In the Matter of

ALPINE MEADOWS LANDSCAPE MAINTENANCE, LLC, and RONALD PARENTEAU,

Case No. 35-99

January 11, 2000

SYNOPSIS

Complainant, who was 42 years old, applied for a job opening with Respondent Alpine Meadows Landscape Maintenance, a limited liability company, as a landscape worker and was refused hire because of his age. The forum awarded Complainant $1,043.03 in back pay and $12,500 in mental suffering damages. Respondent Parenteau, a "member" of Respondent Alpine, was found to have aided and abetted Respondent Alpine and was held jointly liable for back pay and mental suffering damages. ORS 659.030(1)(a); ORS 659.030(1)(g).

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 was held on August 3 and 4, 1999, in the Bureau of Labor and Industries' office at 700 East Main, Suite 105, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, an employee of the Agency. Terrance J. Hershberger (Complainant) was present throughout the hearing and was not represented by counsel. Respondents were represented by Joseph M. Charter, Attorney at Law. Ronald Parenteau ("Parenteau"), Respondent, was present throughout the hearing.

The Agency called as witnesses, in addition to Complainant: Keith Pearson and Betty Moore, employees of the Oregon Employment Department; Joseph Tam, Senior Investigator for the Civil Rights Division; Joy Delucchi, Complainant's girlfriend; Duane

Duckworth, manager of the motel where Complainant lives; and Respondent Ronald Parenteau.

Respondents called as witnesses: Ronald Parenteau; Harry Bower, co-owner of Respondent Alpine Meadows Landscape Maintenance, LLC ("Alpine"); Kenneth Brown, an acquaintance of Respondent Parenteau; and Joseph Tam.

The forum received into evidence:

a) Administrative exhibits X-1 to X-24a (submitted or generated prior to hearing) and X-25 to X-40 (with two exceptions,[1] these exhibits consist of documents submitted or generated after the date of hearing);

b) Agency exhibits A-1 through A-13 (submitted prior to hearing with the Agency's case summary) and A-14 (submitted at hearing); and

c) Respondent exhibits R-4, R-5, R-8, R-10, R-11, and R-14 (submitted prior to hearing with the Agency's case summary), and R-15 (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 October 28, 1998, Complainant filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondents based on their failure to hire him on or about July 13, 1998. After investigation and review, Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations regarding Respondents' failure to hire Complainant.

2) On April 19, 1999, the Agency prepared for service on Respondents Specific Charges alleging that Respondents discriminated against Complainant based on Respondents' failure to hire Complainant due to his age.

3) With the Specific Charges, the forum served on Respondents the following: a) a Notice of Hearing setting forth 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 7, 1999, counsel for Respondents filed an answer in which Respondents denied the substantive allegations contained in the Specific Charges and alleged several affirmative defenses.

5) On May 7, 1999, Respondents moved for a postponement on the basis that Respondents' counsel had a pre-existing trial set for June 22, 1999, the same day the hearing was set to commence. The Agency did not oppose the motion.

6) On May 14, 1999, the ALJ granted Respondents' motion to postpone and reset the hearing for August 3, 1999, a date mutually agreed upon by the Agency and Respondents.

7) On May 14, 1999, the ALJ issued an amended notice of hearing.

8) On May 14, 1999, the ALJ issued a case summary order requiring the Agency and Respondents each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, a statement of any agreed or stipulated facts. The Agency was additionally ordered to submit damage calculations and a brief statement of the elements of the claim. Respondents were additionally ordered to submit a brief statement of any defenses to the claim. The ALJ ordered the participants to submit case summaries by July 23, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On July 6, 1999, Respondents filed a motion to amend their answer to include an additional affirmative defense stating "Complainant's charges are barred by the doctrine of unclean hands."

10) On July 6, 1999, Respondents filed a motion to compel discovery or dismiss the Agency's claim for mental suffering damages. Specifically, Respondents sought Complainant's counseling records, alleging that Respondents had informally requested those records after Complainant was deposed on July 1, 1999, and that the Agency had refused to provide them.

11) On July 9, 1999, the Agency requested an extension of time to file a response to Respondents' motion to amend the answer. The ALJ granted the Agency's request and gave the Agency until July 16, 1999, to respond.

12) On July 13, 1999, the Agency filed a response to Respondents' motion to compel discovery or dismiss claims for mental suffering. The Agency opposed the motion on the grounds that it was untimely, that it requested privileged information, that the Agency did not have control of the records requested, that Respondents could have attempted to subpoena the records, and that Respondents' request was overly broad.

13) On July 16, 1999, the Oregon Dept. of Justice filed a response to Respondents' motion to amend their answer on behalf of the Agency. The response objected to Respondents' motion on the basis that it was subject to being stricken due to Respondents' failure to plead any facts to support their conclusory allegation.

14) On July 15, 1999, the ALJ issued a ruling in response to Respondents' motion to compel discovery or dismiss claims for mental suffering. The ALJ overruled the Agency's objections and ruled that Complainant's counseling records were discoverable pursuant to OAR 839-050-0200(5). The ALJ ordered the Agency to provide to the ALJ, for an *in camera* inspection, "all of Complainant's medical records

created between July 13, 1996 and the present showing 'any mental or emotional counseling or psychological treatment, including substance abuse, anger management, and treatment with Dr. Donnolley for stress or sleep disturbance.'"

15) On July 19, 1999, the ALJ issued a ruling in response to Respondents' motion to amend their answer. Noting that a motion to make more definite and certain would have been more appropriate, but would have produced the same result, the ALJ granted the Agency's motion to strike on the ground that Respondents' proposed amendment stated "a conclusion of law, without any facts to support it * * * [leaving] the Agency in the untenable position of having to prepare a purely speculative defense against Respondents' assertion of 'unclean hands.'" The ALJ granted Respondents leave to amend their answer to allege facts in support of its "unclean hands" defense.

16) On July 22, 1999, Respondents submitted a revised amended answer that alleged substantive facts in support of its "unclean hands" defense.

17) On July 23, 1999, both Respondents and the Agency timely submitted their case summaries.

18) On July 27, 1999, the Agency submitted an addendum to its case summary.

19) On July 28, 1999, the ALJ granted Respondents' revised motion to amend their answer to include an "unclean hands" defense.

20) On July 30, 1999, Respondents filed a motion to strike the Agency's claim for mental suffering damages for two reasons: (1) the Agency had not yet produced Complainant's medical records as required by the ALJ's discovery order issued July 15, 1999, which prejudiced Respondents in the preparation of their case; and (2) the Agency had not mentioned damages for mental suffering in its case summary, and had waived its right to seek mental suffering damages based on that omission. On July 30,

1999, the Agency filed objections to Respondents' motion to dismiss the claim for mental suffering damages and sent the ALJ a letter stating that the Agency's case presenter had received Complainant's medical file from the VA Domiciliary in White City, Oregon that morning.

21) On July 30, 1999, after receiving Exhibit X-20, the ALJ held a telephonic pre-hearing conference with Respondents' counsel, Mr. Charter, and the Agency case presenter, Ms. Domas, to come up with a plan whereby Mr. Charter could be provided with Complainant's medical records prior to the hearing. During the conference, the ALJ stated that Respondents were entitled to move for a continuance at the hearing if one was needed in order for Mr. Charter to prepare adequately for the hearing. As a result of the conference, Ms. Domas sent, via facsimile, 73 pages of Complainant's VA medical records directly to the ALJ, who conducted an *in camera* inspection of the records. After his inspection, the ALJ redacted 27 pages in their entirety, and parts of the remaining 46 pages because they contained no records within the scope of the ALJ's discovery order. On the morning of July 31, 1999, the ALJ sent the latter 46 pages via facsimile to Mr. Charter, who received legible copies of the documents in his office that same morning. At the hearing, Mr. Charter moved for release of unredacted copies of all 73 pages. The ALJ stated the basis for the redactions and denied Mr. Charter's motion. The ALJ also gave Mr. Charter the opportunity to move for a continuance, based on his July 31 receipt of the documents. Mr. Charter declined to move for a continuance.

22) On July 30, 1999, the Agency, through the Oregon Dept. of Justice, filed a motion to strike Respondents' revised motion to amend answer.

23) On August 2, 1999, Respondents filed objections to the Agency's motion to strike Respondents' revised motion to amend their answer.

