

**In the Matter of**  
**SEARS, ROEBUCK and COMPANY**

Case Number 41-97  
Final Order of the Commissioner  
Jack Roberts  
Issued February 19, 1999.

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SYNOPSIS

The forum found that Complainant was harassed and discriminated against in the terms and conditions of his employment and with respect to tenure with Respondent based on his invoking and utilizing the workers' compensation procedures in connection with a compensable injury. The forum found that Complainant was barred from employment with Respondent based on Respondent's perception that Complainant was disabled and that the harassment and unlawful failure to continue Complainant's employment resulted in emotional distress and wage loss. The forum found further that Respondent unlawfully required Complainant to pay for a medical evaluation as a condition of continued employment. ORS 659.330, 659.410, 659.425, 659.060(3).

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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 May 13 and 14, 1997, in hearings conference room 1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. The Civil Rights Division (CRD) of the Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Sears, Roebuck and Company (Respondent), a corporation, was represented by M. Margaret Banas, Attorney at Law, San Francisco,

California, and David J. Buono, Attorney at Law, Portland. Lisa Jerkins, Human Resources Manager for Respondent, was present throughout the hearing. Layne C. Woods (Complainant) was present throughout the hearing and not represented by counsel.

The Agency called as witnesses, in addition to Complainant, Respondent's employees Frank Fontana, Mohammad Ghnaim, Jack D. Sweek, and Steve Trafton (by telephone), and Respondent's former employees Michael Knight, Duane R. Martin, and Christopher Wendt.

Respondent called as witnesses Respondent's employees Gary Bettendorf, Ronald Brown (by telephone), Rainy Fischer, Mohammad Ghnaim, and Lisa Jerkins.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-17, Agency Exhibits A-1 (R-12) through A-3, A-6 (R-1), A-8, A-11, A-12, A-15, A-16 (R-18), A-17 through A-23, A-25 through A-33, and A-36, Respondent's Exhibits R-2 through R-7 (A-10), R-8 (A-29), R-9, R-13 through R-16, R-19 through R-21, and Joint Exhibit J-1, which was a combination of A-4 and R-11.

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 December 12, 1995, Complainant filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondent. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint

2) Thereafter, the Agency prepared for service on Respondent Specific Charges alleging that Respondent employed Complainant in 1995 and discriminated

against him by subjecting him to a course of conduct by his supervisors designed to harass, embarrass, humiliate and intimidate him which conduct was offensive and unwelcome, creating a hostile, intimidating, and offensive work environment because he invoked and utilized the workers' compensation statutes, all in violation of ORS 659.410; the Agency alleged that Respondent treated him differently because he invoked and utilized the workers' compensation statutes, all in violation of ORS 659.410; the Agency alleged that Complainant was placed on medical leave and urged to seek vocational rehabilitation, effectively terminating his employment, because he invoked and utilized the workers' compensation statutes and that his tenure was thus ended in violation of ORS 659.410; the Agency alleged that Complainant was barred from employment because of respondent's erroneous perception and treatment of Complainant as having a substantially limiting physical impairment in violation of ORS 659.425(1)(c); and the Agency alleged that due to a 2 day absence from work in March 1995 he was required to pay for a medical examination as a condition of returning to work, a violation of ORS 659.330.

3) On February 11, 1997, with the Specific Charges, the Agency served on Respondent's registered agent the following: a) Notice of Hearing setting forth the time and place of hearing; b) a Notice of Contested Case Rights and Procedures (Notice of Rights) containing the information required by ORS 183.413; c) a complete copy of OAR 839-050-0000, *et seq.*, regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings. Both the Notice of Rights and the contested case rules at OAR 839-050-0130(1) provide that an answer must be filed within 20 days of receipt of the Specific Charges.

4) On March 3, 1997, a document denominated "Answer of Respondent" was filed by M. Margaret Banas, a California attorney. On March 24, 1997, the Agency

filed a motion for an order of default based on Respondent's failure to timely file an answer through Oregon counsel as required by statute and rule. On March 28, 1997, Respondent through David J. Buono, Attorney at Law, Portland, filed by fax a motion for association of Banas as attorney for Respondent. On March 31, 1997, through Buono Respondent filed its opposition to the Agency's motion, arguing that Respondent had complied with 839-050-130(1) by filing a written answer and that the OAR 839-050-0110(1) requirement that a corporation be represented by counsel applied only to the hearing and not to preliminary matters.

