

In the Matter of
CENTRAL OREGON BUILDING SUPPLY, INC., Respondent.

Case Number 21-98
Final Order of the Commissioner
Jack Roberts
Issued April 7, 1998.

SYNOPSIS

Where respondent's manager, who was complainant's supervisor, verbally harassed complainant because he was a worker who had invoked and used Oregon's workers' compensation procedures, the commissioner held that respondent discriminated against complainant in the terms and conditions of his employment, in violation of ORS 659.410(1). The commissioner awarded complainant \$25,000 for mental suffering. ORS 659.410(1).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, 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 January 6 and 7, 1998, in a conference room at the Bureau of Labor and Industries offices, 1250 NE Third, Suite B-105, Bend, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Ronald E. Bemis (Complainant) was present throughout the hearing. Central Oregon Building Supply, Inc. (Respondent) was represented by Brian Gingerich, Attorney at Law. Dave Paterson, Respondent's president, was present throughout the hearing.

The Agency called the following witnesses: Brenda Bemis, Complainant's wife; Ronald E. Bemis, Complainant; John James (Jim) Blair, Respondent's former employee; Dennis Fitzpatrick, Respondent's former employee; Lorenzo Gonzalez, Respondent's former production manager and swing shift manager; and Peter Martindale, a senior investigator with the Civil Rights Division of the Agency.

Respondent called the following witnesses: James Richard (Rich) Blair, Respondent's former assistant manager of the truss department; William (Bill) Brown, Respondent's plant manager of the truss department; Vincent (Vinni) DiLorenzo, Respondent's former employee; Paul Hamly, Respondent's employee; Chris Paterson, Respondent's employee and son of Dave Paterson; Dave Paterson, Respondent's owner and president; Todd Schouviller, Respondent's employee; and Steve Sjostrand, Respondent's sales manager and human relations director.

Administrative exhibits X-1 to X-9, Agency exhibits A-1 to A-11, and Respondent Exhibits R-1, R-2, R-5 to R-8, R-9 pp. 1-2, and R-10 were offered and received into evidence. Respondent withdrew exhibits R-3 and R-4. The record closed on January 7, 1997.

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

FINDINGS OF FACT -- PROCEDURAL

1) On August 8, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent discriminated against him because he had an on-the-job injury and utilized the workers' compensation system in that, following his on-the-job injury and his return to work on light duty, Respondent's

manager, Bill Brown, required Complainant to work beyond his work limitations, repeatedly verbally abused him, and terminated him.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondent in violation of ORS 659.410 and 659.425.

3) On November 10, 1997, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent's supervisory employee, Bill Brown, harassed Complainant because he had invoked and used Oregon's workers' compensation procedures. The Specific Charges alleged that Respondent's action violated ORS 659.410(1). The Agency claimed damages for Complainant's mental suffering.

4) 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 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.

5) On November 25, 1997, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges.

6) On November 19, 1997, Respondent's attorney requested a postponement of the hearing because of a conflict between the date set for hearing and a settlement conference in another matter. The ALJ denied Respondent's request, pursuant to OAR 839-050-0150(5)(a) and 839-050-0020 (10), because the notice of hearing in this case was issued and received by Respondent's counsel before the

settlement conference was scheduled, and therefore Respondent had not shown good cause for a postponement.

7) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondent each filed a Summary of the Case.

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

9) 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.

10) Following the presentation of all the evidence, the Agency moved to amend the Specific Charges to conform them to the evidence and allege violations of ORS 659.410 (termination based on utilizing the workers' compensation system) and 659.425(1) (a-c) (harassment and termination based on physical disability). Respondent opposed the motion and the ALJ denied it. The ruling was based on ORS 183.415(10) (the ALJ's duty to insure that the record developed at hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before him) and OAR 839-050-0140(2). Respondent had objected to evidence on such issues. The ALJ found that presentation of the merits and defense would not be served by the amendments.

11) On March 6, 1998, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At times material, Respondent was an Oregon corporation operating as a building materials dealer. Respondent employed six or more persons in Oregon. Dave Paterson was Respondent's owner and president.

2) Bill Brown was Respondent's truss plant manager and one of Complainant's immediate supervisors. Rich Blair was an assistant manager (under Brown) and directly supervised Complainant. Brown was a hands-on manager in charge of the department and the drivers.

3) Respondent employed Complainant as a delivery driver and crane operator from on or about June 16, 1993, until on or about June 12, 1996.

