and closing shifts. The “openers” generally prepared the shop for business by “cleaning out merchandise” on the shelves, stocking shelves, if necessary, and mopping the floor. The “closers” pulled in merchandise that was displayed outside, carried out garbage bags, and stocked shelves, if necessary. Outdoor displays sometimes included cases of oil, tires, and pallets of “ice melt.” Bags of “ice melt” weighed about 40 pounds each and tires ranged in size from 25 to 60 pounds each.

7) Although swearing was against Respondent’s official policy, it was tolerated in the TLE department. Almost everyone, including Keys and Jesse Hornbeck, used swear words or offensive language in the workplace. Most of the technicians, including Complainant, tried to watch their language around co-worker Jamey Osborne because he was thought to be very religious and he made known to his co-workers his distaste for foul language. Osborne never complained to management about workplace swearing, but did confront individuals about their language whenever he was particularly offended. Automotive manager Linda Bailey heard “swearing quite often” from all of the technicians, but never reported it to upper management, despite a store requirement that she do so. The only complaints Bailey heard from others concerning swearing were about Ron Crowder, a service manager, who many considered particularly offensive. Some technicians were louder than others and were told by Keys or Bailey to watch their language within customer earshot. Complainant was occasionally loud, but was never given a verbal warning about his use of swear words in the workplace. The use of “bitch,” “prick,” and “slut” was common and considered “guy language” among the technicians. Respondent has not terminated

anyone in the TLE department for offensive language alone or for using “profanity against another associate.”

8) Respondent’s disciplinary policy, “Coaching for Improvement,” published in Respondent’s corporate employee handbook and in effect at times material, stated in pertinent part:

”Coaching for Improvement is designed to be progressive. Apply Coaching for Improvement in a fair, timely and consistent manner. Always start at the appropriate Coaching Level depending on the classification of behavior to be addressed. More serious levels of coaching are used at appropriate intervals until either the Associate’s conduct or performance reaches the desired improvement or all coaching levels have been exhausted.

”Coachings should be conducted in a manner which allows the Associate to explain his/her behavior and to learn from the discussion.

”Investigations are a routine part of the coaching process. It ensures a complete review of the facts and allows time for proper consideration of appropriate disciplinary action. During the investigation, the Associate may be suspended without pay if it is in the best interest of all parties involved.

“ \* \* \* \* \*

”Administering the Coaching for Improvement Process

”1. Gather the facts including witness statements, if appropriate.

”2. Discuss the situation with the Associate to get his/her side of the story and any additional facts.

”3. Follow the procedures for effective coaching (set climate, etc.).

”4. Conduct the Coaching for Improvement session, along with another member of management present, if the facts and the initial discussion with the Associate concludes a coaching is appropriate.

”5. Properly classify whether the action is related to job performance or a specific behavior (misconduct or gross misconduct).

”6. Determine the appropriate level of coaching. Depending upon the behavior, steps may be skipped.

”7. Complete the Coaching for Improvement Form, including the Action Plan.”

The policy includes three levels of “Coaching for Improvement.” The first is verbal notification to the employee that he or she does not meet Respondent’s expectations.

The verbal contact is documented by the supervisor, but not maintained in the employee's personnel file. Level two is a written "coaching" that requires the employee's signature. It is used when "Verbal Coaching has not been successful in changing or correcting the unacceptable behavior or performance." Level three is a "decision making day" and is the "final opportunity for an Associate to evaluate his or her behavior in view of Wal-Mart's expectations prior to Termination." According to the policy, "Level three must also be formally documented and should be signed by the Associate," the supervisor must "clearly explain the deficiencies noted at earlier Coaching for Improvement Levels and the specific improvement required, "and the employee is required to "complete and sign a detailed action plan." The policy describes the "decision making day" as follows:

"After conducting the Level Three session, the Associate is given one (1) day off with pay to decide whether he/she will make the required improvement. The Decision-Making Day is the Associate's next scheduled workday. The Associate should be paid for the number of hours he/she was actually scheduled to work. For payroll, designate these hours as 'Other Pay – Decision Making Day.'

"Meet with the Associate at the start of his/her next scheduled work day to review the Associate's detailed action plan developed during the Decision Making Day and to discuss his/her decision as to making the required improvement.

"An Associate may be given only one (1) Decision-Making Day within a 12 month period. If the Associate has already been given a Decision Making Day within the preceding 12 month period and reaches this coaching step for a separate behavior issue, the Associate is subject to immediate termination."

Complainant received and read the handbook in September 1998.

9) In November 1998, Complainant received a 90-day "Associate Evaluation" for the period September 23 to December 23, 1998, which stated, in pertinent part:

"William is a good leader, he sets a good example for others to follow. He has always shown respect for everyone he works with. William needs to develop motivational skills & help the productivity of our shop through the team.

“ \* \* \* \* \*

“William provides good service to our customers. He has no problem meeting their needs as an individual. William needs to focus on our 15/40 goal to promote the best customer service possible, [*i.e.*], teamwork.

“ \* \* \* \* \*

“William communicates well. He is able to ask questions without hesitation. William needs to communicate more with his co-workers, to inform them about what he is working on & where he left off (this will prevent accidents & better the overall communication in the shop).

“William is dependable & has proven himself to be verry [*sic*] flexible. William needs to remember to wear his safety glasses at all times.

“William meets company goals with no problem on tires \* \* \* William reacts well to changes in workload. (Sometimes taking latter [*sic*] lunches, staying late &/or missing breaks.) His CBL training is complete as well as his tech. training.

“OVERALL STRENGTHS \* \* \* William has a good understanding of what customer service is. He provides it verry [*sic*] well. His knowledge of tires is great. His ability to learn is good. He can be a good leader when he applies himself.

“AREAS OF IMPROVEMENT \* \* \* William needs to focus on his area of responsibility (the shop). He needs to wear his safety glasses at all times in the service area. William also needs to let his co-workers know when he [*is*] moving on to another job, preventing accidents & confusion. William also needs to focus on 15/40 with the rest of the team.”

In the section for “Associate Comments/Goal Setting,” Complainant wrote:

“I do not agree with needing to develop motivational skills. I also don’t believe I have a problem focusing on my area of responsibility.”