5) On April 11, 1997, the ALJ issued an order which acknowledged the appearance of Buono as counsel for Respondent and the association of out of state counsel Banas effective March 28, 1997. The order found in accordance with precedent that the forum had consistently found default where a respondent's answer was defective or untimely, that the requirement for a corporation to be represented by Oregon counsel applied at all stages of the hearings process, and that Respondent's answer was defective. The Agency's motion for default was granted and Respondent was accorded ten days to obtain relief from default for good cause shown.

6) On April 18, 1997, Respondent through counsel filed a request for relief from default. On April 25, citing earlier precedent of relief granted where the forum withdrew a notice of default when an answer had been tendered prior to the Agency's default motion (*In the Matter of Fred Meyer, Inc.*, 12 BOLI 47 (1993)), the ALJ exercised his discretion, withdrawing the default order and accepting Respondent's answer.

7) On May 2, 1997, the ALJ issued an order requiring that each participant file a case summary in accordance with OAR 839-050-0200 and 839-050-0310.

8) On May 2, 1997, Respondent filed a motion for summary judgment on portions of the Agency's Specific Charges based on purported issue preclusion in the

Administrative Determination resulting from the investigation of Complainant's administrative complaint of unlawful employment practices. Respondent alleged that the investigative findings did not find different treatment violating ORS 659.410, did not find a termination violating ORS 659.410, and did not find a violation of ORS 659.425, and that the Agency was precluded from alleging those violations in the Specific Charges. On May 6, the Agency filed a response to the summary judgment motion arguing that the Administrative Determination was not a final order and that the Specific Charges were reasonably related to the initial allegations of the complaint

9) On May 7, 1997, the ALJ ruled, in part, as follows:

"Issue preclusion, at times known as collateral estoppel, is based on the desire for judicial economy and is intended to obviate the relitigation of issues already litigated. The issues which Respondent herein seeks to preclude have not in any sense been previously litigated. They have been the subject of administrative inquiry and report, but not the subject of any final adjudication. Contrast *In the Matter of Efrain Corona*, 11 BOLI 44 (1992), *aff'd without opinion*, *Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1344 (1993). In that case, the Commissioner found that Respondent had violated the Farm Labor Contractor Act by failing to make workers' compensation premium payments when due, and used the previous order of the state Department of Insurance and Finance (DIF) as the basis of that finding, stating:

"The Forum is applying collateral estoppel to prevent the relitigation of an issue that Respondent has had a full and fair opportunity in a previous proceeding to litigate. The issue in the DIF case was whether Respondent made sufficient workers' compensation insurance payments during 1986 to 1988. \* \* \* DIF fully and fairly heard Respondent's evidence and legal arguments on whether premiums were owed, and, through its Final Order, required Respondent to pay premiums in the approximate amount of \$600,000. \* \* \* The issue in this case is whether Respondent failed to make workers' compensation insurance payments when due. OAR 839-15-520(3)(j); ORS 658.417(4). The Forum finds that the evidence is sufficient to establish that the identical issue was actually decided in the DIF hearing, and that the DIF Final Order should have conclusive effect here. Accordingly, the Agency's motion for summary judgment is granted \* \* \*.' *Id*, at 57.

"Clearly, Corona recognizes that an issue is precluded only when it has been previously litigated.

"Complainant's initial complaint and amended complaint allege 'an on the job injury (neck/back)' and 'I had duties removed that I was physically able to perform,' as well as 'perceived disability (vision impairment)' and that 'this comment was a reference to my visual impairment.' I find that the allegation in regard to the after injury lifting requirement that 'Respondent's erroneous perception and treatment of Complainant as having a substantially limiting physical impairment' states a violation of ORS 659.425(1)(c) which could relate back to the removal of duties alleged in the complaints.

"The legislature did not intend that the investigative findings of the Agency have a preclusive effect. The statutory scheme outlined in ORS 659.095 provides that a complainant have a private right of action under ORS 659.121, *whether or not* the administrative determination described in ORS 659.095(2) finds an unlawful employment practice. If the Agency finds substantial evidence supporting the complaint, a complainant may have a hearing on the merits in this forum. ORS 659.050, 659.060. If the Agency dismisses a complaint as unsupported, a complainant retains the right to a judicial determination. ORS 659.095. The rules of the Agency cited by Respondent are not to the contrary.