4) Complainant was initially hired to assemble trusses in Respondent's truss department. After around two weeks, Rich Blair offered Complainant a job as a truck driver and crane operator. Blair normally scheduled the delivery drivers. Complainant accepted. Blair and another driver trained Complainant for around two months. Complainant attended OSHA classes for crane operators and got the required commercial driver's license. After he was trained and licensed, Complainant worked five days per week and made deliveries all over central Oregon. Occasionally he volunteered to work weekends. When Complainant was regularly driving the truck and making deliveries, he was away from Respondent's business around 80 percent of the time.

5) Complainant's starting pay on June 18, 1993, was \$5.75 per hour. He received raises to the following amounts on the dates indicated: \$6.00 on July 19, 1993; \$6.50 on August 26, 1993; \$7.00 on November 10, 1993; \$7.75 on July 11, 1994; \$8.25 on July 11, 1995; \$8.50 on January 26, 1996; and \$9.50 on May 11, 1996.

6) Todd Schouviller was hired to be a delivery driver and crane operator. He had a commercial driver's license and prior experience as a truck driver and crane operator. His starting pay on February 2, 1994, was \$6.00 per hour. He received raises to the following amounts on the dates indicated: \$6.75 on March 25, 1994; \$7.00 on May 10, 1994; \$7.50 on May 26, 1994; \$8.00 on July 11, 1994; \$8.50 on January 26, 1995; \$9.00 on August 26, 1995; and \$9.50 on May 11, 1996.

7) At first, Complainant got along well with Brown. Complainant tried to be sociable with Brown and other workers. Before Complainant's ankle surgery (described below), Brown visited Complainant at home two or three times and they drank beer together. Complainant thought Brown treated the employees unprofessionally and abusively. Complainant thought Brown did not care about the employees, and Brown was only concerned with production.

8) Brown regularly called workers names and insulted them. He used derogatory and racial names. If a worker was hurt (on or off the job), Brown called the worker a "wuss," "gimp," "idiot," "clumsy," and names like that.

9) Complainant thought Rich Blair was an offensive person who acted like a drill sergeant. Blair did not regularly call Complainant names related to his injuries (described below), but once, during a meeting of several people, Blair called Complainant a "pill-popper" because he was taking anti-inflammatory pills. Other workers also thought Blair was loud and obnoxious.

10) During his first year of employment, Complainant slipped on spilled oil and fell off the bed of his truck. He hit his elbow and shoulder. He reported the injuries to Brown and Blair. Blair encouraged him not to file a workers' compensation insurance claim. He said that Respondent would pay the doctor's bill to avoid using its workers' compensation insurance. Complainant did not file a claim or go to a doctor. He got

some physical therapy for stiffness due to the injury. Respondent paid around \$2,000 for the therapy. Complainant believed that Respondent fired employees who filed workers' compensation claims.

11) Respondent's managers discouraged employees from filing workers' compensation insurance claims if their injuries weren't serious. Respondent preferred to pay the employees' medical expenses, rather than have them file workers' compensation insurance claims. Respondent sometimes found light duty jobs for injured workers until they were ready to resume their regular duties.

12) Some workers who were injured on the job filed workers' compensation insurance claims and perceived no different treatment by Respondent as a result.

13) On April 29, 1994, Complainant sustained an on-the-job, compensable, disabling left ankle injury. At Brown's request, Complainant was helping Brown and two others push a cart loaded with trusses to a truck for loading. Complainant was in the front, pulling on the cart's steering handle. After they had moved the cart about half way into the yard, Brown said to Complainant, "I forgot, Ron, you're a gimp. You better stand back so you don't get hurt." Brown called him a "gimp" because of his earlier shoulder injury. About that time the cart ran over Complainant's ankle. Brown called him a "stupid fool" when he was injured. Respondent sent Complainant home and discouraged him from seeing a doctor and filing a workers' compensation insurance claim. At first, Complainant did not file a claim because he thought his ankle was only sprained and because of his perception of how Respondent treated employees who filed claims. He took time off work and iced the ankle. The next day Complainant was seen by a doctor and had the ankle x-rayed.

14) Although it was Rich Blair's job to write a report about any employee who acted unsafely, neither he nor Brown wrote a report about Complainant's ankle injury. Complainant received no written reprimand about the ankle injury.