10) On December 18, 1998, Complainant received a written coaching (level two) after he was observed “clocking out at the end of his shift and leaving out the TLE exit.” Complainant’s behavior was characterized as “a form of gross misconduct impacting the associate’s integrity” and Complainant was advised that henceforth he would be expected to “enter and exit the facility through the front entrance during business hours as stated in the Associate Handbook that he [*had*] signed.” Complainant signed the written coaching, but in the “comments” section he wrote, “I

don't think it is right that when we are not on the clock we still have to enter thru [sic] the front doors."

11) In February 1999, Complainant received a "Decision-Making Day" (level three) after "falsifying" a customer's arrival on a service order. Keys "coached" Complainant and admonished him that "this act of falsification [sic] is not allowing us to properly track our 15/40 results, and it is not allowing us to strive to reach our company goal honestly." Complainant was warned that he would be terminated if "this behavior continues." Complainant wrote an action plan that stated: "In the future if there is a work order without the time of arrival, I will be sure to bring it to the attention of the associate who wrote the customer up, so if they remember the time they can fill it in and if not I will just leave it blank. I will continue to do my job as asked of me and do everything I can to keep away from integrity issues." The decision day was documented and signed by Keys and Complainant.

12) On April 1, 1999, Complainant suffered an on-the-job back injury while lifting a 60-pound tire. Complainant reported his injury to Respondent and made a claim for workers' compensation benefits as provided under ORS chapter 656. His claim was accepted for "lumbosacral strain" and classified as disabling.

13) Complainant sought immediate medical attention for his back injury. The treating physician took Complainant off work for one day and scheduled him for reevaluation the following morning "before returning to work tomorrow." The next day, April 2, 1999, Complainant was reevaluated and released with the following instructions:

"Rest back \* \* \* No lifting > 15 lbs. No climbing ladders, pushing, pulling, prolonged standing or prolonged sitting. If desk work available – he may do this for brief periods at a time. Best that he is totally off work & resting for next few days.

"Sun 4-4 or Mon 4-5 for [reevaluation] before returning to work. If unable to return to work Mon 4-5 will be referred to orthopedic MD.

“Do not return to work F 4-2 or Sa 4-3 (unless light duty available).”  
(emphasis in original)

Complainant acknowledged, in writing, that he had received all of the instructions indicated above. Complainant did not work April 2, April 3, or April 4, 1999.

14) On April 5, 1999, Complainant notified Respondent’s workers’ compensation insurer that he was changing his “attending physician.” His new physician authorized Complainant to be off work for the period April 1 through April 11, 1999. Complainant did not work April 5 through April 11, 1999.

15) By form letter dated April 8, 1999, Respondent, through its “Early Return to Work Nurse,” Sandra Fuchs, notified Complainant’s physician that it had “light duty work available for [Complainant] during the time [he was to be] recovering from his injury” and described the light duty as a “greeter” who “[w]elcomes customers to the store, may alternate between standing, walking and sitting [with] no lifting or carrying required.”

16) Complainant’s supervisor, TLE manager Jeff Keys, telephoned Complainant’s physician’s office twice on April 12, 1999, and expressed concern that Complainant was off work and indicated a desire to speak to the doctor about returning Complainant to light duty work. Complainant’s physician’s notes, dated April 12, state the following:

“1. Will get back x-rays today.

“2. Would like [Complainant] to start on Physical Therapy program for the next 2 weeks.

“3. I have put [Complainant] off work for 1 week and then, after that he may go back to a light duty position, 8 hours per day.

“ \* \* \* \* \*

“5. Have FAX’d a form to attention of Sandra Fuchs, R.N., that [Complainant] may go back to a light duty position as of 04-19-99, at 8 hours per day.”

17) On April 12, 1999, Complainant's physician wrote a brief note stating Complainant was "off work 4/12 – 4/19 due to LS strain." Complainant did not work April 12 through April 19, 1999.

18) On April 19, 1999, Complainant's physician released him for his regular job duties with "no restrictions." Complainant did not work on April 19, 1999, but resumed his regular job duties with no physical restrictions on April 20 for the first time since his injury date.

19) On April 22, 1999, Complainant's physician modified the April 19 work release by limiting Complainant to four-hour workdays and a 25-pound lifting restriction. Thereafter, Respondent offered Complainant light duty work as a "greeter" which, in the TLE department, included greeting customers, writing up service orders, and sweeping floors. Complainant did not work April 21 through April 24, 1999. He began his light duty work on April 25, 1999, and worked the remaining days of April except for April 29, for a total of five days under the 25-pound lifting restriction and four-hour workdays in April. He did not work May 1, 1999, but worked May 2 through May 4, while still under the April 22 restrictions. There is no evidence that Complainant worked more than four hours per day or lifted over 25 pounds between April 25 and May 5, 1999.

20) On May 5, 1999, Complainant was released to work eight-hour days, but his lifting restriction was decreased to 15 pounds "for the next 3 weeks." Complainant did not work May 5 or 6, but worked May 7-11, May 14-15, May 17, and May 21-24 with a 15 pound lifting restriction. Keys did not ask Complainant to work beyond his restrictions between May 7 and May 24, 1999. The TLE department was understaffed and Complainant sometimes felt pressured by Keys and co-workers to work beyond his lifting restrictions and occasionally did so on his own volition.

21) On May 26, 1999, Complainant's weight restriction was reduced to 10 pounds and he was restricted from "work that involve[d] bending over at the waist on a regular basis." Complainant did not work May 25-27.

22) On May 28, 1999, Complainant worked in the Upper Bay. Invoices show that Complainant, in addition to checking fluids, vacuumed and checked the tire pressure on several cars that day.

23) On May 29, 1999, Keys asked Complainant to help with the tires because the TLE department was understaffed that day. Complainant worked on the tires and when he began to experience pain, he told Keys that he wanted to go home early and take some pain pills. Keys told him to continue working. At some point during the day, Keys was given a copy of Complainant's May 26 medical restrictions by the personnel office. On the copy he received, Keys noted the date, "5-29-99" and time, "2:30 p.m.," and wrote: "[Complainant] is to greet customers, write up service orders & work within his doctor's orders." Both Keys and Complainant signed the note.<sup>ii</sup> Sometime thereafter, Complainant left work and returned with a note from his physician, dated May 29, 1999, that stated: "Mr. Masters may not return to work until 6/4/99, if approved by Dr. Moore." By the time Complainant returned with a different note from his physician, Keys was not available, so Complainant made copies of the note and pinned one to the bulletin board near the cash register and asked the cashier to show it to Keys. When he returned home, he received a telephone call from Keys' supervisor, Steve Bock, who berated Complainant "for leaving work early after [Keys] told him no" and for leaving his physician's note on the bulletin board without giving it to Keys. Bock said to Complainant, "shame on you," several times, which upset Complainant very much. Complainant did not work May 30 or 31, 1999.