"Respondent's motion for summary judgment is **denied.**" (emphasis in original)

That ruling is hereby confirmed.

10) On May 8, each participant timely filed a case summary. On May 9, Respondent notified the ALJ of a telephone witness and on May 12 the Agency filed a supplement to its case summary.

11) At the commencement of the hearing, Respondent's counsel acknowledged that Respondent had received a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413 and had no questions about it.

12) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing

13) Subsequent to the hearing, on May 16, 1997, Respondents by fax filed exceptions to the ALJ's order denying summary judgment. Those exceptions reiterate

Respondent's arguments that the Agency may not proceed to hearing on those portions of the administrative complaint not supported by its Administrative Determination, and that in particular, the disability portion of the Specific Charges was not "like or reasonably related" to the disability allegations of the administrative complaint. A discussion of these arguments is contained in the opinion portion below.

14) On December 4, 1998, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

#### **FINDINGS OF FACT -- THE MERITS**

1) During times material herein, Respondent was a foreign corporation operating retail stores in Oregon which utilized the personal service of six or more employees reserving to itself the right to control the means by which such service was performed.

2) Complainant was employed by Respondent from June 1993 through late April 1995 as an automobile service support representative (SSR) at Respondent's Clackamas Town Center Automotive Center (Clackamas Auto Center) in Portland.

3) Complainant's immediate supervisors were Clackamas Auto Center manager Gary Bettendorf and Assistant Manager Ron Brown. Doug Bryant, Auto Center Technician Coordinator, could also assign the priority of Complainant's duties in the absence of Bettendorf and Brown and Complainant reported to Bryant in their absence.

4) Gary Bettendorf was the hardware manager at Respondent's Clackamas Town Center store at the time of the hearing. He had been auto center manager there from July 1993 through April 1995 and supervised Complainant, with whom he had ongoing interactions several times a day during that time.

5) Ronald Brown worked at Respondent's Santa Monica, California store at the time of the hearing. He had been assistant auto center manager at Respondent's Clackamas Town Center store from September 1993 through April 1996 and was one of Complainant's supervisors. He had contact with Complainant several times a day during that time.

6) Complainant's duties were in automotive parts, specifically tires and tire-related items. When first hired, he rearranged the new tire storage in the tire room and around the sales area according to tire brand, tire size, quality, and sales demand. He obtained and installed new racks for this purpose. He was responsible for tracking the inventory of each brand and size on hand and updating the computer record of tires on hand. He received tire shipments as they arrived, helping truck drivers unload, then sorted and put away in storage areas the tires received, either stacked on the floor or shelved in the stockroom. He maintained the organization and cleanliness of the tire stockroom and display areas, maintained and restocked tire displays on the sales room floor, and pulled from stock tires and other parts as requested and delivered them to the backshop for installation. The weight of individual passenger car tires averaged up to 40 or 45 pounds. A few truck or specialty tires weighed as much as 60 or 70 pounds. He processed outside or local purchases of tires and other parts not in stock or from other Sears stores; this sometimes included going after parts at outside locations ("parts runs"), as requested by Bettendorf, Brown or Bryant. Although primarily in charge of tires ("Division 95"), he also assisted in batteries and other non-tire items ("Division 28"). Although classified as part-time, he worked about 40 hours per week

7) In connection with tire inventory, Complainant counted each brand and size of tire on hand then entered the proper count into the computer. When tires were sold, the sale was recorded by the computer if the sales entry was properly noted.

Each shipment of tires arriving was tallied and the result entered on the computer. Certain manufacturers, such as Michelin, required that Respondent inventory their stock on hand on a regular basis. Complainant also kept track of "junk tires," i.e., trade-in tires, which he shipped out at least twice a month. There were as many as 60 lines of tires in addition to the trade-in tires. The time expended by Complainant in counting any line of tires in stock varied markedly with the total tires carried in that line as well as their location. A line might take from ten minutes to 45 minutes or more to count, and twice as long, or more, to enter into the computer. As a result of all of this, Complainant spent as much as 70% of his time doing paper work, maintaining records of receipt and distribution of tire stock. He spent this time at his desk in the parts room where his computer terminal was located, at the various locations of the tire stock, or at the loading dock unloading and tallying the incoming stock. In addition, he averaged at least one to two hours per day on parts runs. Before mid-September 1994, as assigned, he had done a computerized drawing of the store parking area (for which he was paid), of his tire storage plan, and had generated a letter to customers regarding recall of a line of tires.

