In the Matter of

LTM, INCORPORATED,

Respondent.

Case Number 45-98
Final Order of the Commissioner
Jack Roberts
Issued November 18, 1998.

SYNOPSIS

Respondent, which operated a construction business, employed Complainant as a pipe layer and grade checker. After Complainant was injured on the job, Respondent's risk manager knowingly assigned him to work outside his return-to-work restrictions, belittled him, and discouraged him from filing for "time-loss" through the Worker's Compensation system. These actions created a working environment hostile and offensive to workers, like Complainant, who applied for Workers' Compensation benefits or otherwise invoked or utilized the Workers' Compensation system, in violation of ORS 659.410(1). The Commissioner awarded Complainant $5,000.00 for the mental suffering caused by the unlawful employment practice. ORS 659.100, 659.410(1); OAR 839-005-0010(3), 839-006-0125.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on September 22, 1998, in the conference room of the Bureau of Labor and Industries, 700 East Main Street, Medford, Oregon. The Civil Rights Division

("CRD") of the Bureau of Labor and Industries ("the Agency") was represented by Alan McCullough, an employee of the Agency. Respondent LTM, Incorporated, was represented by Gerald Shean, III, Attorney at Law, Medford. Michael Benke, of the corporate Respondent, was present from the beginning of the hearing through the close of Respondent's evidence; he was not present during the testimony of the Agency's rebuttal witness or during closing arguments. The Complainant, Steven M. Eld, was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses, in addition to Complainant, Joyce Smith (a friend of Complainant), Pamela Jean Pratt (a former employee of Respondent), Jerry Anthous (a current employee of Respondent), and Toni Eld (Complainant's wife). The Agency called Barbara Turner, an Agency investigator, as a rebuttal witness.

Respondent called as witnesses Respondent employees Michael Benke and Curtis Crichton.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-10, Agency Exhibits A-1 through A-9 (by stipulation) and A-10 through A-12, and Respondent's Exhibits R-1 through R-7 (by stipulation). The record closed on September 22, 1998.

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 or about December 16, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. Complainant alleged that Respondent

terminated his employment "because [he] suffered an injury and invoked the Worker's Compensation system."

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence that Respondent unlawfully had retaliated against Complainant for filing a Worker's Compensation claim. The Agency did not find substantial evidence that Respondent had terminated Complainant because he filed that claim.

3) On February 26, 1998, the Agency requested a hearing.

4) On March 18, 1998, the Agency served on Respondent Specific Charges alleging that Respondent had harassed Complainant based on his application for benefits, invocation, or utilization of the procedures provided for in ORS Chapter 656, in violation of ORS 659.410.

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) The Notice of Hearing stated that Respondent's answer was due 20 days from receipt of the notice and that, if Respondent did not timely file an answer, it could be held in default.

7) On March 23, 1998, the Agency moved to amend the amount claimed in damages for mental suffering from $10,000.00 to $15,000.00. The ALJ granted that motion by order dated April 8, 1998.

8) On March 26, 1998, Respondent moved to postpone the hearing.

9) Respondent filed its answer on April 6, 1998. In that answer, it admitted the allegations in Paragraphs I, III-2, III-3, III-8, III-12, III-17, III-20, and III-21 of the Specific Charges. Respondent also admitted: that Complainant initially was employed in 1983; the allegations of Paragraph IV except for the allegation that Complainant received a prescription for pain medication; that Jerry Anthous delivered a copy of the "Return to Work" form to Respondent's office; that Complainant suffered increased pain on March 7, 1996; that Complainant had breakfast with Respondent's safety director on March 8, 1996, to discuss a Habitat for Humanity project; and that Jerry Anthous took Complainant from his home to Dr. Naugle's office. Respondent denied the remaining allegations in the Specific Charges. Respondent also asserted two affirmative defenses: (1) that the Specific Charges had not been timely filed; and (2) that the Specific Charges failed to state a claim for discrimination in violation of ORS 659.410. During the hearing, Respondent withdrew its first affirmative defense.