24) At the commencement of the hearing, the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

25) Prior to opening statements, the ALJ informed the participants that the Agency's motion to strike Respondents' revised motion to amend their answer was overruled, and that Respondents would be allowed to present evidence in support of their "unclean hands" defense. In the course of the hearing, the Agency requested, and was granted, a continuing objection to all testimony and exhibits relevant to this defense. The forum has concluded that Respondents' "unclean hands" defense is inapplicable in this proceeding and, in reconsideration, grants the Agency's motion to strike Respondents' revised motion to amend their answer. As a result, all testimony and exhibits or parts of exhibits that relate solely to Respondents' "unclean hands" defense have been disregarded.[2]

26) Prior to opening statements, Respondents objected that not all of Complainant's medical records had been released to them, and that Respondents had not been informed of the specific basis for the redaction of each fully or partially redacted record. The ALJ stated that the records had been redacted in keeping with the specific language of the July 15, 1999, discovery order requiring production of the records by the Agency. Respondents moved that all 73 pages of Complainant's medical records, in their unredacted form, be preserved in the hearings file in the event of an appeal. The ALJ stated that the records would be preserved in a sealed, marked envelope in the event of appellate review.

27) Both the Agency and Respondents were given an opportunity for closing argument after the evidentiary portion of the hearing was concluded. At the conclusion of the hearing, the ALJ requested that Respondents submit a post-hearing brief, and the

Agency submit a post-hearing brief from the Oregon Dept. of Justice, with the option of also submitting a statement of agency policy, on the following issues:

> (a) Whether Respondent Ronald Parenteau could be held liable as an aider and abettor to Respondent Alpine under ORS 659.030(1)(g);
>
> (b) Respondents' affirmative defense stating "To the extent that the Agency contends that remedies can be different for complaints proceeding to hearing under ORS 659.060, the statutory scheme violates Oregon Constitution Article I, section 20, because it grants to a class of people a privilege or immunity that is not granted to the class to which Respondents belong, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
>
> (c) Whether Respondents affirmative defense of "unclean hands" is applicable under the facts in this case and, if the fact that Complainant is not a party in the case makes a difference in the analysis.

The ALJ set a deadline of August 25, 1999, for filing the briefs.

28) On August 24, 1999, Respondent filed their post-hearing brief. It included two pages of argument addressed to the elements of a prima facie case in civil rights cases in general and in this case in particular.

29) On August 25, 1999, the Oregon Dept. of Justice filed a post-hearing brief on behalf of the Agency.

30) On August 26, 1999, the Agency sent a motion via facsimile to Mr. Charter and the ALJ to strike the portion of Respondents' post-hearing brief arguing that the Agency had failed to prove a prima facie case, on the basis that it exceeded the scope of the ALJ's order for post-hearing briefs. The Agency served the document on the Hearings Unit and Mr. Charter by first class mail on August 27, 1999. The forum agrees that Mr. Charter's discussion of the elements of a prima facie case exceeds the scope of the ALJ's order for post-hearing briefs and hereby grants the Agency's motion.

31) On September 14, 1999, the Agency sent a Request for a Protective Order directly to the ALJ, via facsimile, concerning Complainant's medical,

psychological, counseling, and therapy records. The Agency filed the Request with the Hearings Unit on the same day.

32) On September 14, 1999, Respondent filed an objection to the Agency's request for a Protective Order.

33) On September 23, 1999, the ALJ issued a Protective Order effective the date of receipt by the participants requiring that "all the medical, psychological, counseling, and therapy records of Complainant" contained in the official file be placed in a sealed envelope with a notation stating the contents' exemption from disclosure under Oregon's Public Records Law and prohibiting Respondents from any future dissemination of any copies of these documents or disclosure of their contents to any person not a party or a representative of a party.

34) On October 8, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. Both Respondent and the Agency timely filed exceptions, which are addressed in the Opinion section of this Final Order.

35) On October 7, 1999, Respondents filed an addition to their post-hearing brief in which Respondents stated out that the case of *Turnbow v. K.E. Enterprises, Inc.,* 155 Or App 59, 69-70 (1998) also supports Respondents' second affirmative defense.

36) On October 8, 1999, the Agency filed a request that Respondents' letter dated October 7, 1999, be disregarded in its entirety because of its untimeliness. The forum hereby grants the Agency's request.[3]

37) Respondents, in their exceptions, point out that the ALJ never ruled on Respondents' pre-hearing motion that the Agency waived its right to seek damages for mental suffering because it did not specify such damages in its case summary.[4] The Specific Charges and Answer plead and define the issues upon which evidence can be

presented at hearing by the participants. In contrast, the case summary states the specific types of evidence that will be presented at hearing in support of those issues. Its contents have no substantive impact on the issues in the pleadings unless it is specifically coupled with a motion to amend. The only sanction the forum is authorized to impose based on a participant's failure to list a witness or an item of documentary evidence in a case summary is exclusion of that witness or piece of evidence from the hearing.[5] Consequently, Respondents' motion must be denied.

38) Respondents, in their exceptions, request a ruling on their oral motion at hearing to amend Respondents' affirmative defense regarding "unclean hands" to conform to the proof as to the Complainant's failure to disclose that he had been fired from a prior landscaping job and his false representation that he had a current pesticide applicator's license at the time of his interview with Respondent Parenteau. Respondents' motion is hereby granted.[6]

FINDINGS OF FACT – THE MERITS

1) Complainant's date of birth is December 24, 1955.

2) At all times material herein, Alpine was an Oregon limited liability company formed under ORS Chapter 63 that did was based in Ashland, Oregon, and an employer that engaged or utilized the personal services of one or more employees.

3) At all times material herein, Ronald Parenteau and Harry Bower were Alpine's sole "members" and were both initially designated as Alpine's only "managers" under Alpine's "Operating Agreement." Each had a 50% ownership interest in Respondent Alpine. Parenteau was born in July 1949, and Bower was born in December 1939.

4) At all times material herein, Alpine was engaged in the business of landscape maintenance. Alpine's principal work consisted of mowing lawns, weeding, and pruning hedges. In the summer of 1998, Alpine's members and sole employee

typically began work at 7 a.m. and sometimes worked as long as 12 hours per day. Although Parenteau also took care of Alpine's paperwork, both Parenteau and Bower mowed lawns, weeded, and pruned hedges. Alpine owned two pickup trucks that Parenteau and Bower used in the business.

5) On March 16, 1998, Respondents ran an ad in the *Ashland Daily Tidings* "Help Wanted" section that read as follows:

> "LANDSCAPE MAINTENANCE Worker, Qualified applicant should be 21 or older, non-smoking, with valid OREGON driving license. Send resume with Salary requirements to: Alpine Meadows, PO box 3222, Ashland OREGON 97520."[7]

6) Gregory Phillpot, whose date of birth is June 1, 1956, was hired on May 12, 1998, after responding to the ad. Parenteau did not ask Phillpot's age before he was hired and only learned of his age when Phillpot became eligible for company insurance benefits. Although Phillpot initially responded to the newspaper ad, he was actually hired through the "Jobs Plus" program.[8] Phillpot continued to work for Alpine until January 1999.

7) On June 3, 1998, Parenteau contacted the Oregon Employment Department (the "Department") in Medford by telephone and filed a job order for a landscape worker with Jim Pearson, the Department's "Jobs Plus" representative. The job summary entered by Perkins into the Department's computer in the Department's standard job order format contained the following pertinent information:

> "JOB: LANDSCAPE WORKER
>
> REQ: ABILITY TO MOVE 30#, OPERATE POWER EQUIPMENT
>
> DUTIES: MOWING, TRIMMING, EDGING, IRRIGATION, ALL WORK DONE IN TEAMS
>
> WAGE: $7.00 HR
>
> HOURS: 9 TO 5, MONDAY THROUGH FRIDAY
>
> @@APPLICANT CALL FOR APPOINTMENT – SPECIFY JOBS PLUS"

Although the job order form contains a space to note that an employer is requiring a driver's license for the job, Perkins did not list a requirement that applicants have a driver's license. The Department assigned job #4104943 to Parenteau's job order.

8) Parenteau's job order sought applicants who were referred by the Department's "Jobs Plus" program. Respondents were looking for someone who could work at least 40 hours per week.

9) The "Jobs Plus" program is an on-the-job training program that provides a subsidy for employers and is administered by the Department. Any person receiving unemployment or Adult and Family Services benefits is eligible to be referred by the Department to employers who have requested "Jobs Plus" candidates. When a "Jobs Plus" candidate is hired, the Department subsidizes the candidate's wage at the rate of $6.50 per hour for the first month of employment. For the next five months, the employee's wage is subsidized at the rate of $5.50 per hour.

11) Parenteau sought a "Jobs Plus" candidate because of the "Jobs Plus" wage subsidy.

12) On July 13, 1998, Keith Pearson, the Department's veterans' representative, referred Complainant to Alpine based on Parenteau's job order #4104943.

13) Complainant, who lived in Medford, telephoned Parenteau from the Department and made an appointment to meet him at a coffeehouse in Ashland later that day.