24) Complainant's doctor referred him to a bone and joint specialist, Dr. Moore, who examined him on June 3, 1999, and returned Complainant to modified work on June 4, 1999. The modified release included a four-hour workday and modified restrictions for sedentary work that included the following limitations: "Lifting 10 lbs. maximum. Includes occasionally lifting and/or carrying small objects. Involves sitting; a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking, standing is required only occasionally and all other sedentary criteria are met." Additional restrictions included "no changing tires, no repetitive stooping, bending or twisting." The release indicated that the restrictions were temporary and the doctor expected Complainant to return to 6-hour days in one week and 8-hour days after three weeks.

25) Complainant returned to work around 8:00 a.m. on June 4, 1999, and gave Keys his medical release. Keys prepared a written list of job duties Complainant could perform within his restrictions that stated:

"William Masters is to perform the following job duties.

"(1) He is to greet the customers, write up their Service Orders, prepare their static cling window sticker. This Job Dutie [sic] will be defined as the greeter position.

"(2) William will also pull cars into and out of our lube bays[,] then page the customer to let them know their car is completed.

"In the event we are not servicing a vehicle[,] William will be responsible for sweeping inside & outside service area & moping [sic] all areas as necessary.

"William is not to perform any duties that conflict with his doctor's orders if William performs any other dutie [sic] not defined in this discription [sic] he does it at his own risk an[d] against Wal-Mart policy & doctors orders."

Both Keys and Complainant signed the document. Complainant worked his four-hour shift without incident and was not asked at any time to perform work beyond his medical restrictions.

26) After he finished his shift, Complainant looked for Keys to “talk to him about something,” and found him in his office typing what Complainant thought was a “termination notice.” Keys asked Complainant to follow him to Kurt Gale’s office where Keys and Gale told him he was being terminated for “using profanity to verbally degrade a fellow employee.” Complainant was shown a “Coaching for Improvement Form” that stated the following:

“William has been previously coached and sent on a decision making day for integrity [sic] on two separate [sic] occasions.

“ \* \* \* \* \*

“William has used profanity toward [sic] other associates in our unit.

“ \* \* \* \* \*

“This is in direct violation of Wal-Mart policy and will not be tolerated.

“ \* \* \* \* \*

“[T]his is the third violation of Wal-Mart policy and termination.”

Complainant signed the coaching, but wrote in the comment section: “Did not verbally abuse another associate. I know I am being terminated due to my on the job injury & I won’t let this issue be.” Complainant also signed an “Exit Interview” form that stated, in pertinent part: “William used profane [sic] language toward [sic] another associate in the Tire Lube Express.” Keys and Gale also signed the coaching and interview forms.

27) On June 4, 1999, Keys asked Hornbeck to write up a complaint Hornbeck purportedly had regarding Complainant’s language toward him in the workplace. The written complaint was dated “6-4-99” and stated: “I would appreciate [sic] if [Complainant] whod [sic] not use bad language at me when in shop. I do not like be [sic] cald [sic] a bitch or prick. Jesse H.” Hornbeck had purportedly talked to Keys several times before about Complainant’s language, but on this day he was asked to write down his complaint.

28) On June 4, 1999, Keys asked John Leese if he had heard any swear words in the shop that morning. Leese told Keys that Complainant had said, "bitch," and Keys asked Leese to document what he had heard. Leese wrote a note stating: "Jeff has asked me to write a statement on the laungue [sic] being used in the shop. The only word I heard was bitch [and] that came from Bill Masters. John Leese, 6-4-99." Keys did not ask Leese if the language offended him. Leese was not offended by the language and did not know that Keys' request for the note pertained specifically to Complainant.

29) Hornbeck believed that Complainant was exaggerating his work injury in order to avoid working and discussed his belief with Keys, who shared the same "suspicions." Keys also made comments to other workers, including Leese and Bailey, that he believed Complainant was "milking his injury" and just did not want to work, and that Complainant was "stretching it out."

30) One month after Complainant was terminated, Hornbeck was promoted to service manager and received a .50 pay increase. Three months later, he received a .90 pay increase.

31) During Complainant's employment, Ron Crowder was the service manager in the TLE department. At some point, Crowder suffered a compensable shoulder injury and was released for full duty with no restrictions in November 1998. While Crowder was on light duty, Keys referred to Crowder as the "one armed man." Crowder told Keys he was offended by the comment and Keys apologized.

32) On April 30, 1999, Respondent terminated Ron Crowder after he was "observed treating customers rudely." On Crowder's "Coaching for Improvement Form," Keys stated:

“On one occasions [sic] Ron was abusive in unacceptable language referencing a customer. Also Ron was observed canceling [sic] service orders using abusive language again and being overheard by customers.”

Keys noted on the form that Crowder had two previous coachings involving “orientation” [sic] and “customer care and culture.” Keys also noted on the form that Crowder was terminated “effective this coaching.” There are no signatures on the written coaching. Crowder’s purported termination was based on written complaints from Liesa Holliday and Jesse Hornbeck. Holliday’s complaint was dated April 28, 1999, and stated:

“On Saturday April 24, 99, [sic] a woman came in and said we changed her oil on Friday April 23, 99 [sic]. She asked for her air filter to be changed and it wasn’t so I took one off the shelf and took it to her car & Ron [Crowder] said ‘That bitch was here last night, you don’t need to do anything for her.’”

Hornbeck’s complaint was dated April 14, 1999, and stated:

“Regarding the incident on April 12, 1999, a female customer stopped by to pick up her car aproximatley [sic] 6:30 p.m. She had brought it in for a tire change over earlier in the day. I talked with the woman and assured her that after I finished up the car I was currently working on I would pull her car in and do the job. Then I asked Ron [Crowder] to pull it in on another bay for me. At that time he picked up the paper work on the customer’s car and said ‘I’m am [sic] just going to cancel these fucking orders [illegible].’ And then started canceling the orders. After he knew I had already told the customer that I would do her car next. Overhearing what Ron said to me, the female customer asked for her keys back. Ron’s attitude then went pissy because the customer caught him in his bad attitude. I got up from what I was doing. Ron gave her her keys, then asked Ron what his name was he told her and she left. She returned shortly thinking that she didn’t have all of her keys. At that time I stepped in and helped look for more keys and found nothing. It was obvious that she felt belittled and that her business wasn’t needed. Ron continued to belittle the customers and employees the rest of the day. This was not the only customer Ron was rude to on this day.”