8) At times material herein, Jack Sweek was employed as an automobile service support representative at Respondent's Clackamas Auto Center. In 1994 and 1995, his duties were similar to those of Complainant except that his responsibility was non-tire related merchandise. He was responsible for tracking the inventory of batteries, shocks, struts, and other division 28 merchandise on hand and updating the computer record. He received and helped unload merchandise shipments as they arrived, sorted it and put it away. He maintained the organization and cleanliness of the salesroom and parts storage and display areas, maintained, restocked, and set up parts displays on the sales room floor, and pulled parts from stock as requested and delivered

them to the backshop for installation. He processed returned goods inventories and outside or local purchases of parts not in stock or from other Sears stores; this sometimes included parts runs. Although primarily in charge of batteries and other non-tire items, Sweek also assisted Complainant in tires. He was also part-time but worked close to 40 hours per week.

9) In May 1994 Respondent hired Brian Gornick to do automobile service support work at the Clackamas Auto Center. Gornick helped both Complainant and Sweek in unloading, stocking and pulling merchandise, but the majority of his work was with Complainant in tires. Gornick then did most of the unloading and putting tires away while Complainant tallied the tires received and entered the information into the computer. Gornick did not do paper work and did not go after parts.

10) Initially, tire shipments were received several times a week in quantities of from 50 to 300 tires in each load. By late summer of 1994, two shipments of 300 tires each were received each week. By that time, most of the physical unloading of the new tires was done by Gornick and placing them in storage was done by Gornick and by evening and weekend employees.

11) Duane R. Martin worked in Respondent's Clackamas Auto Center from March 1994 to June 1996 as an installer of tires, shocks, and batteries. He is Complainant's half brother. He and other installers were asked to help unload tires. He saw Knight, Wendt, Phillips and Sweek help with tires.

12) Steven R. Trafton began working for Respondent in 1987 and in 1994 and 1995 worked as a service support representative in Respondent's Clackamas Auto Center. He worked 4 hours a night two nights a week and occasionally worked on Saturday. His duties were to put away stock and do cleanup. He helped in the shop, moved cars, moved tires and parts, stocked batteries (Sweek's division 28) and stocked

tires (Complainant's division 95). He did paper work in connection with parts and tire inventory and did some computer input. Bettendorf and Brown were his supervisors, but they were not always there at night. Complainant often left a written list of work to be done, usually putting tires away. Paul Moonan (phonetic) also worked one to two days a week at times material; his duties were similar to those of Trafton.

13) Frank Fontana began working for Respondent in 1973 and in 1994 and 1995 worked as a sales representative in Respondent's Clackamas Auto Center. While working as an auto mechanic for Respondent in 1990 or 1991, he sustained a disabling off the job injury and needed a medical release to return to work.

14) When Complainant began working for Respondent, he and other auto center employees made parts runs, using the employee's own vehicle. Respondent required that the employee have an Oregon driver's license and liability insurance. On September 16, 1994, while on a parts run in his own car, Complainant was injured in an auto accident.

15) Neither Bettendorf nor Brown were available when Complainant returned to the shop and reported the accident. He reported it to Bryant, who urged him to make a claim against the other driver rather than filing for workers compensation. Bryant said that a workers' compensation claim would cause the auto center crew to lose their accident free incentive program bonus. Complainant also reported the accident to Respondent's loss prevention department where he was asked to file any claim for injury against the other driver. It was not until Complainant sought medical attention due to pain the day after the accident that he was told by the hospital staff that his injury was covered by worker's compensation.

16) Complainant had September 17 and 18, 1994, as his regular days off. He tried to work on September 19 but left early due to pain. The following day, Dr. Randle Smith diagnosed an acute neck and back strain and took Complainant off work.

17) On or about September 21, when Complainant turned in workers' compensation accident reports and told Bettendorf he had been taken off work, Bettendorf mentioned that it would affect "our accident free incentive bonus." Bettendorf was speaking of Respondent's program of rewarding the workers in a department or shop with a bonus if the work unit was accident free for a three month period of time. The bonus was usually spent on a party for the unit.