14) Complainant, who did not have a driver's license at the time, took the bus to Ashland to meet with Parenteau. Complainant took his resume, his veterans' card, and a Department referral slip with him that contained essentially the same job summary quoted in Finding of Fact #7, *supra*.[9]

15) Complainant met with Parenteau at approximately 5 p.m. During the interview, Complainant showed Parenteau the referral slip and his resume, which was 22 pages long. The first page of Complainant's resume stated that his desired wage for landscape maintenance was "$8.00-$12.00 HRLY" and described his extensive experience operating landscape related power equipment and hand tools. The second page described his education in turf maintenance, turfgrass and groundcover management, and irrigation design, and stated his certification as a wildland firefighter. It also stated:

> "Public Pesticide Appplicator (sic) License
> Issued by Oregon state Dept, (Agriculture)
> Lic/no# 139524 DATE FROM [1997]
> TYPE #HERB/ORN DATE TO [12/31/2001]"

The third page was a generic letter from Complainant offering reasons why a company should hire him. Pages four through 22 contained pictures of equipment that Complainant had operated; two certificates of appreciation; a newspaper article from the Medford *Mail Tribune* describing the White City, Oregon Veterans Domiciliary and Complainant's history of homelessness and drug use before enrolling in the Domiciliary, as well as stating that his age was 42; certificates of training related to his education in turf maintenance, turfgrass and groundcover management, and irrigation design; and a pesticide applicator's license that indicated Complainant's "certification period" was from "01/14/1997 – 12/31/2001," but that his license was issued on "03/10/1997" and expired on "12/31/1997." Complainant had done landscape maintenance at the Rogue Valley Country Club in 1997 and was fired from that job, but did not list it on his resume.

16) Parenteau's recollection at the time of the hearing was that he only looked at the first page of Complainant's resume and the photos of Complainant on equipment.

He did not ask Complainant about his prior landscape maintenance experience or if he had ever been fired from a job.

17) During the interview, Parenteau asked Complainant how old he was and Complainant said he was 42 years old.

18) During the interview, Parenteau inferred from Complainant's degrees and pictures of the equipment he could operate shown in Complainant's resume that Complainant had prior landscape maintenance experience.

19) During the interview, Complainant told Parenteau that he would take the bus to and from work. Parenteau inferred that Complainant did not have a driver's license from the fact that Complainant had taken the bus to the interview.

20) At the conclusion of the interview, Parenteau indicated he would get back to Complainant concerning Alpine's job opening.

21) After the interview, Parenteau discussed Complainant's application with Bower, and they made a joint decision not to hire Complainant.

22) After making the decision not to hire Complainant, and several days after the interview, Parenteau left Complainant's resume outside Complainant's motel room in a manila envelope. While in the motel parking lot, he wrote a note on a "yellow sticky note"[10] and attached it to Complainant's resume. The note read:

> "TERRY, SORRY, WE WERE LOOKING FOR SOMEONE YOUNGER, TO POSSIBLY TAKE OVER THE BUSINESS. Thanks, Ron"

23) After Complainant was interviewed on July 13, 1998, the Department referred another applicant to Alpine on July 15, 1998, in response to job order #4104943. There was no reliable evidence presented that this applicant was actually interviewed.

24) When Complainant subsequently opened the manila envelope, found Parenteau's note inside, and read it, he initially felt "numb," then experienced anger.

For the next ten days or so, he felt it was futile to look for another job. He suffered stomach upset to the point where he couldn't sleep at night, and watched television 8-12 hours straight during the day, whereas he usually only watches wrestling on television. He withdrew from social contact with his acquaintances and lost his temper easily with his landlord and his girlfriend, especially when she suggested he go out and look for work.

25) During this same period of time, Complainant experienced stress because his unemployment benefits were about to expire. On June 2, 1998, Complainant stated he had felt "depressed" and had "restless sleep" in the past week. He also indicated that he had been bothered in the past month by "repeated, disturbing memories, thoughts or images" of past traumatic events; that he had felt 'distant or cut off from other people" in the past month; and that he had been "super alert" or "watchful" or "on guard" in the past month. Complainant was also continuing to experience emotional distress resulting from his brother's suicide in April 1997.

26) In June and July 1998, Complainant was periodically awakened in the night by numbness and paresthesia in his hands.

27) On July 27, 1998, Complainant contacted the Medford Employment Department and complained that Respondents had discriminated against him on the basis of his age. In response, Betty Moore, a supervisor at the Department, contacted Parenteau. On August 4, 1998, Parenteau visited Moore at her office to discuss Complainant's complaint. In the course of the conversation, Parenteau told Moore that he "had to have people he felt could do the job, younger people," and that he "needed younger people." Moore advised Parenteau that the Department couldn't continue to process Alpine's job order. In response, Parenteau told Moore that he would advertise through the newspaper and hire who he wanted, and canceled the job order.

28) Complainant did not look for work for approximately ten days after receiving Parenteau's note.

29) Complainant went to work as a firefighter for Ferguson Management Company on July 28, 1998 at the wage of $7.80 per hour, and worked through August 13, 1998, earning $8.00 per hour his last week of employment, earning total gross wages in the amount of $528.05.

30) Complainant worked for Personnel Source from August 4-6, 1998, at $7.15 per hour, earning total gross wages in the amount of $171.60.

31) Complainant went to work for Bear Creek in September 1998 for $6.00 per hour and worked until he was laid off sometime after October 1,1998. Complainant earned gross wages of $1337.32 through October 1.[11]

32) Complainant earned a total of $2,036.97 in gross wages at Ferguson, Personnel Source, and Bear Creek from July 28, 1998, through October 1, 1998.[12]

33) During the hearing, the Agency stipulated that it was only seeking back wages for Complainant from July 13, 1998, through October 1, 1998.

34) If Complainant had started work for Alpine on July 14, 1998, he would have worked a total of 440 hours at $7.00 per hour from July 14 through October 1, for total gross earnings of $3,080.00, based on working eight hours per day, five days per week.

35) In the past few years, Parenteau and Bower have discussed bringing two of their nephews into Alpine as members, in part because of Parenteau's and Bower's diminishing health. At the time of the hearing, the two nephews were 22 and 24 years old, respectively, lived in Nevada and Virginia, respectively, and had not become members of Alpine. No evidence was presented to indicate that, in June and July 1998,

there was any more than an abstract possibility that either nephew might move to Ashland and join the LLC.

36) On November 25, 1998, the Civil Rights Division received a three-page letter from Parenteau and Bower responding to the allegations in Complainant's complaint. Included in that letter was a statement to the effect that Complainant was not hired because his wage expectations were too high and he was overqualified. The letter also stated that Complainant had "[L]ost his out-of-state license, and had no transportation, other than the local bus lines. (Again, not a problem, for we hired someone before with no license, but lived locally, so we met daily, and ran the route with our company vehicles.)" Finally, the letter explained that "[T]he 'sticky' note that was left on the applicant's returned resume, was not worded properly and was a mistake. * * * "[T]he 'sticky' note used the term 'looking for a younger person……..' in reference to someone who would be willing to work for minimum wage, and after an extensive period of training and learning with the hopes of assuming the physical operations of the business."

37) Parenteau expects honesty from employees and would not hire an employee who listed false information on his or her application.

38) At an undetermined point between July 13, 1998 and the date of the hearing, Parenteau became aware that Complainant's pesticide applicator license expired at the end of 1997. Sometime in 1999, Parenteau became aware that Complainant had been fired from the Rogue Valley Country Club prior to his interview with Parenteau.

39) Keith Pearson was a credible witness. His testimony related primarily to facts and issues not in controversy and was not controverted.

40) Betty Moore was a credible witness. Despite her cryptic entries in her computer regarding her conversations with Parenteau, she demonstrated a clear recollection of her conversation with him and the events surrounding that conversation. She did not exaggerate in her testimony about Parenteau's demeanor at the time of their conversation, and her testimony was straightforward and responsive to the questions put forth to her. She had a logical explanation for having taken such brief notes of her conversation with Parenteau, namely, the pre-formatted space limitation in the Department's computer program and instructions from her supervisors to be precise and use as few words as possible. It was also clear that she was not an experienced civil rights investigator and would not necessarily know what items to omit and what items to include in a summary report concerning an alleged civil rights violation. For these reasons, the forum has credited her testimony in its entirety.

41) Kenneth Brown was a credible witness. However, his testimony was limited in its scope and only marginally relevant.