On the same day Hornbeck wrote his complaint, he received a pay increase of .25 and a commendation from Keys for, among other things, continuously going “above and beyond the normal call of duty.”

33) On June 22, 1999, Keys wrote a note stating:

“Associate Ron Crowder was being coached on 4-30-99 for abusive behavior toward a customer. When asked if he had anything to say or if he was going to defend the coaching he said ‘Why don’t I save you the trouble, I’ll quit.’ I accepted his resignation as this was going to be a termination anyway. He saved us from proceeding at that point.”

Keys based his decision to terminate Crowder on Hornbeck’s complaint. Hornbeck replaced Crowder as the service manager in July 1999.

34) Complainant usually gave Respondent a copy of his medical restrictions the day after or within two days of seeing his physician.

35) Complainant was “upset and depressed” that Respondent “used his on-the-job injury to take [his] job away.” He also suffered financial strain due to his sudden loss of income that resulted from his termination. His credit cards, which had stayed current while he worked for Respondent, were eventually turned over to a collection agency. He also lost the benefit of his employee discount card for purchasing necessities. Although he still shops at Respondent’s Redmond store, he continues to experience a loss of savings that averages approximately \$21.50 per month. Complainant would have saved approximately \$623.50 in purchases had he continued in Respondent’s employ. Additionally, Complainant no longer engages in his hobby of purchasing “wild baby horses” to tame and sell because he cannot afford the \$20-\$50 purchase price for wild horses.

36) Complainant’s physician released him for “full” duty with a 50 pound lifting restriction approximately two months after Respondent terminated him. When he was terminated, Complainant was earning \$7.80 per hour and was subject to a medical release that authorized four-hour workdays and sedentary work. The week prior to his termination, Complainant was scheduled to work five workdays. There is no evidence that Complainant would not have been kept on the same weekly schedule had he continued in Respondent’s employ, nor is there any evidence establishing that Respondent would not have continued to accommodate the medical restrictions in place

when Complainant was terminated. During that two-month period, Complainant would have earned \$1,248 ( $\$7.80$  per hour x 4 hours per day x 5 days per week x 8 weeks) had he continued his employment with Respondent.

37) After Complainant received his "full" work release, he had a difficult time finding suitable employment. At the time of hearing he was still unemployed after 29 months. During that time, he applied for 30 to 35 jobs, at farms and ranches, and with employers such as, Les Schwab's, Leathers' Fuel Station, Texaco, Star Mart, Shotard Farms, Ace Buyers of Madras, and the Oregon Livestock Auction. Five to six months after he was terminated, Complainant was hired by the Oregon Livestock Auction, but was terminated thereafter for lack of work. He earned approximately \$3,000. He applied again later for the same job, but was told they were not hiring at that time. There is no evidence that Complainant would not have been reinstated nor reemployed after he received his full work release had he continued his employment with Respondent. Complainant would have earned \$33,696 between August 1999 and the date of hearing ( $\$7.80$  per hour x 8 hours x 5 days per week x 4 weeks x 27 months) had he continued in Respondent's employ. After deducting Complainant's interim earnings, the total Complainant would have earned, but for his termination, is \$30,696 in gross wages.

38) Complainant's testimony was somewhat self-serving. He insisted Keys "forced" him to work beyond his medical restrictions within a few days after he returned to work and continually thereafter, despite evidence that he was initially returned to work with no restrictions and his own testimony that Keys did not ask him to exceed his restrictions between May 5 and May 25, 1999. Except for two occurrences, he was unable to remember specific dates Keys asked him to work beyond his restrictions, what work Keys asked him to perform, or what medical restrictions were applicable at

the time. One of his examples purportedly took place during “icy” weather and involved “pulling in pallets of ice melt.” Credible evidence shows, however, that the only time that incident could have occurred was on April 20, a day that he was working under a full work release. When asked by an Agency investigator, Complainant denied ever receiving a “full” work release while still employed by Respondent. At hearing he insisted he had no memory of the documented release. Additionally, his initial statement to the Agency investigator that Keys forced him to work beyond his most restrictive work release his last full day of work, June 4, 1999, was contradicted by his testimony at hearing that he was not asked to do anything beyond his medical restrictions that day.

On the other hand, Complainant acknowledged that he occasionally worked beyond his medical restrictions on his own volition and the forum found his testimony that he felt compelled to do so at times because he thought it was expected of him, believable. The forum also believed his testimony that on May 29, 1999, Keys asked him to help with the tires. The forum accepts Complainant’s account of the events that day, except for the timing and with the addition of an event Complainant omitted during his testimony at hearing.<sup>iii</sup> Overall, the forum found Complainant’s testimony more credible than that of Keys. Consequently, the forum has relied on Complainant’s testimony in deciding the material facts, particularly where other credible evidence supported that testimony. In some instances, where Complainant’s testimony was not corroborated, did not seem inherently credible, and was self-serving, the forum has not credited it.

39) Russel and Rebecca Horn’s testimony was not entirely credible. They both showed a bias as Complainant’s “foster parents” by their emphatic belief that virtually anything Complainant told them must be the truth. Moreover, their memory of

pertinent events was unreliable and at times was inconsistent with prior statements each made to the Agency investigator. For instance, when explaining knowledge of Complainant's work restrictions and his being pushed beyond those restrictions, Russel Horn told the Agency investigator that he went with Complainant to all of his doctor's appointments and saw the doctor with Complainant each time. At hearing, he stated he did not go to two of the medical appointments and had not read all of the medical releases, but had relied on Complainant's statements about some of his restrictions. Both Horns testified that Complainant was released within four or five days after he was injured, with a very limited work restriction - "to do almost nothing" - and that Respondent forced Complainant to work beyond those restrictions within a week or two of his release. Yet the only incident they describe with clarity is one where Russel Horn helped Complainant move pallets of "ice melt" into the shop at closing time, on a date Horn claims could "very easily be April 20."<sup>iv</sup> On that date, Complainant had a full work release with no restrictions. Additionally, both Horns told the Agency investigator that Complainant had to work with a "new" person who "didn't know what he was doing" on the night Complainant and Horn moved the pallets of "ice melt." At hearing, both testified with certainty that Complainant had been "forced" to work alone that night, which caused him to work beyond his restrictions. Despite their confusion about the sequence of events and their prior inconsistent statements, the forum finds their testimony that Complainant was a hardworking person who will "go above and beyond what he is supposed to do" believable. On all other matters, the forum credits their testimony only where it is uncontroverted or corroborated by other credible testimony.