10) By order dated April 8, 1998, the ALJ granted Respondent's motion for postponement. The ALJ also issued a discovery order to the Agency and Respondent directing each to submit a summary of the case, including: a list of witnesses to be called; the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence; a statement of any agreed or stipulated facts; and, from the Agency only, any wage computations. The summaries were due by September 12, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-050- 0200(8), for failure to submit the summary. The Agency and Respondent each submitted a timely summary. On September 18, 1998, Respondent submitted a copy of Exhibit R-5, to be attached to its case summary.

11) At the start of the hearing, counsel for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

12) 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.

13) During the hearing, the participants stipulated to three changes to the Specific Charges: (1) the date mentioned in Paragraph 3, Item 10, of the Specific Charges should be amended to March 8, 1996 (not March 7); (2) Paragraph 3, Item 11, of the Specific Charges should be amended to state that Complainant and Benke had breakfast together on March 9, 1996 (not March 8); and (3) the phrase "the next morning" in Paragraph 3, Item 17, should be replaced with "March 15, 1996." The ALJ ordered these amendments to be made by interlineation.

14) At the hearing, the participants submitted a document listing certain stipulated facts.

15) On October 22, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. By the terms of the proposed order and in accordance with OAR 839-050-0380, exceptions were due by November 2, 1998, unless a request for extension of time was submitted no later than that day. OAR 839-050-0050(2). The Forum received no timely exceptions.

FINDINGS OF FACT -- THE MERITS

1) At all material times, Respondent was an Oregon corporation that employed six or more persons in the State of Oregon. Respondent was registered with the Corporation Division to perform highway and street construction.

2) Complainant has worked for Respondent at various times beginning in 1983. In December 1993, Res- pondent terminated Complainant's employment because he refused to take a random drug/alcohol test. Respondent rehired Complainant in 1995 to work as a grade checker and pipe layer. As a condition of re-employment, Respondent required Complainant to take a drug test and to sign a last-chance agreement.[1]

3) In March 1996, the only work available with Respondent was dismantling Respondent's old asphalt plant. Respondent assigned Complainant to do that work so Complainant would not sign on to work with another contractor. On March 4, 1996, Complainant injured his shoulder while moving steel beams with a large loader.

4) Complainant's injury occurred shortly before the end of the work day, and he went home without seeing a doctor. When Complainant woke up the next morning, he discovered the injury was more serious than he had thought. He went to LTM's office and completed an accident report; he also told Wes Nieto, a construction supervisor, that he needed to see a doctor. Jerry Anthous, a non-supervisory employee of Respondent, drove Complainant to Occupational Health to see Dr. Naugle.[2]

5) Dr. Naugle prepared a Form 827 -- entitled "FIRST MEDICAL REPORT FOR WORKERS' COMPENSATION CLAIMS" -- regarding Complainant's March 4, 1996, injury.

6) Dr. Naugle referred Complainant to Dr. Galt, a shoulder specialist. Anthous immediately drove Complainant across town to Dr. Galt's office. Dr. Galt determined that Complainant needed an MRI, which the doctor scheduled for March 12th or 13th. After the examination, Dr. Galt's nurse brought out paperwork, including a "Return to Work Recommendations/ Restrictions" form. Anthous took these papers and later gave them to Nieto.

7) Joyce Smith and her husband, friends of Complainant, went to the LTM plant to see Complainant and were told that Complainant had been injured. The Smiths then went to Dr. Galt's office, where Complainant was being examined. After the Smiths, Anthous, and Complainant left Dr. Galt's office, Anthous handed Complainant a prescription for pain medication. The Smiths and Complainant went to get the prescription filled and the Smiths drove Complainant home.

8) The next day, March 6, Complainant went to work and reported to Nieto, as usual. Nieto said he did not know what to do with Complainant, but eventually told Complainant to go back to the place he had been working when he was injured. Complainant complied, and continued helping tear down the old asphalt plant. His shoulder hurt while he did that work, and he reported the pain to "anybody that would listen," including Respondent's risk manager, Benke (a supervisory employee). When he got home, Complainant told his wife that he had been doing the same work he had been performing when he was injured.