42) Harry Bower's testimony was not credible on several critical issues related to the legitimate, non-discriminatory reasons ("LNDRs") proffered by Respondents in defense of their decision not to hire Complainant. Some of his testimony was inconsistent with other credible testimony, some with his own testimony, and at least one statement inherently improbable. He testified that a driver's license was necessary for the job Complainant applied for, but acknowledged having read the statement contained in Respondents' three-page letter to the Civil Rights Division stating that the lack of a driver's license was "not a problem"[13] before signing the letter. He testified that when he talked to Parenteau about Complainant's application and learned he was not from the Jobs Plus program, he immediately decided that Complainant could not be hired. This is in direct contrast with the undisputed fact that Complainant was a direct

referral from the Jobs Plus program. He stated that the only papers Parenteau brought back from the interview with Complainant were the photographs of equipment that were part of Complainant's resume. This contrasts both Parenteau's and Complainant's testimony. Finally, Bower testified that he has no idea of Complainant's age.[14] Given that Complainant's age is stated in his original complaint and on the Specific Charges, and that this case had been an issue for Respondents for nine months prior to the hearing, the forum finds this testimony patently unbelievable. Accordingly, the forum gave Bower's testimony little or no weight whenever it conflicted with other credible evidence on the record.

43) Joy Delucchi's testimony was biased by her romantic relationship with Complainant. She gave exaggerated testimony that was contrary to Complainant's later testimony in an apparent attempt to bolster Complainant's case. For example, she testified that Complainant was more depressed over Alpine's failure to hire him than over the suicide of his brother. Her testimony on cross-examination also implied that Complainant had not looked for work for two months after getting the "yellow sticky note." This is a significant contrast with Complainant's testimony and documentary evidence provided by the Agency that shows Complainant started work at Ferguson Management on July 28, 1998. For this reason, her testimony regarding the extent and duration of Complainant's mental suffering was found not credible by the forum. However, her testimony regarding the *types* of mental suffering experienced by Complainant as a result of Alpine's failure to hire him that was corroborated by Complainant was found credible.

44) Joseph Tam appeared to be deliberately difficult with Respondents' attorney during cross examination, and took an extended period of time before responding directly to various questions where it was obvious, by his answer, that the

information sought was readily within his grasp. Despite this attitude, the substance of Tam's testimony did not indicate that he was biased in any way towards Respondents or that bias towards Respondents had influenced his investigation. In addition, his testimony on all material issues was both internally consistent and consistent with other credible evidence on the record. Consequently, the forum finds Tam's testimony to be credible.

45) Ronald Parenteau's testimony was inconsistent in a number of respects with documentary evidence created by Parenteau prior to the hearing, with other credible evidence on the record, and with common sense. Like Bowers, his testimony was not credible on several critical issues related to Respondents' LNDRs.[15] Accordingly, the forum gave Parenteau's testimony little or no weight whenever it conflicted with other credible evidence on the record.

46) Complainant's testimony was exaggerated to some degree regarding the extent and duration of his mental suffering and the length of time it took him to find subsequent employment after receiving the "yellow sticky note." Ironically for Respondents, the very evidence that shows Complainant's testimony to be exaggerated regarding how long it was before he looked for work also disproves Respondents' contention that he failed to mitigate his damages. However, Complainant's testimony material to his application for and subsequent rejection from Alpine's landscape worker job opening was straightforward, responsive to the questions asked of him, and unembellished. Consequently, the forum found Complainant's testimony credible in all material respects related to the Agency's allegation that Complainant was not hired because of his age. Complainant's testimony regarding the types of mental suffering he experienced has also been credited in its entirety.

ULTIMATE FINDINGS OF FACT

1) Complainant is an individual who was 42 years old in July 1998.

2) At all times material herein, Alpine was an Oregon limited liability company engaged in landscape maintenance within the state of Oregon and was an employer in this state that engaged or utilized the personal services of one or more persons.

3) At all times material herein, Ronald Parenteau was a member, manager, and 50% owner of Alpine.

4) In June 1998, Alpine advertised a job opening for a landscape worker with the Oregon Employment Department at the pay rate of $7.00 per hour for a 40-hour workweek.

5) Complainant was referred to Alpine's job opening by the Employment Department on July 13, 1998, was interviewed for the job by Parenteau, and was not hired.

6) Complainant was qualified for Alpine's job opening of landscape worker.

7) Parenteau and Harry Bower, Alpine's other member, made a joint decision not to hire Complainant within a week of July 13, 1998.

8) Complainant was not hired based on his age.

9) On August 4, 1998, Alpine withdrew its job order from the Employment Department and did not hire anyone.

10) Complainant suffered a $1,043.03 gross wage loss as a result of Alpine's refusal to hire him.

11) Complainant suffered significant emotional and mental distress as a result of Respondents' conduct that was partially offset by pre-existing conditions.

CONCLUSIONS OF LAW

1) At all times material herein, Alpine was an employer subject to the provisions of ORS 659.010 to 659.110.

2) At all times material herein, Ronald Parenteau was a member, manager, and 50% owner of Alpine subject to the provisions of ORS 659.030(1)(g).

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050.

4) The actions of Ronald Parenteau and Harry Bower, described herein, and the attitudes underlying those actions, are properly imputed to Alpine Meadows Landscape Maintenance, LLC.

5) At times material herein, ORS 659.030(1)(a) provided, in pertinent part:

> "(1) For the purposes of ORS 659.010 to 659.110, * * * it is an unlawful employment practice:
>
> "(a) For an employer, because of an individual's * * * age if the individual is 18 years of age or older * * * to refuse to hire or employ * * * such individual."

Alpine, as Complainant's prospective employer, committed an unlawful employment practice through its members Ronald Parenteau and Harry Bower in refusing to hire or employ Complainant based on his age.

6)) At times material herein, ORS 659.030(1)(g) provided, in pertinent part:

> "(1) For the purposes of ORS 659.010 to 659.110, * * * it is an unlawful employment practice:
>
> "* * * * *
>
> (g) For any person, whether an employer or an employee, to aid, abet * * * the doing of any of the acts forbidden under ORS 659.010 to 659.110 * * *."

At all times material herein, ORS 659.010(12) provided, in pertinent part:

> "'Person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers."

Ronald Parenteau, an individual person, member, and manager of Alpine, committed an unlawful employment practice in violation of ORS 659.030(1)(g) by aiding and abetting Alpine in refusing to hire or employ Complainant based on his age, an act forbidden by ORS 659.030(1)(a).

7) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), 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 Respondents' 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 Respondents in the Order below are appropriate exercises of that authority.

OPINION

1. INTRODUCTION

In its Specific Charges, the Agency alleges that Alpine refused to hire Complainant based on his age, and in doing so, committed an unlawful employment practice in violation of ORS 659.030(1)(a). The Agency additionally alleges that Ronald Parenteau aided and abetted Alpine in violation of ORS 659.030(1)(g). The Agency seeks remedies consisting of back pay in the amount of $2,233 and mental suffering damages in the amount of $12,500.

2. UNLAWFUL EMPLOYMENT PRACTICE

The Agency's prima facie case consists of proof of the following elements: (A) Respondents are Respondents as defined by statute; (B) Complainant is a member of a protected class; (C) Complainant was harmed by an action of Respondents; and (D) Respondents' action was taken because of the Complainant's protected class. *See OAR 839-005-0010(1).*

A. Respondents are Respondents as defined by statute.

In their answer to the Specific Charges, Respondents admit that Alpine is a limited liability company and was an employer in Oregon subject to the provisions of ORS 659.010 to 659.435. Respondent Parenteau contends that he cannot be held

liable as an aider and abettor under ORS 659.030(1)(g) as a matter of law. For reasons discussed later in this opinion,[16] the forum finds otherwise, and concludes that Alpine and Parenteau are both proper Respondents as defined by statute.

B. Complainant is a member of a protected class.

Complainant, by virtue of being an individual who is 18 years old or older, is a member of a protected class as defined by ORS 659.030(1)(a).

C. Complainant was harmed by an action of Respondents.

Although Respondents contend that Complainant was not harmed because the landscape worker position he applied for was never filled, the forum is convinced that, but for Complainant's age, he would have been hired to fill the position advertised by Alpine.[17] Credible evidence establishes that Complainant lost wages and experienced mental suffering as a result of Respondents' refusal to hire him, constituting the requisite harm.

D. Respondents' action was taken because of the Complainant's protected class.

The "yellow sticky note" that Parenteau attached to Complainant's resume[18] is the lens through which the analysis of causation must be viewed. It was written in the same time frame that Parenteau and Bower made the decision not to hire Complainant and was obviously intended to provide Complainant with an explanation of why he was not hired. Parenteau testified that the note was "a mistake," that its words have been taken out of context, and that there were several other reasons why Complainant was not hired. However, given that it is the most direct reflection of Parenteau's state of mind at the time the alleged discriminatory hiring decision was made, and that none of those other reasons appear on the note, the forum concludes that Parenteau's words on the note constitute direct evidence of unlawful discrimination.