40) Linda Bailey's testimony was credible. She readily acknowledged that swearing was commonplace in the TLE department and that she heard it, did not like it, but did not report it to upper management as required by her management position.

Bailey credibly testified that no one was terminated for swearing. The forum credits her testimony in its entirety.

41) Christopher Bjerke was a credible witness. Despite his involuntary termination from Respondent's employ, he showed no animosity toward Respondent nor did he exaggerate his testimony to enhance Complainant's case. He credibly testified that Keys told him that Complainant was not allowed to lift more than 25 pounds due to a back injury and thereafter Bjerke made a point of helping Complainant "so that he wouldn't throw his back out." He acknowledged that he never heard Keys tell Complainant to perform duties beyond his medical restrictions, but he did hear Keys tell Complainant to "get to work." Bjerke also credibly testified that he was aware of a company policy discouraging swearing, but that most employees swore, including Bjerke. Bjerke's testimony was straightforward and unbiased and the forum credits it in its entirety.

42) John Leese testified credibly on key issues. He readily acknowledged that his knowledge of Complainant's medical restrictions was based on Complainant's description of his restrictions. His testimony was straightforward and substantially consistent with his previous statements to the Agency. The forum finds no reason to disbelieve him.

43) Jesse Hornbeck was not a credible witness. His bias toward Respondent was evident by his demeanor, particularly when he testified as Respondent's witness. His testimony differed substantially from his prior statement to the Agency. For example, he told the Agency investigator that he had "dug through" invoices to see if Complainant had initialed any work orders and claimed he found no invoices with Complainant's initials. In contrast, there are numerous invoices in the record, dated May 28, 1999, that show Complainant's initials. Additionally, Hornbeck's testimony that

two other technicians, including Jamey Osborne, complained to Hornbeck about Complainant's language on Complainant's last day of work conflicted with other credible testimony. The forum does, however, believe Hornbeck's testimony that he and Keys believed that Complainant exaggerated his injury to avoid work and "go home early" as a statement against interest. On all other matters, the forum believed Hornbeck only when his statements were corroborated by credible evidence.

44) Jamey Osborne credibly testified that between April 1 and June 4, 1999, the TLE department was "always understaffed," which increased the workload for each technician. He recalled that during that time Complainant worked hard and was willing to help anyone who needed assistance. Osborne also credibly testified that Complainant's language was no worse than others, including Jesse Hornbeck's, and denied complaining about Complainant's language. He acknowledged that swearing was commonplace in the shop and that he swore at times, though infrequently. The forum credits Osborne's testimony in its entirety.

45) Kurt Gale's testimony had little bearing on key issues. His memory was unreliable – he couldn't recall who decided to terminate Complainant - and despite his position as Redmond store manager, his explanation of Respondent's policy pertaining to the use of swearing or "profanity" was confusing. He also appeared to have little understanding of Respondent's termination policy. The forum gave little weight to Gale's testimony and only when other credible evidence corroborated it.

46) Liesa Holliday was generally credible, although she demonstrated some bias toward her employer. The forum consequently gave more weight to her testimony when other credible evidence corroborated it.

47) Jeff Keys' testimony was biased and tailored to counter adverse testimony he had the opportunity to hear throughout the hearing. His testimony that he was

unaware that Complainant was working beyond his medical restrictions was not believable and contrary to other credible testimony. He acknowledged, however, that he used swear words occasionally and that “some” swearing was overlooked in the workplace. The forum credited Keys’ testimony only where it was corroborated by other credible testimony or was logically credible.

48) Tony Farkas, James Shortreed, and Leslie Taylor (formerly Van Sant) were credible witnesses.

### **ULTIMATE FINDINGS OF FACT**

1) At all times material, Respondent Wal-Mart Stores, Inc. was a foreign corporation operating retail stores in Oregon under the assumed business name of Wal-Mart, and engaged the personal services of six or more persons within Oregon.

2) At all times material, Respondent employed Complainant at the Wal-Mart store located in Redmond, Oregon.

3) Complainant sustained a compensable injury on April 1, 1999. He applied for and received workers’ compensation insurance benefits.

4) Complainant was temporarily disabled from performing his regular job duties and regularly provided Respondent with medical documentation describing changes in his physical limitations.

5) Respondent provided Complainant with suitable modified work while he was disabled from performing his regular job duties.

6) On his own volition, Complainant occasionally worked beyond his medical restrictions with Respondent’s knowledge.

7) Complainant’s physical limitations increased by May 26, 1999.

8) Complainant’s supervisor expressed his concern to others that Complainant was “milking his injury” and “stretching it” to avoid work.

9) On May 29, 1999, Complainant provided Respondent with a medical note that authorized Complainant to be off work until June 4, 1999.

10) On June 4, 1999, Complainant provided Respondent with a medical release that authorized Complainant to work four hours per day and to temporarily perform sedentary work only.

11) On June 4, 1999, Respondent informed Complainant that he was being terminated for having used "profanity" to degrade a fellow worker.

12) Respondent had a policy prohibiting the use of vulgar or offensive language in the workplace that was not enforced in the TLE department.

13) All of the TLE department employees used vulgar language regularly in the work place, except one who used it occasionally.

14) Complainant was the only TLE department employee terminated by Respondent for using vulgar language in the work place.

15) Complainant was terminated because he applied for and used the workers' compensation provisions under ORS chapter 656.

16) Complainant suffered lost wages and benefits and experienced mental suffering as a result of his discharge.

### **CONCLUSIONS OF LAW**

1) At all material times, Respondent was an employer subject to the provisions of *former* ORS 659.010 to ORS 659.110 and *former* 659.400 to 659.435.

2) *Former* OAR 839-006-0120 provided:

"To be protected under ORS 69.410, a person must be a worker as defined in OAR 839-006-0105(4)(a)."

*Former* OAR 839-006-0105(4)(a) defines "worker" as follows:

"Worker' means any person \* \* \* who engages to furnish services for remuneration, subject to the direction and control of an employer \* \* \*."