9) On March 7, 1996, Respondent completed an 801 form for Complainant.

10) Complainant reported to work on March 7 with his right arm in a sling. Nieto and/or Doug Wright told Complainant to move iron I-beams that had supported the asphalt plant. The job involved using a piece of heavy equipment called a "loader" that had a large bucket with a heavy chain attached to it. Complainant wrapped the chain around the beam, then climbed up a ladder into the loader to move the beam. Complainant found it difficult to wrap the chain around the beam, get into the loader, and operate the loader using only one arm. Complainant's shoulder bothered him while he was doing this work.

11) While Complainant was performing this work, the chain slipped and Complainant instinctively reached out with his injured right arm to prevent the chain

from falling on him. Complainant fell into the bucket of the loader, further injuring his right shoulder and hands. Complainant went to Respondent's office and told Nieto and Benke that he wanted to look at the work restrictions that Dr. Galt had recommended. Benke gave Complainant the paperwork, but Complainant was unable to read it without his reading glasses. Complainant told Benke that he had hurt his arm again, and Benke told him to stop acting like a sissy.

12) Benke told Complainant to deliver parts to another asphalt plant. Complainant told Nieto and Benke that he could not drive because he had just taken more pain pills, which had made him ill. Benke laughed and said that Complainant probably had driven drunk before and could handle the drive to the asphalt plant. Complainant felt like he was talking to a wall when he spoke with Benke because Benke did not listen to anything he said. Complainant delivered parts to the asphalt plant for the remainder of the day because he felt he had no choice -- Respondent had no other work for him to do.

13) That night, Complainant and his wife read the Return to Work Recommendations/Restrictions that Dr. Galt had prepared on March 5. That document stated that Complainant was not supposed to drive or lift objects over 10 pounds. Complainant felt that Respondent was taking advantage of him.

14) The next day, March 8, Complainant visited a physical therapist, who cut the therapy session short because Complainant's hand was very swollen. The therapist's office was in the same building as Dr. Galt's office, and Complainant's wife told Dr. Galt how Complainant was being treated at work. Dr. Galt then gave Complainant's wife new paperwork putting Complainant on "no work" status. Complainant and his wife believed the no-work paper meant that Complainant was not supposed to work at all unless Respondent abided by the original work restrictions Dr.

Galt had specified. Complainant took that paperwork to Respondent's facility and gave it to Pamela Pratt with instructions to deliver it to Benke. Complainant then went home because he was in too much pain to work. (Testimony of Complainant, Toni Eld; Exhibit A-8)

15) Later on March 8, Complainant had a telephone conversation with Benke, who asked why Complainant had gotten the no-work paper. Complainant explained that he needed it because he had not been treated right and, as a result, had reinjured his arm. Benke told Complainant that Respondent was close to 1000 injury-free days and Complainant would let down Benke and the whole company if he turned in the no-work paper and took "time loss" through the Worker's Compensation system. Benke also said that such things just weren't done, and told Complainant that he would receive more money if he continued light-duty work than if he took time-loss benefits. Benke told Complainant that his modified work duties would involve sitting in a room with three girls, answering the telephone, and drooling all day. Complainant told Benke that he would be willing to do paperwork if it did not hurt his shoulder.

16) Before Complainant was injured, he and Benke had arranged to do some volunteer work on a project for Habitat for Humanity. On March 9, Complainant had breakfast with Benke and then went with him to the Habitat for Humanity project. Complainant was at the job site for about six hours, instructing Benke how to use laser equipment for aligning pipes.

17) On March 11, 1996, Doug Wright gave Complainant the assignment of figuring out the amounts of different types of rock Respondent had used over the years. Complainant took this work home, and his wife did the calculations because Complainant's injury prevented him from writing or using a calculator.

18) On March 12, 1996, Complainant returned to Respondent's plant and Benke told him that he should not have finished the paperwork assignment so quickly. Wright gave Complainant large three-ring binders full of Material Safety Data Sheets to update. For the rest of the week, Complainant did this work himself at home, using his injured arm at times. On March 12th or 13th, Complainant had the MRI examination.