Respondents offer four LNDRs[19] for not hiring Complainant. If any of those are found credible, then the forum must apply a "mixed motive" analysis, in which the burden of proof rests on Respondents to prove that the same hiring decision would have been made even if Complainant's age had not been taken into account.[20]

Respondents' first LNDR is that the job required a valid Oregon driver's license, which Complainant lacked. Respondents point to the March 1998 newspaper ad,[21] from which Greg Phillpot was hired, as evidence of this requirement. Contradicting this evidence is the job order itself, which does not reflect the need for a valid Oregon driver's license,[22] the fact that Respondent Parenteau did not tell Complainant he would not be hired because he lacked a valid Oregon driver's license,[23] and the statement by Parenteau and Bower to the Civil Rights Division that Complainant's lack of a driver's license was "not a problem." The forum finds this LNDR is not credible.

Respondents' second and third LNDRs are interrelated. Those LNDRs are that Complainant was overqualified for the job, as demonstrated by his resume, and that his wage expectation was too high, based partly on his qualifications and partly on the wage expectation stated in his resume of $8-$12 per hour for landscape work. These LNDRs are also unworthy of credence. To begin with, Parenteau and Bower testified that they could only afford minimum wage and they placed a job order with the Jobs Plus program because of its wage subsidy. However, the job order specified a wage of $7 per hour, $1 more than the statutory minimum wage at the time.[24] Secondly, the Jobs Plus program would have subsidized $6.50 per hour of Complainant's wage for his first month of employment, then $5.50 per hour of Complainant's wage for the next five

months. Third, Complainant knew from the job order that the job only paid $7 per hour, and there is no evidence that he told Parenteau that he would not work for that wage. This conclusion is bolstered by the fact that within two months after July 13, 1998, Complainant took three separate jobs that all paid less than $8.00 per hour. Finally, there is no evidence on the record that Alpine has rejected other applicants because they were "overqualified."

Respondents' final LNDR relates to the "yellow sticky note." Parenteau testified that when he wrote the note, he had in mind his and Bower's younger nephews and bringing them in as members of the LLC. This argument is inherently flawed. If Parenteau's real plan was to bring in the out-of-state nephews, aged 22 and 24, into the LLC, there would be no point in advertising for applicants in the first place. In addition, no evidence was presented to indicate that, in June and July 1998, there was any more than an abstract possibility that either nephew might move to Ashland and join the LLC. Consequently, the forum also finds this LNDR not credible.

The forum concludes that Parenteau meant exactly what he said in the telltale "yellow sticky note" – that he and Bower were looking for someone younger than Complainant, and that Complainant was not hired as a landscape worker because of his age.

Respondents pose two additional arguments in an attempt to nullify the Agency's prima facie case. First, the facts that Parenteau and Bower are themselves older than Complainant, and had just hired Phillpot, who is the same age as Complainant, show that Respondents had no motivation to refuse Complainant hire based on his age. These facts create a potential inference, but do not, as a matter of law, require a conclusion that Respondents were not motivated to discriminate against Complainant because of his age. This potential inference is overcome by the direct evidence

contained in the "yellow sticky note" and the lack of credibility of Respondents' LNDRs. Second, Respondents point out that no one was actually hired to fill the job opening that Complainant applied for. A prima facie showing in a case involving allegations of age discrimination in hiring typically includes evidence that a comparator applicant, usually younger, was hired to fill the sought after position. In this case, the Agency proved by direct evidence that Respondents were looking for someone younger than Complainant, and that Complainant was not hired as a landscape worker because of his age. Consequently, the lack of a comparator is not a fatal flaw in the Agency's case.

3. LIABILITY

A. Respondent Alpine Meadows Landscape Maintenance, LLC

It is undisputed that Alpine would have been Complainant's employer, had Complainant been hired. Accordingly, Alpine is jointly and severally liable[25] for the damage awards made by this forum to compensate Complainant for his back pay loss and mental suffering.

B. Respondent Ronald Parenteau

Respondents argue that the *Schram*[26] and *Ballinger*[27] decisions by the Oregon Court of Appeals prevent the forum from holding Parenteau liable as an aider and abettor under ORS 659.030(1)(g).

In *Schram*, plaintiff brought a civil action in Circuit Court in which she alleged Albertson's had discriminated against her in violation of ORS 659.030, and that two supervisors employed by Albertson's had aided and abetted Albertson's in

discriminating against plaintiff in violation of ORS 659.030.[28] Plaintiff sought back and front pay from those supervisors.[29] The trial court granted summary judgment to the two supervisors on the basis that plaintiff did not seek a remedy from them that was available under the statute of the facts alleged, and the Court of Appeals affirmed. The court characterized the supervisors as "low-level supervisors" who were "co-employees" with plaintiff and held that requiring these supervisors to pay plaintiff lost wages "would belie the kind of 'equitable remedies' that the legislature would have contemplated against co-employees * * *."[30] Additional considerations cited by the court were the fact that Albertson's had "ultimate responsibility for the payment of lost wages," that "Albertson's is the entity that benefited from not having to pay wages to plaintiff," and that "requiring lost wages to be paid by [the supervisors] departs from the idea of restoration of plaintiff's employment status as it existed before she left her job and is more in the nature of sanctions or punishment."[31]

The *Schram* decision was addressed by this forum in 1998, where the Commissioner held that the president of a private corporation who was also an employee of that corporation could be held liable for lost wages as an aider and abettor under ORS 659.030(1)(g).[32] The Commissioner reasoned that administrative proceedings brought in this forum are not based on ORS 659.121, and that the Commissioner's remedial authority in administrative proceedings is distinct from that of ORS 659.121, which governs remedies in civil suits.[33] The forum adopts the same conclusion in this case.[34]

Respondents cite *Ballinger* for the proposition that lost wages cannot be awarded against Parenteau because he is not an "employer." Respondents miss the point. *Ballinger* can be distinguished from this case because the plaintiffs in *Ballinger* alleged

that the supervisors were liable as "employers," not because they had personally aided and abetted the unlawful discrimination.

On the surface, Parenteau's legal relationship to Alpine, for the purpose of determining his liability as an aider and abettor, appears to be a possible obstacle. Alpine is a limited liability company set up in March 1998 under the provisions of ORS Chapter 63. Limited liability companies ("LLC") are a relatively new concept under the law. In 1993, 18 states, including Oregon, adopted a limited liability company act (LLCA).[35] The LLC is a new form of business in Oregon that combines a corporation's limited liability with a partnership's economic and tax flexibility.[36] A "member" of an LLC is a person or persons with both an ownership interest in a limited liability company and all the rights and obligations of a member specified in ORS Chapter 63. [37] All "members" are managers unless the articles of incorporation provide for a non-member manager or managers.[38]

ORS 659.030(1)(g) forbids "any person, whether an employer or an employee, to aid, abet * * * the doing of any of the acts forbidden under ORS 659.010 to 659.110 * * *." ORS 659.010(12) includes "one or more individuals" under the definition of "person." "Employer" is defined under ORS 659.010(6) as "any person, who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed."

In this case, it is undisputed that Parenteau was both a "member" and "manager" of Alpine, and held a 50% ownership interest in Alpine. However, due to the hybrid nature of an LLC, it is impossible to conclude, as a matter of law, that Parenteau was or was not an "employer" as defined by ORS 659.010(6).[39] The evidence is insufficient to establish whether or not Parenteau "directly * * * engage[d] or utilize[d] the personal

service" of Phillpot, Alpine's only undisputed employee, "reserving the right to control the means by which [Phillpot's] service is or will be performed" or that Parenteau was an "employee" of Alpine. However, it is not necessary to reach the question of whether Parenteau is an employer or an employee. The forum previously found a joint labor management trust liable as an aider and abettor under ORS 659.030(1)(g) because it met the definition of a "person" under *former* ORS 659.010(11).[40] In the present case, Parenteau is the "individual" who wrote the "yellow sticky note" telling Complainant he would not be hired because of his age, and, in doing so, aided and abetted Respondent Alpine in an unlawful employment practice. As a "person," Parenteau is jointly and severally liable with Alpine for Complainant's back pay and mental suffering damages.