15) Bill Brown and Steve Sjostrand signed a memorandum, handwritten by Sjostrand and dated May 26, 1994, concerning Complainant's accidents. In the memo, they referred to the accident when Complainant slipped off the trailer and hurt his shoulder and the accident when he injured his ankle. They characterized both accidents as preventable, and wrote that Complainant's "failure to work in a safe manner will place his job in jeopardy." Complainant never saw or signed the memorandum.

16) On Complainant's one-year written evaluation, Bill Brown and Steve Sjostrand acknowledged that Complainant had once been nominated employee of the month. They found his performance "real good," except for making sure his truck was loaded and ready to go for the next day. Under "Area of Concern," they wrote, "Ron needs to be more safety concious [*sic*] and to take more responsibility for his own safety and the safety of others working with him." Under "Expectations," they wrote, "I would like to see Ron go the remainder of the year with Ø accidents [*sic*]. I also would like to see Ron have his truck loaded + ready to go for the next day." Complainant signed the evaluation, which was written on a form entitled "90 Day Evaluation." During the rest of his employment with Respondent, Complainant did not receive another written evaluation.

17) Complainant's ankle continued to bother him, and a surgeon advised him he needed surgery. At that point, Brown told him to fill out a workers' compensation claim form. Complainant filed a workers' compensation injury report on August 23, 1994, concerning his left ankle injury.

18) Surgery was performed on Complainant's ankle on October 31, 1994. He was off work until November 15, 1994. When he returned to work, Respondent put him on light duty in the office. He was receiving physical therapy. He did some deliveries with an assistant to help strap and unstrap the load. During this time he wore a removable cast and used crutches. He wore plastic bags on his cast to protect it from the snow. Because of the deliveries, Complainant missed around 10 physical therapy appointments.

19) After Complainant had surgery on his ankle, Brown regularly referred to him as "gimp," "wuss," "hoppy," "crip," "cripple," "puss," and "stupid," and criticized Complainant for being slow. Blair also called Complainant a "crip" and other names after the ankle injury. Brown criticized Complainant's job performance, although Complainant was doing a good job. Other workers considered Complainant a safe worker. Complainant felt that Brown was harassing him and treating him differently than he had before the ankle injury. Jim Blair, who was Rich Blair's brother and who worked in the yard loading and unloading trucks, believed Brown had a different attitude toward Complainant after the ankle injury. He thought Brown was meaner to Complainant because Complainant was slower, and Brown was never satisfied with him.

20) Complainant had a second surgery on February 8, 1995. He was taken off work until March 18, 1995. When he returned to work, Respondent again put him on light duty. He worked first in the truss department office. There was not enough work for him there, so Respondent put him in the "front" office, where the roofing and sales departments were. Soon he was sent back to the truss department. He answered phones, made copies, filed, and ran errands.

21) At that time, Brown's treatment of Complainant worsened. Rich Blair was making deliveries, so Brown was Complainant's direct supervisor. Brown was unhappy

that Complainant was working in the office. Complainant was supposed to keep his foot elevated to relieve his pain. Brown complained to Complainant about this and called him a "gimp."

22) At some point, Complainant talked to Brown about the verbal abuse. Brown did nothing and the problem was not resolved.

23) While Complainant was on light duty and while he was still in a cast and using crutches, he volunteered to deliver a load because Rich Blair was on a one-week vacation. Brown directed Complainant to make additional deliveries that week. Brown pushed Complainant to work beyond his light-duty work limitations. Complainant complained to Brown about the deliveries because he was on light duty and was taking pain medications. Brown told him not to be a "wuss" and said if Complainant couldn't do to job, Brown would find someone who could without whining. Complainant contacted the workers' compensation insurance company and his doctor, who gave him a note that prohibited him from driving.

24) When Complainant's wife went to Respondent to deliver the doctor's note, Brown asked her why gimpy couldn't limp down on his own.

25) Without his knowledge, Complainant's wife talked to Dave Paterson about the offensive treatment Complainant was getting from Rich Blair and Brown. Her primary complaint was about Blair and his "pill popping" comment about Complainant. Paterson talked to Blair about his treatment of Complainant. Blair later talked to Complainant and his wife about his treatment of Complainant, and he apologized for his conduct. He stopped teasing Complainant after that. Blair, Brown, and a dispatcher in the building department later attended a managerial course on managing people.

26) After Brown had worked Complainant beyond his light duty work restrictions, Complainant complained to Respondent's president, Dave Paterson.