19) Also on March 12, Complainant was selected for random drug testing, pursuant to his last-chance agreement, and submitted a urine sample at Occupational Health. Complainant tested positive for opiates and marijuana. On March 14, 1996, the Occupational Health facility left a message for Complainant to contact Dr. Naugle. Complainant did not return that call.

20) On March 15, 1996, Complainant had a 10:00 appointment with Dr. Galt to get the results of his MRI. That same morning, Nieto called Complainant, told him that he had to go see Dr. Naugle, and said Anthous would drive Complainant to Occupational Health. Anthous went to Complainant's house, where Complainant and his wife were getting ready to go to Dr. Galt's office. Anthous told Complainant that he was supposed to take Complainant to Dr. Naugle's office, and Complainant asked Anthous to take him to his appointment with Dr. Galt instead. Despite Complainant's request, Anthous drove him to Dr. Naugle's office, with Complainant's wife following in her car. When Anthous reached Occupational Health, Complainant got into his wife's vehicle and they went to see Dr. Galt.

21) On March 16, 1996, Respondent discharged Complainant because he had violated his last-chance agreement and had violated Respondent's policy against drug and alcohol use.

22) Complainant felt bad, depressed, and hurt after he reinjured his shoulder. Those feelings were caused in part by Benke's comments and Complainant's discovery

that Respondent's supervisors had ordered him to do work that was beyond his work restrictions. Complainant's shoulder pain and the illness he suffered because of taking pain medication also contributed to those feelings. From the time he first injured his shoulder and the day he was terminated, Complainant was depressed and just sat on the couch and vegetated, which was not normal for him.

23) About eight years before the hearing, Anthous suffered a back injury while he was driving heavy equipment for Respondent. Anthous did not return to work the day after his accident because he was in too much pain. He spoke with Benke, who then was Respondent's risk manager, the day after he was injured. Benke wanted to know how Anthous was feeling and when he would be back to work. About three days after the accident, Anthous's wife went to LTM to speak with Benke to explain why Anthous was not yet able to return to work. Anthous already had told Benke that he could not come back yet, but Benke wanted him to come back on a part-time basis, which is why it was necessary for Anthous's wife to speak with him. When Anthous returned to work, he had written work restrictions, which he showed to Benke. Neither Benke nor anybody else at LTM asked Anthous to exceed those restrictions.

24) Pamela Pratt, a former employee of Respondent, testified regarding her experience with an on-the-job injury. Pratt injured her knee in September 1995 and filed a Workers' Compensation claim. She was treated by a doctor chosen by Respondent, who believed Pratt had a muscle injury. Pratt kept working for Respondent until about November 1995 and then was laid off because of a seasonal reduction in work force. After the layoff, Pratt went to see her own doctor, who ordered an MRI examination and determined that surgery would be necessary. Pratt made an appointment for the surgery to be performed on a Monday. At some point before that day, Pratt called the doctor's office to determine whether the surgery still was scheduled to be performed.

Pratt was informed that Benke had canceled the surgery. Benke then called Pratt and told her that she should schedule the surgery for a Friday so she could get a full paycheck. Pratt did not understand what Benke was telling her because she had been laid off. Benke also stated that LTM would pay Pratt's wages after the surgery so she would not have to accept the lower amount in time-loss payments she otherwise would receive from Worker's Compensation.

25) Pratt scheduled her knee surgery to be performed on Thursday, February 15, 1996, and Benke arranged for her to work the Tuesday and Wednesday before the surgery. On one of those days, Benke and Pratt went to the doctor to discuss how the injury might have been avoided. Benke stated that Pratt should return to full-time, light-duty work the following Monday. The doctor stated, with Benke present, that Pratt should work only four hours on Monday and work back to eight hours over the course of the week.

26) Pratt had her knee surgery on Thursday, as scheduled. The next day, she received a return-to-work authorization that stated she could stand or walk for a total of one to two hours per day, and could sit for a total of four to six hours per day, "progress as tolerated." These work restrictions were presented to Respondent.