4. DAMAGES

A. Back Pay

Back pay awards in hiring cases typically consist of the wages or salary earned by the hired comparator in the relevant time period, less mitigation. In this case, there is no comparator because no one was hired, and there is no date certain that Complainant would have started work. However, it is clear from the job order and from Bower's and Parenteau's testimony that the job paid $7.00 per hour and involved working a minimum of 40 hours per week, Monday through Friday. At the time of Complainant's job interview, he was not employed. Given that Complainant took the bus to be interviewed by Parenteau on the same day he obtained the job referral, and absent any evidence to the contrary, the forum infers that Complainant would have begun working for Alpine on Tuesday, July 14, 1998, the day after the interview, and that he would have worked eight hours per day, five days a week, earning $7.00 per hour. The forum further infers that Complainant would have worked this schedule, at this wage, until at least October 1, 1998, the date the Agency stipulated that Complainant's entitlement to back pay

ended. On July 28, 1998, Complainant obtained alternative employment at Ferguson Management, then at Personnel Source. Although his hourly wages at Ferguson and Personnel were higher than he would have earned at Alpine, his overall earnings were less.[41] Adding his Bear Creek wages, Complainant earned gross wages of $2,036.97 from July 28 through October 1, 1998. Had he been employed by Alpine, he would have earned gross wages of $3,080.00 in that same period of time.[42] This forum has previously held that an employer is liable for back wages until a complainant obtains subsequent employment paying at least as much as the position lost.[43] In this case, that did not occur until October 1, 1998, the date the Agency stipulated that Complainant's entitlement to back pay ended. Consequently, Complainant is entitled to a back pay award from July 14 through October 1, 1998, for a total gross wage loss of $1,043.03.

The forum notes that Complainant's delay of two weeks in finding alternative employment, despite his apparent failure to look for work in that interim, does not constitute a failure by Complainant to mitigate his back pay loss,[44] absent a showing by Respondents that alternative suitable employment was offered to Complainant and that he declined it.

In addition, Respondents cite *McKennon v. Nashville Banner Publishing Company*, 115 SCt 849 (1995) for the proposition that Complainant's entitlement to back pay should be annulled because he made misrepresentations and omissions in his resume that would have legitimately caused Alpine not to hire him, had Parenteau and Bower known of these facts. When applied to a hiring case, *McKennon* stands for the proposition that back pay liability ends for a respondent at the time the respondent discovers the facts that would have caused respondent not to hire a complainant, had the respondent known of those facts at the time the hiring decision was made. *Id.,* at

886-87. Here, Respondent Parenteau did not become aware of the misrepresentations and omissions in Complainant's resume until well after October 1, 1998, the date at which the forum has cut off Respondents' back pay liability. Consequently, the *McKennon* doctrine does not apply to this case.

B. Mental Suffering

Credible testimony by Complainant and his girlfriend, Joy Delucchi, established that Complainant experienced shock when he learned, by reading Parenteau's "yellow sticky note," that he would not be hired. Complainant experienced anger after that, then stomach upset that aggravated his pre-existing sleep problems. He became more depressed and withdrawn from his acquaintances after getting the note. For a period of at least two weeks, until he got another job, he spent an inordinate amount of time watching television. He lost his temper easily, especially with Delucchi when she suggested he go out and look for work.

Prior to Respondent's refusal to hire him, Complainant was already experiencing stress from other sources, as well as physical problems, which caused him to feel depressed and have sleep problems. However, the record is undisputed that the emotional and related physical distress described in the preceding paragraph that was experienced by Complainant as a result of Respondents' unlawful employment practice was *in addition* to whatever distress he was already experiencing. Complainant is entitled to damages to compensate him for that distress. The forum finds that $12,500 is an appropriate award.

5. AFFIRMATIVE DEFENSES

A. "Unclean Hands"[45]

In their amended answer, Respondents plead their affirmative defense of clean hands in the following language:

> "Complainant's charges are barred by the [equitable] doctrine of unclean hands in that Complainant is now in competition with Respondents and performs work for which a Landscape Contractor Board licence (sic) is required by ORS 671.530. Complainant does not hold a Landscape Contractor's Board license, although he holds himself out to the public as being so licensed. Complainant also drives without a license and without insurance. Complainant should not be allowed to invoke the equitable remedies of this forum for lack of employment while violating the laws of the State of Oregon in the course of his current employment."

By amendment at hearing, Respondents added the additional allegations that Complainant provided false and incomplete information on his resume.[46] Respondents argue that proper application of the clean hands doctrine would prevent the forum from granting any remedy sought by the Agency.

Clean hands "is a doctrine, maxim or principle of equity which may be invoked to deny the opposing party the right to come into a court of equity." *Gratreak v. North Pacific Lumber Co.*, 45 Or App 571, 576-77, *rev den* 289 Or 373 (1980). It "applies to any party who seeks either the affirmative or defensive intervention of the court for equitable relief." *Rise v. Steckel*, 59 Or App 675, 681, *rev den* 294 Or 212 (1982). The "purpose [of the doctrine] is to deny equitable relief to a party that, by its actions, has disqualified itself from the assistance of a court of conscience." *Thompson v. Coughlin*, 144 Or App 348, 352 (1996), *rev allowed*, 325 Or 367 (1997). It is inapplicable to an action at law where a legal remedy is sought. *Gratreak*, 45 Or App at 575-76. This case is an action at law. Consequently, the clean hands doctrine does not apply to the legal remedy of monetary damages sought by the Agency.

The Agency also sought an additional remedy consisting of "such other relief as is appropriate to eliminate the effects of the unlawful practices found both as to Complainant and as to others similarly situated." In this case, the ALJ recommended that the Commissioner issue an Order requiring Respondents to "Cease and desist from discriminating against any applicant from employment based upon the employee's age."

This remedy, which is injunctive in nature, is properly construed as an equitable remedy.[47] The question, then, is whether Complainant's "unclean hands" prevent the Commissioner from entering a Cease and Desist Order against Respondents.

The clean hands doctrine is used to preclude a "party" from obtaining relief if the party engaged in serious misconduct related the transaction giving rise to the claim.[48] For the purpose of this analysis, the parties to this action are the Civil Rights Division of the Bureau of Labor and Industries and Respondents. Although the monetary damages awarded, if collected, are ultimately distributed to the Complainant, the Complainant is not a "party" to this action. *OAR 839-050-0020(13)*. "Clean hands" applies to the government,[49] as well as private litigants. However, Respondents have not alleged that the Commissioner or any of the Agency's staff engaged in any misconduct related to Respondents' unlawful employment practices. With no evidence of misconduct on the part of the Commissioner or his staff, the clean hands doctrine cannot be invoked against the Commissioner's Cease and Desist Order.

B. Constitutionality

In Oregon, a complainant aggrieved by an alleged unlawful employment practice as defined by ORS Chapter 659 may pursue a claim with BOLI through an administrative proceeding under ORS 659.060 or file a civil suit in circuit court pursuant to ORS 659.121(1). Depending upon the choice of forum, a complainant's remedies differ. Specifically, BOLI's administrative scheme awards lost wages and benefits, related out-of-pocket expenses, and damages for emotional distress. Equitable remedies, such as reinstatement and cease and desist orders, are also available. Under ORS 659.121(1), only lost wages are available.

Respondents contend that this statutory scheme, which provides different sets of remedies against different employers, depending on a complainant's choice of forum,

violates Article I, section 20 of the Oregon Constitution because it grants to a class of employers who are subjected to suit under ORS 659.121(1) immunity from "mental suffering" damages, which is not granted to the class to which Respondents belong. Respondents' answer also contends that this scheme violates the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution. Since Respondents have chosen not to discuss that defense in their post-hearing brief, the forum disregards it.

As an initial matter, the defense only applies to Respondent Parenteau, as an individual. Article I, section 20 "forbids inequality of privileges or immunities not available upon the same terms, first, to any citizen, and second, to any class of citizens." *State v. Clark*, 291 Or 231, 237, 630 P2d 810 (1981); *Tanner v. Oregon Health Sciences University*, 157 Or App 502, 971 P2d 435, 445 (1998). Both Respondents have asserted unequal treatment based on class membership. However, Respondent Alpine lacks standing to assert this defense because those rights are reserved for citizens, and Respondent Alpine is not a citizen.[50]

In order to prevail on an Article I, section 20 defense, Respondent Parenteau must show:

> "(1) that another group has been granted a 'privilege' or 'immunity' that their group has not been granted, (2) that [the regulations] discriminates against a 'true class' on the basis of characteristics that they have apart from the regulation[s themselves], and (3) that the distinction between the classes is either impermissibly based on persons' immutable characteristics, which reflects 'invidious' social or political premises or has no rational foundation in light of the [enabling statute's] purpose."[51]

Respondent Parenteau's defense fails based on his inability to meet the second and third prongs of this test.

The second prong requires that the challenged regulations must discriminate against a "true class" on the basis of characteristics that members of the class have apart from the regulations themselves. A "true class" for purposes of section 20 is a

group of persons whose characteristics or status are not created by the challenged regulations, but which exist as a result of antecedent characteristics or status.[52] Classes created by the challenged regulations themselves "are entitled to no special protection and, in fact, are not even considered to be classes for the purposes of Article I section 20."[53] Since Parenteau's only class was created by the challenged statutory scheme, he is not entitled to the protection of Article I section 20 as a Respondent.