Complainant complained about Brown sending him out on deliveries and, along with the other driver, complained about not getting pay raises. Paterson told Complainant that he (Paterson) needed him in the truck, and that Complainant was no good to Respondent in the office. He said once Complainant got well and returned to driving, they would discuss a raise. Paterson and Steve Sjostrand, Respondent's human resources manager, later talked to Complainant about his work restrictions. Respondent stopped working Complainant beyond his light duty restrictions. Brown later warned Complainant that if he ever went over Brown's head again, Brown would make sure Complainant got fired. He told Complainant that he wouldn't get a raise until he was driving again.

27) On July 14, 1995, the Workers' Compensation Division, Respondent, and Complainant entered into a workplace modification agreement. Complainant qualified for the Division's Preferred Worker Program. Under the agreement, Respondent received \$25,000 to help it purchase a particular truck and crane for \$115,000. The truck and crane had features, such as an automatic transmission and a remote control for the crane, that would assist Complainant to meet the physical requirements of his job. Respondent purchased the truck and crane to accommodate Complainant's work restrictions. Respondent would not otherwise have bought this truck and crane. After Respondent got the truck and Complainant was released to return to work, Complainant went back to his old job.

28) On August 9, 1995, Complainant was declared medically stationary.

29) Due to his ankle injury, Complainant was permanently restricted "regarding the duration of walking and was left with a permanent limp when he walk[ed]." Because of nerve damage, Complainant's foot constantly hurt or stung. His leg went numb. The limp caused hip and back problems. The Workers' Compensation

Division awarded Complainant permanent partial disability for a 35 percent loss in his left foot (ankle).

30) After Complainant began using the new truck, Brown still considered Complainant slow and incompetent. He called Complainant "gimp" every day, and said he was a "wuss" and a "whiner." He treated Complainant in an angry, aggressive way. At times, Complainant had to operate his old truck-crane that did not have an automatic transmission because another driver was using the newer, modified truck. Complainant complained to Blair about this, and it was eventually resolved. Complainant began constantly arguing with Brown about pay raises that had been promised.

31) On June 4, 1996, Complainant had an accident with Respondent's crane truck that damaged a contractor's pickup truck. Respondent paid \$2,800 for those damages. On June 6, 1996, Complainant was using a crane to unload trusses at a worksite. A front stabilizer on the crane truck gave way and the truck flipped onto its side. When Brown arrived at the scene, he screamed and cursed at Complainant and fired him. Respondent later put Complainant on probation while Respondent and OR-OSHA investigated the accident. Damage to the truck cost Respondent \$68,000. Respondent terminated Complainant on June 12, 1996, in part because of the recent truck accidents. Complainant blamed Brown for his termination.

32) Complainant felt embarrassed, degraded, and belittled by Brown's offensive comments. His self confidence and self esteem were diminished. He did not feel able bodied or like a man because of Brown's comments. He went home each day upset because of Brown's treatment. He was angry, depressed, and frustrated. At times he wanted to quit, but he had a mortgage to pay and a family to support. The emotional effects on Complainant upset and worried his whole family. He began smoking and drinking more than before. Complainant received no counseling for these emotional

effects. Sometime after he was terminated by Respondent, he talked to Rich Blair about getting another job with Respondent.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed six or more persons within the state of Oregon.

2) Respondent employed Complainant.

3) Complainant sustained an on-the-job, compensable injury. He applied for and received workers' compensation insurance benefits.

4) Thereafter, Respondent's supervisory employee, Bill Brown, repeatedly and continuously called Complainant names such as "gimp," "wuss," "hoppy," "crip," "cripple," "puss," and "stupid," and criticized Complainant for being slow. Brown pushed Complainant to work beyond the limitations of his work release. Brown's conduct was unwelcome and offensive to Complainant. Brown directed this conduct at Complainant because he was a worker who had applied for benefits or invoked or utilized the workers' compensation procedures.

5) A reasonable person in Complainant's circumstances would find that Brown's conduct had the effect of creating a hostile and offensive working environment.

6) Respondent knew or should have known of Brown's conduct.

7) Complainant suffered mental distress because of Brown's conduct.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.460. ORS 659.400 (3) and 659.010(12) and (13); OAR 839-006-0115(1).

2) Complainant was Respondent's "worker," as that term is used in ORS 659.410(1). OAR 839-006-0105(4), 839-006-0120.