27) On the Monday after her surgery, Pratt felt ill because of the pain medication she was taking, but worked a full day. The next day, Pratt worked only part of the day because she still felt ill. On Wednesday that week, Pratt did not work a full day, but Benke asked her to sign an "Offer of Modified Work" memorandum that stated: "Your hours for work will be from 8:00 am to 4:30 pm, Monday through Friday." Pratt refused to sign the document because she was not working eight hours per day. Benke told Pratt that the work restrictions from her doctor did not state clearly that she could not work full-time. Pratt then obtained another letter from her doctor stating specifically:

"Patient to progress from 4 hrs/day to 8 hrs/day week of 2/19 -> 2/23 as tolerated." Pratt gave that letter to Respondent. About that same day, Pratt changed pain medications, returned to work full-time, and signed the "Offer of Modified Work" memorandum. Pratt performed light-duty work until May 1996. Respondent did not ask her to work outside her limitations.

28) Respondent awarded its employees yearly bonuses that depended, in part, on the company's work safety record. Each time an employee filed a Workers' Compensation claim, the amount of money available for bonuses decreased.

29) Complainant's testimony was credible in some respects. For example, Complainant's testimony regarding the manner in which his injuries occurred and the nature of those injuries was straightforward and did not appear exaggerated. The Forum has accepted Complainant's testimony on those points, which was corroborated in part by accident reports and return-to-work recommendations. The Forum also has accepted Complainant's description of Benke's belittling remarks (calling Complainant a "sissy," etc.) because Benke did not deny having made those remarks. For similar reasons, the Forum has credited Complainant's testimony that Benke told him he would be "letting down" the company if he turned in the no-work paper. Although Benke denied having made that specific remark, he acknowledged having discussed with Complainant the fact that Respondent was nearing the mark of 1000 injury-free days. The Forum infers from that remark that Benke wanted to discourage Complainant from taking advantage of the Workers' Compensation system, which is consistent with Complainant's description of his telephone conversation with Benke. The Forum also found credible, and has accepted, Complainant's somewhat restrained testimony regarding the emotional distress he suffered as a result of Benke's remarks and other events.

30) Other aspects of Complainant's testimony, however, were inconsistent or overly self-serving. Complainant testified initially that he did not know what his medical restrictions were until after he suffered the second shoulder injury, and testified that Dr. Galt had not explained the work restrictions to him. Later, Complainant testified that when he was moving I-beams on March 7 -- before the second injury -- he believed that work exceeded his restrictions, but he decided to do it anyway. Because of this inconsistent testimony, and the improbability of Complainant's testimony that Dr. Galt did not explain the work restrictions to him, the Forum has not credited Complainant's testimony that he was unaware of his work restrictions until after his second injury.

31) The testimony of Complainant's wife, Toni Eld, seemed exaggerated and skewed to portray Complainant in a positive light. For example, Toni Eld testified that Complainant did not dislike Benke when, in fact, Complainant already had testified that he did dislike Benke. For this reason, the Forum has not accepted Toni Eld's testimony where it conflicted with other, more credible testimony.

32) Anthous's recall of events was not wholly credible or reliable. He first testified emphatically that Complainant had not told him why he did not want to go to Dr. Naugle's office on March 15. On redirect, however, he remembered that Complainant had mentioned that he had another doctor's appointment at about the same time. Similarly, when interviewed by an Agency investigator, Anthous initially said that he did not recall taking Complainant to the doctor. Later, he remembered that he had taken Complainant to the doctor and had spoken with him about his shoulder. Still later in his conversation with the investigator, Anthous decided that he could not recall taking Complainant to the doctor's office. Because Anthous's recollection of historical events appears imprecise and incomplete, the Forum has given little weight to those portions of his testimony that conflicted with other, more credible evidence.

33) Pratt testified in a straightforward, sincere manner. She readily acknowledged facts favorable to Respondent, as well as those that portrayed Respondent in a negative light. The Forum finds her testimony to be credible in all material respects.