The third prong requires that any distinction between true classes is impermissibly based on persons' immutable characteristics and reflects "invidious" social or political premises or has no rational foundation in light of the statute's enabling purpose. Respondent Parenteau has alleged no immutable characteristics or invidious premises. Furthermore, an examination of the statutory scheme shows that it is rationally based. ORS 659.022 sets out the legislative policy behind the statutory scheme encompassed by ORS chapter 659. In pertinent part, it reads as follows:

> "The purpose of ORS 659.010 to 659.110 * * * is to encourage the fullest utilization of available manpower by removing arbitrary standards of * * * age as a barrier to employment of the inhabitants of this state; to insure human dignity of all people within this state * * *. To accomplish this purpose the Legislative Assembly intends by ORS 659.010 to 659.110 * * * to provide:
>
> "* * * * *
>
> "(2) An adequate remedy for persons aggrieved by certain acts of discrimination because of * * * or unreasonable acts of discrimination in employment based upon age."

The legislature consciously implemented this policy by adopting the two separate remedial schemes embodied in ORS 659.060 and ORS 659.121(1). Oregon appellate courts have approved this remedial scheme by upholding the Commissioner's authority to award compensatory damages for mental suffering.[54] The forum concludes that any distinction in remedies between ORS 659.060 and ORS 659.121(1) is rationally based in light of the statutory purpose set out clearly in ORS 659.022.

EXCEPTIONS

A. The Agency's Exceptions.

In response to the Agency's exceptions, the forum has made three changes. In Findings of Fact – The Merits ## 7 and 9, the name "Perkins" has been changed to "Pearson" where it appears in parenthesis. In the section on "Back Pay" in the Opinion, the forum has substituted "October 1, 1998" for "July 28, 1998" where it appears on page 34, line 8 of the Proposed Order.

B. Respondents' Exceptions.

Respondents filed 24 exceptions to the Proposed Order.

1. Proposed Findings of Fact – Procedural.

Respondents' objections have been addressed through modifications in Findings of Fact – Procedural ##21, 27, 28, 37, and 38.

2. Proposed Findings of Fact – The Merits.

Respondents' objections in exceptions 7, 8, and 11 have been addressed through modifications in Findings of Fact – The Merits ## 19, 22, 24, and 28.

The forum disagrees with Respondents' observation that footnote 2 on page 10 is a gratuituous comment, but has modified it to reflect that no violation of ORS 659.030(1)(d) was charged.

Exception 6 dovetails with an Agency exception.

Exception 7 is addressed in a footnote to Finding of Fact – The Merits #22.

Exception 9 has already been adequately addressed in the Opinion.

Exception 10 is not supported by testimony in the record.

In Exception 12, Respondents contend that the ALJ's findings that Joseph Tam was a credible witness, despite his "deliberately difficult * * * attitude," are inconsistent. In some instances, attitude may demonstrate a lack of credibility. In this case, it did not.

3. Proposed Ultimate Findings of Fact.

Respondents' Exception 13, requesting that the forum should add "Respondents' only employee at the time of the events in question was the same age," is overruled. Although relevant as comparative evidence, it is not a fact necessary to support the forum's conclusions of law.

In Exception 14, Respondents contend that the ALJ's proposal to award the entire amount of mental distress damages sought by the Agency, despite the finding that Complainant's mental distress "was partially offset by pre-existing conditions, violates Respondents' Due Process rights under the Fourteenth Amendment of the United States. Oregon appellate courts, as well as the forum, have long held that awards for mental suffering damages are constitutional. *Williams v. Joyce*, 4 Or App 482, 479 P2d 513 (1971); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979); *In the Matter of Jerome Dusenberry*, 9 BOLI 173, 190 (1991). As noted in the Proposed Opinion, Complainant experienced mental suffering as a result of Respondents' unlawful employment practice *in addition* to the distress he was already experiencing. The ALJ proposed to award damages only for the mental suffering he experienced in addition to whatever distress he was already experiencing. Therefore, awarding Complainant the mental suffering damages sought by the Agency is not inconsistent with a finding that he was already experiencing suffering from other sources.

4. Proposed Conclusions of Law.

Exception 15, which objects to Nos. 2 and 6, lacks merit for reasons already described in the Opinion.

5. Proposed Opinion.

Exceptions 16, 18, 19, and 20 object to inferences and conclusions drawn from the evidence by the ALJ. The forum notes that its determination of the witnesses' credibility was also a factor in arriving at these conclusions. Respondents' arguments repeat Respondents' arguments at hearing, which the forum has already rejected.

Exception 17, which characterizes footnote 13 on page 25 as "gratuitous," is granted. That note, containing the ALJ's candid view of Respondent Parenteau's motivation in writing the "yellow sticky note," has been deleted.

Exception 21 argues that the ALJ should have concluded that the Agency failed to prove a prima facie case under applicable federal case law. The Opinion contains an adequate discussion of how the Agency met its prima facie case, and Respondent raises no new arguments. This exception is overruled.

Exception 22 argues that Respondent Parenteau cannot be held liable as an aider and abettor under ORS 659.030(1)(g) as a matter of law. Again, the Opinion contains an adequate discussion of why the forum has found Respondent Parenteau liable under this statute. This exception is overruled.

Exception 23 contends that Complainant's back pay should be reduced, based on Proposed Finding of Fact – The Merits #29. The forum rejects Respondents' argument for the reasons stated in the Opinion.

Finally, in Exception 24, Respondents point out that the ALJ misapplied Respondents' "clean hands" defense by failing to take into consideration the fact that at the time of his interview, Complainant misrepresented that he had a current pesticide applicators license and did not disclose that he had been fired from his only directly relevant job experience. This section of the Opinion has been rewritten to address Respondents' exception and to provide a more lucid analysis.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found in violation of ORS 659.030(1)(a) and 659.030(1)(g) and as payment of the damages awarded, Respondents RONALD PARENTEAU and ALPINE MEADOWS LANDSCAPE MAINTENANCE, LLC, are hereby ordered 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 Terrance J. Hershberger, in the amount of:

a) ONE THOUSAND FORTY THREE DOLLARS AND THREE CENTS ($1,043.03), less lawful deductions, representing wages lost by Complainant between July 13, 1998, and October 1, 1998, as a result of Respondents' unlawful practices found herein, plus

b) TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500.00), representing compensatory damages for mental suffering as a result of Respondents' unlawful practices found herein, plus,

c) Interest at the legal rate from October 1, 1998, on the sum of $1,043.03 until paid, and

d) Interest at the legal rate on the sum of $12,500.00 from the date of the Final Order until Respondents comply herewith.

2) Cease and desist from discriminating against any applicant for employment based upon the employee's age.

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[1] Exhibit X-26 is a copy of Respondent's letter of July 22, 1999 amending paragraph 7 of Respondent's amended answer that was filed on July 22, 1999. It substitutes for the original document, which is

missing from the official hearings file. *See* Procedural Finding of Fact #16, *infra.* Exhibit X-28 is Respondent's original letter of July 22, which was discovered by the ALJ after receipt of X-26 from the Agency. X-27 is the original of "Respondents' Response to Requests for Admissions."

[2] *See* discussion of Respondents' affirmative defense of "unclean hands" in the Opinion section of this Order, *infra*.

[3] The forum notes that it may rely on case law, including the *Turnbow* case that is the subject of the Agency's objection, whether or not a relevant case is brought to the attention of the forum by the participants.

[4] *See* Finding of Fact – Procedural #20, *supra*.

[5] *See* OAR 839-050-0210(5), 839-050-0200(8).

[6] However, this is a moot issue, inasmuch as the forum has held that the doctrine of "unclean hands" is not available in this forum. *See* discussion of "Affirmative Defenses" in the Opinion, *infra*.

[7] Although the Agency has not alleged a violation of ORS 659.030(1)(d), the forum notes that this ad appears on its face to be a violation of ORS 659.030(1)(d), which makes it an unlawful employment practice for "any employer * * * to cause to be printed * * * any advertisement * * * in connection with prospective employment which expresses directly * * * any limitation, specification or discrimination as to an individual's * * * age if the individual is 18 years or older * * *."

[8] *See* Findings of Fact – The Merits ##7-9, *infra*, for a description of the "Jobs Plus" program.

[9] The only differences are that the job referral slip omitted the language ""ALL WORK DONE IN TEAMS" and specifically stated that a driver's license was "NOT REQUIRED."

[10] During cross-examination, Respondent Parenteau was asked "And at that time, isn't it true that you'd already written the yellow sticky note?" He responded "No, I wrote it in the parking lot" and did not deny that the note was yellow in color.

[11] This sum was arrived at by adding total gross wages from Complainant's payroll slips through September 27, then adding 80% of Complainant's gross wages from his payroll slip for the pay period

that ended October 4, 1998. The forum bases the latter calculation on the assumption that Complainant worked five days during the week that ended October 4, 1998.