Complainant was at all times material a worker entitled to the protection of *former* ORS 659.410(1) and 659.420.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practices found herein. ORS 659A.820, ORS 659A.830, ORS 659A.835.

4) The actions, inaction, statements, and motivations of Jeff Keys, described herein, are properly imputed to Respondent.

5) At times material herein, *former* ORS 659.410(1)(1) provided:

“It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656 or of ORS 659.400 to 659.460 or has given testimony under the provisions of such sections.”

Respondent discriminated against Complainant with respect to his tenure by terminating Complainant because he invoked and utilized procedures under the workers’ compensation laws, in violation of *former* ORS 659.410(1)(1).

6) At times material herein, *former* ORS 659.420 provided, in pertinent part:

“(1) A worker who has sustained a compensable injury and is disabled from performing the duties of the worker’s former regular employment shall, upon demand, be reemployed by the worker’s employer at employment which is available and suitable.

“(2) A certificate of the worker’s attending physician that the worker is able to perform described types of work shall be prima facie evidence of such ability.

“(3) Notwithstanding subsection (1) of this section, the right to reemployment under this section terminates when whichever of the following events first occurs:

“ \* \* \* \* \*

“(d) The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary.”

Former OAR 839-006-0135 provided, in pertinent part:

“(1) An employer with 6 or more employees is required to re-employ an injured worker not physically able to perform the former job to the most suitable vacant position available if:

“(a) The injured worker is medically released to perform the duties of the vacant suitable position; and

“(b) Timely demand is made as provided in OAR 839-06-135(4) [*sic*].

“(2) A suitable position is one which is as similar as practicable to the former position in compensation, duties, responsibilities, skills, location, duration (full or part-time, temporary or permanent) and shift;

“(a) The injured worker shall have the right to discuss and receive clarification in writing of the specific duties of the position with the employer prior to actually commencing work;

“(b) At the time of the injured worker’s demand for reemployment, a suitable alternative may not be available. When this occurs, the injured worker must follow the employer’s non-discriminatory and written reporting policy which has been effectively made known to the employer’s work force and is practiced by the employer, until the employer offers the injured worker a suitable position. If the employer has no such reporting policy, the injured worker must inform the employer of any change in address and telephone number within ten days of the change.

“(3) The attending physician’s approval for the injured worker’s return to a suitable position is prima facie evidence of the injured worker’s physical ability to perform the job. The employer may require the worker to provide such approval in writing prior to reemployment.

“ \* \* \* \* \*

“(4) The injured worker will make demand for reemployment according to the employer’s written policy. If the employer has no such policy, the injured worker’s demand:

“(a) May be oral or written;

“(b) Must be made to a supervisor, personnel officer or someone in management; and

“(c) May be made at any time after release by the attending physician, but no later than the seventh calendar day following the date the worker is notified by the insurer or self-insured employer by certified mail that the worker’s attending physician has released the worker for employment \* \* \* .

“(6) The employer has no obligation to create a job for a returning injured worker and is under no obligation to continue a particular position if one has been created.

“(7) Except as provided in these rules, the injured worker has no greater right to a job or other employment benefit than if the worker had not been injured.”

Respondent did not violate former ORS 659.420 as charged, because Complainant was not medically released for reemployment until after Respondent terminated him.

7) Pursuant to ORS 659A.850(2) and by the terms of ORS 659A.850(4), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondent’s unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are appropriate exercises of that authority.

#### **OPINION**

The Agency alleged in its Specific Charges that Respondent violated *former* ORS 659.410(1) by discharging Complainant because he applied for benefits under and utilized the provisions of ORS chapter 656. The Agency further alleged that Respondent failed to reemploy Complainant in an available and suitable job in violation of *former* ORS 659.420. Respondent does not dispute that it is subject to the provisions of ORS chapter 659 or ORS chapter 659A, or that Complainant was compensably injured while in Respondent’s employ and terminated from employment two months thereafter. However, Respondent denies terminating Complainant because of his on-the-job injury and alleges in its answer that Complainant was terminated because he used “foul and abusive language” against fellow employees in violation of company policy. Respondent also asserts that during the time Complainant was restricted from performing certain job duties, Respondent made available to Complainant suitable duties that he could perform within his work restrictions.

## **TERMINATION/*FORMER* ORS 659.410(1)**

In order to prevail, the Agency must show, by a preponderance of the credible evidence, a causal connection between Complainant's termination and his use of statutory workers' compensation provisions. The Agency, at all times, has the burden of proving Complainant was terminated for an unlawful reason. The Agency has met that burden.

### **A. Causal connection between termination and use of workers' compensation provisions**

*Former* OAR 839-005-0010(2) describes two methods of determining whether there is a causal connection between a respondent's adverse action and a complainant's protected class status. One is the Specific Intent Test, the other is the Different or Unequal Treatment Test. In this case, the Agency established a causal connection under the specific intent theory. Specific intent may be shown by circumstantial evidence. *In the Matter of Sierra Vista Care Center*, 9 BOLI 281, 296 (1991). Evidence includes inferences and more than one inference may be drawn from the basic fact found. *Id.* at 297. In this case, while the temporal relationship alone is not dispositive, the progression of events following Complainant's injury and his supervisor's expressed suspicion that Complainant was "milking his injury," are enough to establish a link between the two events. Evidence shows that as Complainant's physical limitations increased, Keys' patience with Complainant decreased to the extent that he expressed skepticism about Complainant's work restrictions to another manager (Bailey) and at least one of Complainant's co-workers (Hornbeck). Finally, after Complainant was taken off work for four days after complaining about pain he suffered while helping Keys with tires,<sup>v</sup> and following his first day back at work with an additional, even more restrictive medical release, he was terminated. Although Respondent claims Complainant was terminated because he called a co-worker a "bitch," evidence shows

Respondent's reason is pretext for discrimination as discussed below. The forum concludes that Respondent knowingly and purposefully terminated Complainant because he invoked and used the provisions of ORS chapter 656. See *former* OAR 839-005-0010(2)(a).