34) In some respects, Benke's testimony was credible, although he put a "spin" on conversations he had with employees. For example, Benke acknowledged that the "Offer of Modified Work" letter was designed to get Pam Pratt to agree to work full-time after her surgery. He later stated that the decision to have her work full-time had been made before the surgery and that, after the operation, he did not pressure her to work eight-hour days. That testimony does not ring true in light of the fact that Benke did not present the "Offer of Modified Work" letter to Pratt until a few days *after* she had returned to work. Similarly, Benke insisted that he was not upset with Complainant for filing a Workers' Compensation claim, and that his statements to Complainant were meant only to inform him that he would get more money by taking light-duty work with Respondent than by filing for "time-loss" benefits. Benke's characterization of those conversations conflicts with his admission that he reminded Complainant of Respondent's long "injury-free" record, and how proud employees were of it. It also conflicts with Complainant's uncontroverted testimony that Benke called him a sissy after he asked to look at the work restrictions ordered by Dr. Galt. The Forum finds Benke's descriptions of his conversations with employees to be disingenuous, and has not relied on them. With regard to other objectively verifiable historical events, however, Benke's testimony generally comports with that of other witnesses, and the Forum has relied on it to some extent.

35) Complainant and his wife testified that Anthous behaved badly on March 15 when he took Complainant to Occupational Health. For example, Complainant

testified that Anthous pulled him into his pickup truck and started driving before Complainant had gotten entirely into the vehicle. Complainant's wife also testified that Anthous had acted insistently, but stated that Complainant jumped into the truck, and was not pulled. She also stated that neither she nor Complainant had spoken loudly to Anthous before he drove away. Anthous testified, to the contrary, that Complainant and his wife had yelled at him when he went to pick up Complainant and had claimed that Respondent was picking on Complainant. Anthous also testified that Complainant got into the truck by himself and was all the way in the truck before Anthous started driving. The Forum found all three witnesses' testimony regarding these events to be self-serving and overblown, and has not credited any of it. The Forum, therefore, makes no finding with regard to the details of Anthous's behavior on March 15.[3]

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a corporation that had six or more employees within the State of Oregon.

2) At all material times, Complainant furnished services to Respondent for remuneration, and was Respondent's employee.

3) After Complainant was injured on March 4, 1996, he invoked his rights under, or utilized, the Worker's Compensation system.

4) By the time Complainant returned to work after his first shoulder injury, Respondent was aware of the restrictions and limitations Dr. Galt had placed on Complainant's work. Respondent knowingly required Complainant to perform work that exceeded those work restrictions. Respondent did not, however, take that action because Complainant had invoked his rights under the Workers' Compensation system.

5) Respondent's risk manager, Benke, discouraged Complainant and at least one other employee from taking advantage of the Workers' Compensation system. Benke is one of Respondent's supervisory employees.

6) After Complainant asked to review his work restrictions, Benke belittled Complainant, ordered him to drive a truck, even though Dr. Galt had stated that Complainant should not drive at all, and discouraged him from filing for "time-loss" benefits. Benke took these actions because Complainant had invoked his rights under the Workers' Compensation system.

7) A reasonable person in Complainant's circumstances would find that Benke's conduct had the effect of creating a hostile and offensive working environment for workers, like Complainant, who invoked their rights under the Workers' Compensation system.

8) Respondent knew or should have known of Benke's conduct.

9) Complainant suffered mental distress because of Benke's conduct.

CONCLUSIONS OF LAW

1) For purposes of ORS 659.400 to ORS 659.460, "employer" generally is defined as "any person that employs six or more persons * * *." ORS 659.400(4). The term "person" includes corporations. ORS 659.010(11). At all material times, Respondent was an employer subject to the provisions of ORS 659.400 to 659.460, including ORS 659.410.

2) OAR 839-006-0120 provides:

> "To be protected under ORS 659.410, a person must be a worker as defined in OAR 839-006-0105(4)(a)."

OAR 830-006-0105(4)(a) defines "worker" as follows:

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

Complainant was a worker entitled to the protection of ORS 659.410.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.010(2), 659.060(3), 659.435.

4) The actions, inactions, statements and motivations of Benke, Wright, and Nieto, all employees of Respondent, properly are imputed to Respondent.