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein. ORS 659.435.

4) The actions, inactions, and knowledge of Dave Paterson and Bill Brown, employees or agents of Respondent, are properly 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 659.400 to 659.460 or has given testimony under the provisions of such sections."

Respondent violated ORS 659.410(1).

6) 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 to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110 and 659.400 to 659.545, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of the Complainant and other persons similarly situated.

OPINION

The Agency alleges that Respondent's supervisor, Bill Brown, harassed Complainant because of his status as an injured worker who had applied for benefits or invoked or utilized Oregon's workers' compensation procedures. It contends that Brown's conduct was unwelcome to Complainant and created an intimidating, hostile, and offensive work environment, which caused Complainant mental suffering. This harassment, the Agency charges, constituted discrimination with respect to the terms and conditions of employment, in violation of ORS 659.410(1). Respondent denies the allegations of harassment and damages.

This is a case of first impression for this forum. The Commissioner has expressly recognized harassment as a form of discrimination based on race, religion, sex, age, and national origin. Harassment on the basis of disability is prohibited by ORS 659.425. *Leggett v. First Interstate Bank of Oregon*, 86 Or App 523, 530-31, 739 P2d 1083, 1087-88 (1987) (arachnophobic complainant, harassed by her coworkers who put rubber spiders on her desk, could show disability discrimination if she could show she "was terminated for resisting harassment relating to her spider phobia"). This, however, is the first contested case to address harassment based on applying for benefits or invoking or utilizing the state's workers' compensation procedures. Nevertheless, there can be little doubt that the prohibition of discrimination by ORS 659.410(1) includes a prohibition of harassment based on applying for benefits or invoking or utilizing the state's workers' compensation procedures. *In the Matter of James Meltebeke*, 10 BOLI 102, 129 (1992) ("Oregon has a compelling interest in enforcing its laws that prohibit harassment and discrimination based upon the protected classes listed in ORS chapter 659"). Respondent did not contend otherwise.

Prima Facie Case

To establish a prima facie case of harassment in this matter (that is, in a case of hostile environment harassment by a supervisor of a worker who has applied for benefits or invoked or utilized the workers' compensation procedures), 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. OAR 839-005-0010; 839-007-0550; *In the Matter of Kenneth Williams*, 14 BOLI 16, 24 (1995).

The Evidence of Harassment in Violation of ORS 659.410(1)

The evidence was undisputed on the first three elements of the prima facie case. Conflicting evidence was presented on the remaining elements.

The Agency presented credible evidence that Bill Brown frequently called Complainant a variety of demeaning names related to his ankle injury and resulting limp. Credible evidence also showed that Brown required Complainant to work for a week beyond his light duty restrictions. Complainant gave credible testimony that he found Brown's conduct unwelcome and offensive. Credible evidence showed that Respondent's managers discouraged workers from filing workers' compensation insurance claims, and that Brown's harsh treatment of Complainant increased after he filed a claim. Thus, one could infer that Brown's unwelcome conduct was because of Complainant's membership in the protected class.

There was credible evidence that others found Brown's name calling and harsh treatment of Complainant abusive and offensive. Thus, a reasonable person in Complainant's shoes would have found that Brown's conduct created a hostile and offensive work environment.

Unrebutted evidence showed that Brown was Complainant's supervisor. He was the person who evaluated Complainant and recommended pay raises. Complainant testified credibly that, after he complained to Dave Paterson about his pay and being worked beyond his light duty restrictions, Brown threatened to get him fired if Complainant ever went over his head again. Complainant's wife testified credibly that she complained to Paterson about Brown's and Rich Blair's treatment of her husband.

In addition, other employees and at least one other manager knew of Brown's hostile treatment of Complainant. This evidence shows that Respondent had actual knowledge of Brown's conduct. Even if it did not have actual knowledge, it certainly had constructive knowledge. While credible evidence shows that Paterson immediately took care of Complainant's complaint about working beyond his restrictions, there is no evidence of timely or appropriate corrective action related to Brown's other conduct toward Complainant.¹ Complainant and his wife testified credibly about mental suffering he experienced due to Brown's conduct.

With the credible evidence described above, the Agency established a prima facie case. Respondent presented evidence to refute the prima facie case. For the reasons given below, the forum finds that the preponderance of credible evidence on the whole record supports the Agency's allegations.