## **B. Pretext**

Unequivocal evidence shows Complainant was singled out for using the word "bitch" and was Respondent's only TLE department employee to lose his job for that reason alone. There is no dispute that vulgar language was tolerated and widespread in the TLE department and that no one was terminated for using it. Keys distinguished Complainant's offensive language from others by arguing that it was directed toward a co-worker who complained about Complainant's use of the word "bitch," making it intolerable by Respondent's standards.<sup>vi</sup> That argument fails for several reasons. First, Hornbeck, the co-worker who complained, also used profanity in the workplace, including the same words he found offensive when spoken by Complainant. Second, Hornbeck demonstrated a clear bias when he admitted he believed Complainant was exaggerating his physical limitations in order to avoid working. He also acknowledged that he spoke with Keys about his "suspicions" and that Keys agreed with him. Keys also told Leese and Leese overheard Keys tell Bailey that he thought Complainant was "milking his injury" to avoid work and go home early, demonstrating a motive to terminate Complainant that diminishes Respondent's professed reason. Third, Hornbeck was promoted to service manager, which included a pay increase, one month after writing the complaint that resulted in Complainant's termination. Although the promotion alone does not denote a plan between Keys and Hornbeck to get rid of Complainant, the forum notes that Hornbeck also received a commendation and pay increase from Respondent on the same day he wrote a complaint about Crowder, who

was also terminated as the result of a Hornbeck complaint.<sup>vii</sup> In Crowder's case, the termination may have been justified, but the forum notes that Crowder also had a work injury while employed by Respondent and had been released for work only five months before his termination.

Finally, Respondent did not follow its own disciplinary procedure with regard to Complainant's termination. Noticeably absent from the process were required steps, including a pre-coaching investigation to "gather the facts including witness statements, if appropriate \* \* \* and discuss the situation with the Associate to get his/her side of the story and any additional facts." If Respondent "concludes a coaching is appropriate," then the employee's behavior is classified to determine "whether the action is related to job performance or a specific behavior (misconduct or gross misconduct)." It is only after the behavior is classified, that Respondent then determines "the appropriate level of coaching. Depending upon the behavior, steps may be skipped." In this case, there was no investigation, Complainant's behavior was not classified as misconduct or gross misconduct, and there was no discernable determination of the appropriate level of coaching necessary. Instead, Respondent skipped all of the steps and summarily terminated Complainant based on what the forum has found to be a sham complaint.

The forum infers from those facts that Keys was, at best, irritated by Complainant's physical restrictions, perceived they were not altogether legitimate, and consequently found an excuse to terminate him. Respondent's reason for terminating Complainant was a pretext for discrimination and Respondent terminated Complainant because he used the workers' compensation provisions.

### **REEMPLOYMENT/*FORMER* ORS 659.420**

The Agency is required to prove by a preponderance of the evidence that (1) Complainant sustained a compensable injury and (2) was disabled from performing the

duties of his former regular employment, and (3) that upon Complainant's demand, (4) Respondent failed to reemploy Complainant at (5) available and (6) suitable employment. *Former* ORS 659.420. There is no dispute that Complainant sustained a compensable injury and was disabled from performing his regular job duties. The Agency, however, has not established the remaining elements. First, Complainant did not make a demand for reemployment in accordance with *former* OAR 839-006-0135(4)(c), which requires the demand "be made at any time after release by the attending physician, but no later than the seventh calendar day following the date the worker is notified by the insurer or self insured employer by certified mail that the worker's attending physician has released the worker for employment \* \* \*." The Agency contends that each time Complainant presented a copy of his medical restrictions, he was making a demand for reemployment. That argument is not logical. The evidence shows only that Complainant was temporarily disabled from performing some of his regular job duties after his injury. Complainant's work restrictions were temporary and fluctuated week to week. When Complainant was terminated he was still working under temporary restrictions. Respondent is not required to offer Complainant suitable employment until Respondent knows the extent of Complainant's physical disability to a reasonable degree of certainty. *See former* OAR 839-006-0135(3). Neither Complainant nor Respondent was in a position to make a reasoned assessment of "suitable" employment without Complainant's physician's input. Other than the April 19 unequivocal work release that permitted Complainant to return to his regular job duties, all other medical releases imposed temporary restrictions. By Complainant's own testimony, he was not medically released to "full" duty until almost two months after he was terminated from employment. It is axiomatic that Complainant would not seek

reemployment until he was reasonably certain he could no longer be reinstated to his former employment.

Evidence shows that Respondent offered suitable modified work that conformed to Complainant's ever-changing medical restrictions. Complainant does not deny that he voluntarily worked beyond his restrictions occasionally, and his own testimony limits the time frame to two days in May 1999 that Keys may have told him to perform work beyond his medical restrictions. The forum believes Complainant's testimony that Keys asked Complainant to help with tires in late May 1999, but there is no credible evidence that Keys repeatedly told Complainant to work beyond his restrictions before May 29, 1999. Even if a preponderance of the evidence showed Complainant was forced to work beyond the temporary restrictions imposed by his physician, Complainant's claim is under *former* ORS 659.410(1) with respect to his terms and conditions of employment and not under *former* ORS 659.420.

## **DAMAGES**

### **A. Back Pay**

The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits that the complainant would have received but for the respondent's unlawful employment practice. *In the Matter of ARG Enterprises, Inc.*, 19 BOLI 116, 136 (1999). A complainant seeking back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *Id.* at 136. Where the forum deems a back pay award appropriate, the respondent has the burden of proving the complainant failed to mitigate his or her damages. To meet that burden, a respondent must prove the complainant "failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the

complainant could have discovered and for which the complainant was qualified.” *Id.* at 137.

In this case, the Agency established that Complainant was terminated in violation of ORS 659.410(1) and that he has been unable to obtain suitable employment as of the hearing date. The only issue to determine, therefore, is the amount of back pay to which Complainant is entitled. Evidence shows Complainant was earning \$7.80 per hour when he was terminated and that he had worked an average of 38 hours per week prior to his work injury.

At the time he was terminated, Complainant was under a doctor’s care and was released to do sedentary work activities that included a 10-pound lifting limitation. Complainant’s testimony that two months after he was terminated he was fully released by his doctor with a 50-pound lifting restriction is uncontroverted. After he was medically released, Complainant first applied for numerous ranch or farm jobs, but was turned down. By the date of hearing, he had applied to places such as Les Schwab’s, Leathers’ Fuel Station, Texaco, Star Mart, Shotard Farms, Ace Buyers of Madras, and the Oregon Livestock Auction. He was hired by the Oregon Livestock Auction for a brief period until his employer “ran out of work” for him to do. He earned \$3,000 during that interim employment. There is no evidence in the record about Complainant’s pay rate or work schedule while he was employed by the Oregon Livestock Auction. Also, there is no evidence that controverts Complainant’s testimony that since his “full” work release he has applied for 30 to 35 jobs. Complainant testified credibly that he does not have a high school diploma, that the job market was poor in his locale, and that he was required to give his job history on applications, including his reason for leaving Respondent. On the other hand, Respondent has offered no evidence showing that jobs were plentiful at times material or that Complainant had opportunities for

employment that he refused, thereby failing to exercise reasonable care and diligence in seeking employment. The forum concludes that Respondent did not meet its burden of proving Complainant failed to mitigate his damages.