5) ORS 659.410(1) provides:

> "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."

OAR 839-005-0010 provides, in pertinent part:

> "(3) Harassment on the basis of protected class is an unlawful employment practice if the employer knew or should have known both of the harassment and that it was unwelcome. Unwelcome conduct of a verbal or physical nature relating to an employee's protected class is unlawful when such conduct is directed toward an individual because of the individual's protected class and
>
> "(a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
>
> "(b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
>
> "(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.
>
> "(d) The standard for determining harassment will be what a reasonable person would conclude if placed in the circumstances of the person alleging harassment."

Respondent violated ORS 659.410(1) because it knew or should have known of Benke's conduct, which created a hostile and offensive working environment.

6) Pursuant to ORS 659.010(2), 659.060(3), and 659.435, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue a Cease and Desist Order requiring Respondent to

pay Complainant money damages for emotional distress sustained as the result of Respondent's unlawful employment practice and to perform certain actions reasonably calculated 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

Unlawful Employment Practice

To establish a prima facie case that Respondent, through a supervisory employee, unlawfully engaged in "hostile work environment" harassment of a worker who applied for benefits or invoked or utilized the Workers' Compensation system, the Agency must present evidence to show that:

> "(1) respondent is an employer of six or more persons; (2) respondent employed complainant; (3) complainant is a member of a protected class (that is, a worker who applied for benefits or invoked or utilized the workers' compensation procedures); (4) respondent's supervisory employee engaged in unwelcome verbal or physical conduct directed at complainant because of his protected class; (5) the conduct had the purpose or effect of creating an objectively intimidating, hostile, or offensive working environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct."

In the Matter of Central Oregon Building Supply, 17 BOLI 1, 9 (1998). In this case, the first three elements are undisputed. In addition, Respondent has not contended that, if its employees engaged in the unwelcome verbal or physical conduct described in the factual findings, *supra*, it had no reason to know of that conduct. The remaining questions, then, are whether Respondent's employees directed unwelcome conduct at Complainant because of his protected class, whether that conduct created an objectively hostile or offensive working environment, and whether (and to what degree) Complainant was harmed by the conduct.

After Complainant suffered his first shoulder injury on March 4, 1996, Respondent's supervisors told him to go back to helping tear down the asphalt plant, which involved activities outside Complainant's work restrictions. There is no doubt that Wright and/or Nieto knowingly assigned Complainant to perform work outside his restrictions, and that assignment led to Complainant suffering the second injury. But no evidence suggests that this improper work assignment was "directed at complainant because of his protected class." In other words, the Agency did not establish that Respondent's decision to order Complainant back to working at the asphalt plant was improperly motivated by Complainant's invocation or utilization of the Workers' Compensation system. It is true, as discussed below, that Benke discouraged employees from filing for Worker's Compensation time-loss benefits. The Forum will not infer from that fact alone, however, that the improper work assignment -- ordered by someone other than Benke -- constituted an act of discrimination. *Cf. Central Oregon Building Supply*, 17 BOLI at 11 ("Just as harassment of a woman does not necessarily amount to sexual harassment, harassment of an injured worker does not necessarily amount to harassment prohibited by ORS 659.410; the Agency must show that the harassment was directed at the worker because he or she applied for benefits or invoked or utilized Oregon's workers' compensation procedures").

The Forum reaches a different conclusion with regard to the acts that took place after Complainant asked to review his work restrictions. Complainant made that request just after he suffered his second injury. Benke responded by calling Complainant a "sissy," instructing him to drive under the influence of pain medication (another activity outside Complainant's work restrictions), and telling Complainant he could drive in that condition because he probably had driven drunk before. After Complainant obtained a "no-work" order from Dr. Galt, Benke actively discouraged Complainant from taking

Workers' Compensation "time-loss" benefits, telling him that he would be letting down the other employees. Benke told Complainant that, instead, he should take a light-duty assignment that would consist of sitting in a room with three girls, answering the telephone, and drooling all day. Thus, Benke's attitude toward Complainant became demeaning immediately following Complainant's request to review his work limitations; it deteriorated further after Complainant indicated he would file for time-loss benefits. The Forum infers from these facts that Benke's poor treatment of Complainant from March 7, 1996, through the date of his termination was prompted by Complainant's invocation of the Workers' Compensation system. Benke's discriminatory motivation is confirmed by the fact that he actively discouraged at least one other employee, Pratt, from invoking the Workers' Compensation system.