18) As Complainant was leaving after informing Bettendorf of his injury absence, he told Bryant that he was going off on compensation. Bryant said "thanks for blowing our bonus." Complainant told both Bettendorf and Bryant that the injury was not his fault. He knew that the accident was not his fault but the remarks about the bonus made him feel ashamed that he got injured, as if he had intentionally deprived the other employees of a reward.

19) Complainant remained on time loss through November 6, 1994. During that time, Assistant Manager Brown repeatedly asked Martin "Where is your lazy brother; is he ever going to return to work?" On or about October 27, Bryant asked Martin "Where is your lazy brother, how long is he going to milk the system?" Martin reported these remarks to Complainant.

20) Complainant returned to limited duty work on November 7, 1994, with an overall lifting restriction of 25 pounds. He was limited by his doctor to four hours work per day. This was referred to by Complainant and co-workers as "light duty."<sup>1</sup>

21) On November 7, Brown greeted Complainant with "Hey, lazy, so you finally decided to come back to work." When Complainant informed him that the work

release was for light duty, Brown remarked to the effect "what good are you here if you can't do the job."

22) During the time he worked subject to the light duty release, Complainant did not unload tires or put them away. He opened the truck, tallied the tires received and entered the information into the computer. Other employees assisted the driver in unloading. The tires were put away by other SSR's on the regular shift or by evening and weekend employees.

23) During the time he worked subject to the light duty release, Complainant did paper work involving inventory, local purchases and interstore transfers. Bettendorf assigned these duties in accordance with his understanding of Complainant's light duty restrictions. Bettendorf received the information regarding Complainant's need for light duty either from Respondent's loss prevention section or from Complainant himself.

24) On or about December 13, 1994, Bryant told Complainant that a delivery truck of tires had arrived. Complainant told Bryant that his medical restrictions would not allow him to unload the tires. Bryant said to Complainant "you faker, I am going to talk to Ron Brown." Complainant told the truck driver that someone would help him unload. When Ron Brown came out and told Complainant to unload the tires, Complainant explained to him that he was unable to do so because of medical restrictions. Brown appeared angry as he yelled out for others to unload tires because "old lazy Layne is slacking off again." Brown then said to Complainant "Why don't you just go home so we can get someone in here that wants to work." All of this was said in front of co-employees and the truck driver and Complainant was "totally embarrassed."

25) Christopher Wendt worked at Respondent's Clackamas auto center from July 1994 to April 1995, first as a tire installer, then as a battery installer. He overheard comments between Brown and Bryant, while Complainant was off on time loss,

concerning Complainant "milking the system" and playing at being hurt. After Complainant returned to light duty in November 1994, Brown called Complainant "lazy Layne" because he didn't do any lifting in unloading trucks and moving tires in the tire room. These remarks were usually made about rather than to Complainant, but some were made in his presence. While Complainant was on light duty, Wendt was asked to help unload trucks. He was not asked to unload before Complainant was injured. He did not overhear Bettendorf make any negative comment about Complainant. Brown's remarks about Complainant sounded joking but sarcastic and suggested that Complainant was faking.

26) Michael Knight worked at Respondent's Clackamas auto center from November 1994 to April 1995 as a tire installer. Complainant returned to work from an injury after Knight started. Knight overheard comments by Brown and Bryant concerning Complainant being lazy, a slacker who was "milking the system." These remarks were usually made about rather than to Complainant, but some were made in his presence and were overheard by other employees and by delivery drivers. Knight was asked to help unload trucks. He did not overhear Bettendorf make any negative comment about Complainant.

27) On December 13, Complainant reported to Bettendorf that Doug Bryant and Ron Brown were making remarks about his restrictions due to the injury and light duty. Bettendorf said he would take care of it. The remarks slowed but did not stop entirely.

28) Bettendorf spoke to Bryant after Complainant had complained to him about Bryant's remarks regarding Complainant's physical condition. He told Bryant to be sensitive to Complainant's situation. Bettendorf did not recall any similar complaint by Complainant regarding Ron Brown, so he did not recall any discussion with Brown

about Brown's alleged remarks. Bettendorf did not remember whether Complainant later complained again about Bryant.

29) Complainant was determined to be medically stationary on February 17, 1995. Dr. Steven S. Anderson, M.D., his attending physician, wrote a brief note on a prescription pad dated "2/17":

"Return to regular hours[.] May lift up to 50 # occasionally[,] 25 # frequently[.] Avoid frequent above shoulder lifting."