Respondent presented witnesses who testified they did not hear Brown call Complainant demeaning names. However, some of those witnesses, such as Sjostrand, Chris Paterson, and Hamly, did not work around Brown and Complainant much of the time. They simply were not able to witness much of Brown's alleged conduct. Thus, testimony that they did not see Brown abuse Complainant or call him names was given less weight than the testimony of other witnesses who worked around Brown and Complainant more often. Other testimony, such as that of Brown (who admitted calling Complainant "gimpy" on one occasion) and Rich Blair (who said he couldn't remember Brown ever calling Complainant a "gimp," "crip," or "cripple"), was not credible because it was so greatly outweighed by opposing credible evidence. The preponderance of credible evidence shows that Brown verbally harassed Complainant with demeaning names and criticism related to his injury.

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. Respondent presented credible evidence that some workers, including Brown, suffered on-the-job injuries, filed workers' compensation claims, and did not experience negative consequences from Respondent. There was also evidence that Brown used names like "gimp" for any injured worker, whether or not the injury occurred on-the-job or the worker had filed a workers' compensation claim. Nevertheless, the preponderance of credible evidence showed that employees were discouraged from filing workers' compensation insurance claims, and Respondent was willing to pay doctors' and therapist bills directly to avoid such claims. For example, Respondent paid around \$2,000 in Complainant's therapist bills so that he would not file a workers' compensation insurance claim.² This type of discouragement, however subtle, along with the increased hostile treatment that Complainant experienced soon after he filed his claim permit the reasonable inference that Brown's hostile conduct was directed at Complainant because he had filed a claim.

Respondent also presented evidence to show that the conditions were not as pervasive as alleged or, in other words, that the conditions did not create a hostile or offensive work environment. For example, credible evidence showed that after Complainant was discharged, he asked Rich Blair about getting reemployed by Respondent. Respondent argued that a person who had experienced the harassment and mental suffering alleged by Complainant would not seek reemployment with the same employer, under the same supervisor. Respondent also presented credible

evidence that vulgarity and name-calling was not uncommon in the work place, and other employees including Complainant engaged in it.

With that evidence in mind, the forum still finds that the preponderance of evidence in the whole record shows that Brown's treatment of Complainant was unusual in its severity, frequency, and duration. The evidence is persuasive that Complainant found Brown's conduct unwelcome and offensive. He and his wife both complained to Respondent's management about it. Assistant manager Rich Blair recognized that his comments to Complainant were hurtful and he apologized. Evidence was also persuasive that Complainant had enjoyed his job as a driver and crane operator. He thought it was an important job and he was good at it. After he was medically stationary and had returned to his former job, he was away from Respondent's business (and Brown) making deliveries about 80 percent of the time. Just as before his termination, Complainant had a mortgage to pay and a family to support. He could not find an equivalent job as a driver and crane operator because other employers did not have the modified equipment he needed. Viewing the record as a whole, it is not inconsistent to conclude that Respondent's work environment had been hostile and offensive to Complainant, but also to find that he wanted another job with Respondent.

Regarding the issue of whether Respondent knew or should have known of Brown's conduct, Dave Paterson testified that Complainant complained to him about two things: (1) that Brown assigned him to work beyond his restrictions, and (2) that Brown was not being responsive to Complainant's requests for a pay raise. (Complainant did not get a raise in pay between July 11, 1994, and July 11, 1995. The other driver, Todd Schouviller, had gotten a raise of 50 cents per hour on January 26, 1995.) Paterson denied that Complainant complained about Brown picking on him. He also denied that Complainant's wife complained about Brown. Brown, of course, denied

that he engaged in the alleged conduct, and Blair said he never heard Brown call Complainant the demeaning names alleged. For the reasons already given, the forum found Brown's and Blair's testimony on this issue not credible.

The forum has weighed Respondent's evidence on this issue against conflicting evidence in the record. The conflicting evidence shows that Brown (Respondent's manager and Complainant's supervisor) regularly engaged in a course of verbal conduct that Complainant found unwelcome and offensive. Evidence shows that this conduct was notorious among many truss department employees, including at least one other manager, Gonzalez. Complainant complained to Gonzalez and others about Brown's conduct. Complainant's wife testified credibly that she complained to Dave Paterson about Brown's conduct. Respondent subsequently sent Brown to training. Under these circumstances, the forum concludes that Respondent's management level employees either knew or should have known of Brown's conduct. As noted above, no evidence shows that Respondent took appropriate corrective action.