Benke's insistence that Complainant not file for time-loss benefits, his requirement that Complainant perform duties outside his work restrictions, and his belittling remarks toward Complainant combined to create an environment that a reasonable person would find hostile and offensive. Because Benke was Respondent's risk manager and a supervisory employee, the Forum finds that Respondent knew or should have known of his harassment of Complainant. Moreover, Respondent's system of linking employee bonuses to the lack of Workers' Compensation claims increased the hostility of the work environment for individuals who invoked their rights under the Workers' Compensation system. The Agency met its burden of proving the existence of an unlawful employment practice.[4]

Damages for Mental Suffering

The Commissioner is authorized to award compensatory damages, including damages for mental suffering, as a means reasonably calculated to eliminate the effects of any unlawful practice found. *See In the Matter of Harry Markwell*, 8 BOLI 80, 82

(1989). In determining the amount of damages, the Commissioner considers "the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused." *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 21, 27 (1997). The Commissioner also considers "a complainant's vulnerability due to such factors as age and work experience." *Id.*

Here, the harassment consisted of: a discussion between Complainant and Benke in which Benke discouraged Complainant from filing for time-loss benefits, three belittling remarks,[5] Benke's instruction that Complainant drive a truck, an activity outside his work limitations, and a general hostility toward workers who filed for time-loss benefits. Complainant experienced that harassment over a period of about ten days, from March 7, 1996, until he was terminated on March 16, 1996. The Forum finds the severity, frequency, pervasiveness and duration of the discrimination to be less onerous than in some other cases it has heard, although still sufficiently severe to constitute unlawful harassment.

After his second injury, Complainant felt bad, hurt, and depressed. Complainant just "vegetated" for the ten days prior to his termination, which was unusual for him. Both Benke's harassment and Complainant's physical pain contributed to this mental suffering. The Forum has determined that an award of $5,000.00 will compensate Complainant for that portion of his mental distress attributable to the hostile work environment created by Benke's harassment.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010, 659.060,, and 659.435, and to eliminate the effects of the unlawful practice found in violation of ORS 659.410(1), as well as to protect the lawful interest of others similarly situated, the

Commissioner of the Bureau of Labor and Industries hereby orders **LTM, Incorporated** 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 STEVEN M. ELD in the amount of:

a) FIVE THOUSAND DOLLARS ($5,000.00), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice found herein; plus

b) Interest on said damages for mental suffering at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any employee because that employee 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.

3) Post in a conspicuous place on the premises of Respondent's facility in Medford, Oregon, a copy of ORS 659.410(1), together with a notice that anybody who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

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[1]In the last-chance agreement, Complainant agreed to be evaluated by a drug/alcohol counselor and complete any recommended treatment. Complainant also agreed to submit to a drug/alcohol test "at any time requested by LTM" and agreed that, if he refused to take the test, or if the test results were positive,

his employment would be terminated immediately. Complainant further indicated his "understand[ing] that this agreement constitute[d] a final warning," giving rise to the term "last-chance agreement."

[2]Throughout the hearing, witnesses referred to Respondent's employee "Wes" only by his first name. The Forum has cited Respondent's case summary *only* for the fact that Wes's last name is Nieto.

[3]In any event, even if Anthous had acted in the manner alleged by Complainant, the Forum would not attribute that off-site behavior, committed by a non-supervisory employee, to Respondent in the absence of any evidence in the record that Respondent instructed or encouraged Anthous to act that way.

[4]For this reason, Respondent's affirmative defense of failure to state a claim is unavailing.

[5]Benke calling Complainant a "sissy," telling him he could drive while using pain medication because he previously had driven drunk, and telling him he could sit in a room with three girls and drool all day.