Respondent was so advised by letter from Kemper National Services, Inc., Respondent's insurer, on February 20, 1995, together with a form containing the following:

"Providence Worker Rehabilitation Services  
 5420 N.E. Glisan  
 Portland, Oregon 97213  
 (503) 238-4033  
 "PHYSICAL CAPACITY SUMMARY  
 "WORKER: LAYNE C. WOODS  
 "PHYSICIAN: Steven Anderson, M.D.  
 "INSURER/CLAIM No.: Kemper/787CU047093  
 "DIAGNOSIS: Thoracic Strain

	At one time	Total hours in 8-hour day
Sit	2 hours	8 hours
Stand Stationary	2 hours	8 hours
Stand With Movement	2 hours	8 hours
Walk	2 hours	8 hours

Lift	Maximum	Occasional	Frequent
Floor to Waist	45 lbs.	45 lbs.	20 lbs.
Waist to Shoulder	35 lbs.	35 lbs.	20 lbs.

Shoulder to Reach	25 lbs.	25 lbs.	15 lbs.
CARRY 25 Feet	45 lbs.	45 lbs.	25 lbs.

positional	never	minimal (1-10%)	occasional (11-33%)	frequent (34-66%)	continuous (67% +)
Bend			X		
Kneel				X	
Squat				X	
Crawl			X		
Reach Fwd				X	
Reach above shoulder			X-----	-----X	
Handling					X
Climb stair				X	
Climb ladder			X		

Endurance	Part-Time	X	Full Time
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COMMENTS: Capable of full-time work within the above-listed capacities

"Therapist's Signature: Larry Andes, P.T., #0613 Date February 3, 1995"

30) In a narrative of his closing examination conducted on February 17, Dr. Anderson noted "In no apparent distress. Posture normal," and recited his impression as

"Status post cervical thoracic strain, medically stationary with very mildly impaired thoracic left rotation (26° compared to normal of 30°) and no other range of motion impairment in the cervical or thoracic spine. No atrophy, no weakness, no sensory loss."

Dr. Anderson commented further:

"RESIDUAL FUNCTIONAL CAPACITY: He performed in the light medium range at the time of discharge from Providence Worker Rehabilitation Services. I discussed these with Larry Andes, the treating therapist, who felt that these might be a somewhat conservative estimate of his true capacities. I will therefore estimate that he may lift up to 50 lbs. occasionally, up to 25 lbs. frequently, and that he should avoid frequent

over-the-shoulder lifting. He may work regular hours with no other limitations other than those described above."

31) In late 1994, Respondent purchased a van for use by store departments for parts runs and similar errands. Each department designated an employee as van driver and that employee received special training and certification as van driver. Only the designated driver made parts runs in the van. Sweek received the training and was designated as van driver for the Clackamas Auto Center. If Sweek was unavailable, Auto Center parts runs were made by other employees, using their own vehicles as before.

32) Following his return to regular duty, Complainant was sent on a parts run on a Saturday by Bryant. Brown and Bettendorf were not present and Complainant used the company van. He was told by Bettendorf on the following work day that he was not to use the van. Brown remarked that Complainant wasn't to drive because he'd be off for a year if he had another wreck.

33) Because of Complainant's being in charge of division 95, Bettendorf gave Complainant permission to put the title "supervisor" on his name tag on his company mailbox area used for internal mail. Bryant appeared to resent this and in July, 1994 admitted that he defaced or removed the "supervisor" title. On January 26, 1995, following Complainant's injury and return to light duty, Bryant again admitted tampering with Complainant's company mailbox. He told Complainant that Complainant was not a supervisor. Complainant again asked Bryant to leave his company mailbox alone.

34) On February 21, 1995, Complainant again noted that the mailbox had been tampered with and Bryant admitted responsibility when confronted. Complainant told Bryant he would report his harassment to Bettendorf. On February 24, Bryant accused Complainant of faking. Bryant stated that a relative of his who was a doctor had said that Complainant's pain should be gone and that he must be faking. Bryant

told Complainant to quit milking the system and start doing his job. Complainant denied faking or milking the system. On or about March 1, he again reported to Bettendorf that he was still being harassed by Bryant and Brown. Bettendorf said he would take care of it.