The forum's calculations show that even when deducting Complainant's interim earnings, Complainant's back wages exceed the \$25,000 the Agency seeks in its pleading.<sup>viii</sup> At hearing, the Agency declined to calculate Complainant's back pay based on the evidence presented at hearing and did not move to amend its charging document to conform to that evidence. Therefore, the back pay award is limited to \$25,000, the amount sought in the Agency's pleading.

#### **B. Mental Suffering**

The Agency asks this forum to award Complainant \$20,000 damages for mental suffering as an effect of Respondent's unlawful employment practices found herein. In determining an award, the commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. *In the Matter of James Breslin*, 16 BOLI 200, 219 (1997), *aff'd without opinion, Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999). While the forum may also review the mental suffering damages awarded in previous years to determine the amount of damages that would appropriately compensate Complainant for the mental suffering he experienced,<sup>ix</sup> the amount of the award depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999).

Complainant testified credibly that he suffered some financial strain, was "upset and depressed," and experienced difficulty finding work as a result of his termination. At the time of hearing, he was still unemployed despite some unsuccessful efforts to gain

employment. Other than his inability to make his credit card payments, Complainant did not point to any specific or lasting adverse effects of the financial strain or depression he suffered. The forum, however, has held previously that the anxiety and uncertainty connected with the loss of employment income is compensable when attributable to an unlawful practice. *In the Matter of Tyree Oil, Inc.*, 17 BOLI 26, 44 (1998). In *Tyree*, the complainant, an injured worker, was awarded \$10,000 for distress from financial hardship caused by his unemployment, his difficulty in finding other work, and his impaired self esteem as effects from the respondent's failure to reinstate him after he was medically released for work. The complainant in that case testified that he was over 40 years old and the sole provider for his wife and two children. He also testified that he experienced sleeplessness, his wife was forced to clean houses for income, he could not pay his bills, and he had to borrow money from his mother as a consequence of the respondent's action. *Id.* at 33. The facts in this case are not as egregious as those found in *Tyree*, but are sufficient to show that Complainant suffered some financial hardship and angst, albeit short-lived, connected to his loss of employment. The forum therefore concludes that \$7,500 in this case is an appropriate award for Complainant's mental suffering.

### **C. Benefits Lost**

Complainant credibly testified that while employed, he regularly enjoyed the use of an employee discount card Respondent provided as a benefit to its employees. The Agency and Respondent stipulated that between October 1998 and May 1999, Complainant made purchases totaling \$1,503.30 using his employee discount card. The participants agree that a 10 per cent discount on that amount afforded Complainant average savings of \$21.50 per month on household items during his employment. Based on those facts, the forum finds that the employee discount card is a fringe benefit

that Complainant lost as a result of Respondent's unlawful employment practice. The forum concludes that Complainant would have saved an average of \$623.50 (\$21.50 per month x 29 months) had he continued in Respondent's employ.

### **RESPONDENT'S EXCEPTION**

Respondent excepts to the forum's \$10,000 mental suffering award in the proposed order. Contrary to Respondent's assertion that there are no facts to justify any award in this case, substantial evidence in the record demonstrates otherwise. Respondent, however, accurately distinguishes the facts in *Tyree* to those in this case and the forum has modified its opinion to reflect the argument raised by Respondent in its exception and has adjusted its mental suffering award accordingly.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), to eliminate the effect of Respondent's unlawful employment practices, and as payment of the damages assessed for its violation of *former* ORS 659.410(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Wal-Mart Stores, Inc.** to

- 1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant William F. Masters** in the amount of:
  - a) TWENTY FIVE THOUSAND DOLLARS (\$25,000), less appropriate lawful deductions, representing wages Complainant lost from June 4, 1999, through the date of hearing, as a result of Respondent's unlawful employment practice; plus
  - b) Interest at the legal rate on the sum of \$25,000 from August 4, 1999, until paid; plus
  - c) SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice; plus
  - d) Interest at the legal rate on the sum of \$7,500 from the date of the final order until paid; plus

- e) SIX HUNDRED TWENTY THREE DOLLARS AND FIFTY CENTS (\$623.50), representing benefits lost as a result of Respondent's unlawful employment practice.
- 2) Cease and desist from discriminating against any employee in tenure of employment based upon the employee's having filed for benefits or invoked or utilized Oregon's workers' compensation laws.

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<sup>i</sup> The witnesses used the words "profanity" and "swearing" interchangeably throughout the hearing to denote vulgar or offensive language.

<sup>ii</sup> During cross-examination, Complainant reluctantly acknowledged signing the note, but failed to mention it during the Agency's investigation or when he recounted the events of May 29 during his testimony at hearing.

<sup>iii</sup> See Finding of Fact – The Merits 23.

<sup>iv</sup> An April 1999 calendar shows that April 20 is the only date that corresponds with the Horns' testimony about Complainant's "first" medical release and the specific incident wherein they witnessed Complainant pulling a pallet of "ice melt." Complainant did not work between April 1 and April 20, and did not work for four days after April 20.

<sup>v</sup> There is no evidence in the record showing that Complainant actually lifted a tire.

<sup>vi</sup> Despite Respondent's assertion that others also complained about Complainant's language, there is no evidence in the record to support that position. Leese credibly testified that he was not offended by Complainant's language and that he did not know the reason behind Keys' request that he write a statement describing the swear word Complainant used the day of Keys' request. Osborne also denied complaining to anyone about Complainant's language.

<sup>vii</sup> Hornbeck complained on April 14 and Keys terminated Crowder on April 30, 1999, based on Hornbeck's complaint.

<sup>viii</sup> See Finding of Facts – The Merits 36 & 37.

<sup>ix</sup> See *In the Matter of Bob G. Mitchell*, 19 BOLI 162, 189 (2000).