[12] Although the participants stipulated this figure was $1,774.25, upon review of this figure and the calculations upon which it was based, the forum concludes that Complainant's gross earnings at Bear Creek during the week ending October 4, 1998, were inadvertently omitted from in this calculation. Consequently, the forum adds $252.72 in gross wages to the stipulated figure to avoid injustice to Respondents. *See also In the Matter of Franko Oil Company*, 8 BOLI 279, 291 (1990)("The Hearings Referee has the right and duty to conduct a fair and full inquiry and create a complete record. * * * Where errors are detected, the Hearings Referee is empowered to cause them to be corrected. This is especially true where there are arithmetic errors or other similar computation oversights.")

[13] *See* Finding of Fact – The Merits #36, *supra*.

[14] His specific testimony was "To this day, I have no idea how old Complainant is."

[15] *See* discussion in the Opinion in section entitled "Unlawful Employment Practice – Respondents' action was taken because of the Complainant's protected class," *infra*.

[16] *See* discussion of "Liability" in Opinion, *infra.*

[17] *See* discussion of causation in Opinion section entitled"Respondents' action was taken because of the Complainant's protected class," *infra.*

[18] The note specifically read "TERRY, SORRY, WE WERE LOOKING FOR SOMEONE YOUNGER, TO POSSIBLY TAKE OVER THE BUSINESS. Thanks, Ron." *See* Finding of Fact – The Merits #21, *supra*.

[19] *See* Finding of Fact – The Merits #42, *supra*.

[20] OAR 839-005-0015 specifically provides:

"Frequently, the evidence indicates that several factors contribute to causing the Respondent's action, of which only one factor is the Complainant's protected class. The Division will apply the mixed motive analysis to determine whether the Complainant's protected class membership played so

substantial a part in the Respondent's action to be said to have 'caused' that action. Under this analysis, the Complainant's protected class membership does not have to be the sole cause of the Respondent's action but must have played a substantial role in the Respondent's action at the time the action was taken. A Respondent must prove that it would have made the same decision even if it had not taken Complainant's protected class into account."

The forum also notes that direct evidence of an unlawful employment practice is not always necessary to trigger the mixed motive analysis under OAR 839-005-0015.

[21] *See* Finding of Fact – The Merits #5, *supra*.

[22] Although the job order, as entered onto the Employment Department's computer by employment representative Jim Perkins, erroneously describes Alpine's work hours as 9 a.m. to 5 p.m., this apparent error, by itself, does not establish that Parenteau specified a driver's license as a job requirement in giving the order to Perkins, particularly in view of Parenteau's and Bower's subsequent statement to the Civil Rights Division that Complainant's lack of a driver's license "was not a problem."

[23] The forum notes Parenteau's testimony that he inferred during his interview with Complainant that Complainant had no license, based on the fact that Complainant took the bus from Medford to Ashland for the interview.

[24] *See* ORS 653.025.

[25] *See* the following paragraph, *infra*, in which the forum discusses Respondent Parenteau's joint and several liability.

[26] *Schram v. Albertson's, Inc.,* 146 Oregon App 415, 934 P2d 483 (1997).

[27] *Ballinger v. Klamath Pacific Corp.,* 135 Or App 438 (1995).

[28] *Id.*, at 488.

[29] *Id.,* at 489.

[30] *Id*.

[31] *Id.*

[32] *In the Matter of Body Imaging, P.C.,* 17 BOLI 162 (1998), *appeal pending*.

[33] *Id.,* at 184.

[34] *Schram* can also be distinguished from this case on its facts. The *Schram* supervisors were "co-employees" for a large corporation. In contrast, Parenteau has a 50% ownership interest in Alpine.

[35] *See* Erich W. Merrill, Jr., *Treatment of Oregon Limited Liability Companies in States without LLC Statutes*, 73 Or L. Rev. 43 (1994)

[36] *See* Mark Golding, *Financial Aspects of Oregon Limited Liability Companies*, 73 Or L. Rev. 112 (1994)

[37] *ORS 63.002(16)*

[38] *ORS 63.130; ORS 63.135.*

[39] *Compare Ballinger*, 135 Or App at 452 (Corporate employer's agent was not an "employer" for purposes of ORS 659.010(6), despite fact that agent was corporate employer's president, was 52% shareholder, and had plenary authority to hire and fire and direct activities of employees.)

[40] *See In the Matter of Arden-Mayfair, Inc.,* 2 BOLI 187, 190 (1981). *See also In the Matter of Sapp's Realty,* 4 BOLI 232, 278 (1985)(A respondent found not to be an "employer" or an "employee" who aided and abetted the respondent employer was held liable for back pay and mental suffering damages on the basis that he was "an 'individual' and therefore a "person" within the meaning of the statute.")

[41] Complainant earned a total of $699.65 in gross wages from Ferguson and Personnel, whereas his gross earnings at Alpine during the same period of time would have been $728.00 (13 days x 8 hours x $7.00=$728.00).

[42] Although this figure is not a certainty, due to the fact that Alpine hired no one whose wages could be used as a lodestar, federal courts in Title VII cases have held that back pay is awardable even when they cannot be calculated with precision. *See Christopher v. Stouder Memorial Hospital*, 936 F.2d 870, 880 (6th Cir. 1991), *cert. den*. 502 U.S. 1013, 112 S.C. 658,. Also, the U.S. Supreme Court, *in Albemarle Paper Company. v. Moody*, 422 U.S. 405 (1975), held that there is a strong presumption in favor of back-pay awards to victims of employment discrimination under Title VII, and that "backpay should only be

denied for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." In the past, this forum has held that, because Oregon's Fair Employment Practices Law contained in ORS 659.010 to 659.110 is analogous to Title VII of the Civil Rights Act of 1964, federal court decisions are instructive and entitled to great weight on analogous issues in Oregon law. *See In the Matter of Wing Fong*, 16 BOLI 280, 292 (1998). Therefore, this forum relies on the cited federal cases in calculating Complainant's back pay award.

[43] See *In the Matter of James Breslin*, 16 BOLI 200, 218 (1997*), affirmed without opinion, Breslin v. Bureau of Labor and Industries*, 158 Oregon App 247, 972 P2d 1234 (1999; *In the Matter of City of Umatilla*, 9 BOLI 91, 105 (1990), *affirmed without opinion, City of Umatilla v. Bureau of Labor and Industries,* 110 Oregon App 151, 821 P2d 1134 (1991).

[44] *See, e.g*. *In the Matter of Love's Woodpit Barbeque Restaurant*, 3 BOLI 18, 26 (1982)(Complainant's speed in obtaining alternative employment 10 days after respondent's unlawful discharge established that complainant properly mitigated his damages.)

[45] Courts refer to the same defense both as "unclean hands" and "clean hands." The forum entitles this section "Unclean Hands" because Respondent has given that label to their defense.

[46] *See* Finding of Fact – Procedural #38, *supra*.

[47] *See, e.g. E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991) (An ex parte temporary restraining order and preliminary injunction sought by the E.E.O.C. were construed as an action for equitable relief).

[48] *See North Pacific Lumber Co. v. Oliver*, 286 Or 639, 596 P2d 931 (1979).

[49] See, e.g. *E.E.O.C.,* 939 F2d at 752-3. (Court declined to enforce clean hands doctrine against EEOC based on EEOC's disclosure of investigation against employer which violated Title VII confidentiality requirement, stating that the doctrine, although applicable to government, "should not be strictly enforced when to do so would frustrate a substantial public interest.")

[50] *See State v. James*, 189 Or 268, 219, 219 P2d 756 (1950)(corporations or business entities are not citizens).

[51] *Jungen v. State of Oregon*, 94 Or App 101, 105, 764 P2d 938 (1988).

[52] *See Hale v. Port of Portland*, 308 Or 315, 783 P2d 506 (1989).

[53] *Kmart Corp. v. Lloyd*, 155 Or App 270, 963 P2d 734 (1998), *rev'd and remanded on other grounds, citing Sealy v. Hicks*, 309 Or 387, 397, 788 P2d 435 (1990); *Tanner v. Oregon Health Sciences University*, 157 Or App 502, 971 P2d 435, 445 (1998).

[54] *See In the Matter of James Breslin,* 16 BOLI 200 (1997)*, affirmed without opinion, Breslin dba Garden Valley Texaco v. Bureau of Labor and Industries et al,* 158 Or App 247, 972 P2d 1234 (1999*)*(upholding award of $30,000 for mental suffering)*; A.L.P. Incorporated et al v. Bureau of Labor and Industries,* 161 Or App 417 (1999)(upholding award of $20,000 for mental suffering*); Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, *rev den* 287 Or 129 (1979)(upholding award of $4,000 for mental suffering).