Finally, Respondent presented evidence to dispute Complainant's alleged mental suffering. The forum discussed above some of that evidence, which also related to the pervasiveness of Brown's conduct and Complainant's post-termination inquiry about another job with Respondent.

Respondent also presented evidence to attack Complainant's credibility. The ALJ carefully observed the demeanor of each witness and evaluated the credibility of the testimony based upon its inherent probability, its internal consistency, whether it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible. See *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256, 602 P2d 1161 (1979) (Richardson, J., concurring in part and dissenting in part). In Complainant's case, the forum found his testimony

credible based upon his demeanor at hearing. His demeanor was calm and forthright, even where his memory was deficient and unresponsive to his claim. He responded to questions without hesitation and made no effort to avoid any issue. His statements were supported by testimony from other witnesses whom the ALJ found to be credible. As with other witnesses, Complainant and his wife were sometimes vague or imprecise about when some events occurred. However, the forum believes this reflects some difficulty remembering the timing of events as opposed to an attempt to deceive the forum. In addition, the forum's opinion of Complainant's credibility was not diminished by his conviction of a crime that did not involve dishonesty or false statement. Complainant and his wife testified credibly, and the forum finds, that he suffered mental distress -- as described in Finding of Fact, The Merits, number 32 -- as a result of Brown's harassment.

Accordingly, the preponderance of credible evidence on the whole record supports the prima facie case of harassment, in violation of ORS 659.410(1), for which Respondent is liable.

Damages

Awards for mental suffering damages depend on the facts presented by each complainant. Respondent pointed out that Complainant did not seek counseling as a result of his distress. However, a failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence. *In the Matter of Portland General Electric Company*, 7 BOLI 253 (1988), *aff'd*, *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Jerome Dusenberry*, 9 BOLI 173 (1991).

Here, credible evidence showed that, as a result of the discrimination Complainant experienced, he suffered embarrassment, degradation, anger, depression, frustration, and diminished self confidence and self esteem, as described in the Findings of Fact. Brown's harassment started after Complainant filed his workers' compensation insurance claim in August 1994 and continued on a daily basis (when Complainant was present) until he was terminated nearly two years later. Even after August 1995, when Complainant returned to his regular duties, Brown continued to call him demeaning names and criticize him for slowness on a daily basis. By Complainant's own testimony, however, he was probably away from Brown about 80 percent of the time, once he was back to making deliveries. Nonetheless, while the frequency of the Brown's treatment may have decreased, the severity continued.

The effects of Complainant's mental distress appear in his anger and depression, low self esteem, increases in smoking and drinking, and changes in his behavior at home. His mental distress has had a long duration. It covered not only the two years he was harassed, but to some extent it continued to the time of hearing. Respondent is directly liable for these damages.

The amount awarded to Complainant in the order below is compensation for his mental suffering and is a proper exercise of the Commissioner's authority to eliminate the effects of the unlawful practices found.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2) and to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent, CENTRAL OREGON BUILDING SUPPLY, INC., is hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street # 32, Suite 1010, Portland, Oregon 97232- 2162, a certified check, payable to the Bureau of Labor and Industries in trust for Ronald E. Bemis, in the amount of:

a) Twenty Five Thousand Dollars (\$25,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; plus,

b) Interest on the compensatory damages for mental distress, 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 current or future employee because the employee has applied for benefits or invoked or utilized Oregon's workers' compensation procedures.

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¹After Complainant's wife complained to Dave Paterson about Brown and Blair, Brown (along with Blair and another employee) attended training on how to manage people. However, no evidence suggests that this training did anything to correct Brown's offensive conduct. No evidence suggests that Respondent did anything to follow up or evaluate whether the training had any substantive corrective effect.

²Compare Respondent's actions with the requirements in the workers' compensation law, at ORS 656.262(3) ("Employers shall, immediately and not later than five days after notice or knowledge of any claims or accidents which may result in a compensable injury claim, report the same to their insurer. * * *"), and ORS 656.262(5) ("Payment of compensation under subsection (4) of this section or payment, in amounts not to exceed \$500 per claim, may be made by the subject employer if the employer so

chooses. The making of such payments does not constitute a waiver or transfer of the insurer's duty to determine entitlement to benefits. If the employer chooses to make such payment, the employer shall report the injury to the insurer in the same manner that other injuries are reported. * * *").