35) In a "Notice of Closure" mailed to Complainant on March 3, 1995, Respondent's insurer found permanent partial disability from Complainant's September 16, 1994 injury as "Unscheduled disability of 14% equal to 44.8 degrees for injury to the neck, body part code 200. The value of this award is \$5,262.66." The insurer had previously paid \$2,266.62 in time loss and \$4,039.23 in medical compensation.

36) Complainant believed that he could no longer do the lifting portions of his SSR position. He told both Bettendorf and Brown that he was permanently partially disabled. He asked them if they could have others do the lifting portion while he did the other aspects. They said no, that coworkers had taken extra strain since November (i.e., while Complainant had been on light duty).

37) Bettendorf learned of Complainant's permanent partial disability from Complainant. Bettendorf did not recall whether he saw the return to work release; he did know that it was received by both loss prevention and human resources. Bettendorf believed that Complainant could not do the assigned duties of his regular position. Bettendorf went to store manager Frank Bonser for advice.

38) On or about March 29, 1995, Complainant was ill; he called in to Respondent to report he was sick. He called in sick again on March 30. On Friday, March 31, Complainant returned to work. On Saturday, April 1, he again became ill and called to report he would not be in. Later on April 1, Bettendorf telephoned Complainant and told him he would need a doctor's excuse to come back to work. When Complainant asked why, Bettendorf told him that if he was ill three days in a row, he

had to bring a doctor's excuse so he could return to work. When Complainant pointed out he had not missed three days in a row, Bettendorf said it was any three scheduled days in a work week. Complainant never saw such a policy in writing. He went to his doctor and obtained the needed excuse. He received a bill for \$40.00 from his doctor's office which he paid.

39) Bettendorf's practice was to require a doctor's note from an employee if the employee was absent due to illness "more than 3 days," or if the employee was "chronically sick, continued to call in sick." He had no recall of specific circumstance regarding asking Complainant for such a note; he did recall generally that he had requested such a note of other employees when they missed over three days.

40) On April 8, 1995, Complainant was 66 minutes late in arriving at work. He telephoned before his reporting time to report he would be late, and in the absence of Brown or Bettendorf, spoke with co-employee Lisa Conner, who initially forgot to tell Brown or Bettendorf. Brown wrote up the incident on a "Memorandum of Deficiency Interview" form ("Deficiency Interview"), stating that Complainant had not talked to a manager. Complainant felt the write-up was unfair because he had called and had followed the only procedure of which he was aware.

41) On April 18, 1995, Complainant was 40 minutes late in arriving at work. He telephoned before his reporting time, spoke with Bryant and asked for Brown. He was told that Brown was in a meeting, so Complainant reported to Bryant that he would be late. Brown wrote a Deficiency Interview on the incident; Bryant overheard the discussion and confirmed to Brown that Complainant had called. Complainant felt the write-up was unfair. He refused at first to sign the acknowledgment of the memo, and asked for a copy. On April 19, Brown told him he had to sign the Deficiency Interview in order to get a copy, but that it would appear in Complainant's personnel file

regardless. Complainant signed the memo. When he was called to a meeting the next day, he believed he had made Brown angry by refusing to sign and that he would be terminated.

42) Between November 18, 1993 and August 17, 1994, at least three auto center sales or service consultant employees received Deficiency Interview write-ups for tardiness. Some were late by over two hours. Between September 1, 1994 and April 6, 1995 no Deficiency Interview write-ups for tardiness appear on this record. On April 6 and 15, sales employees Healy and Batcheller received Deficiency Interview write-ups for tardiness.

43) Bettendorf had discussed attendance with Complainant in 1994 on several occasions and may have joked with him about it. He never wrote Complainant up. He was made aware of Complainant's April absences by Ron Brown sometime after they occurred.

44) Complainant had no Deficiency Interview write-ups in his record from July 1993 until April 8, 1995. He was often late to work before his injury but always made up any time loss. Bettendorf treated it lightly, if at all, and joked about "late Layne." In December 1994, Bettendorf mentioned to Complainant that he was getting "carried away" with being late.

45) Complainant believed that before his injury he had a good relationship with Bettendorf which seemed to deteriorate when Complainant had to refuse to unload trucks while on light duty and neither Gornick or his replacement were available.

46) Lisa Jerkins began working for Respondent in 1981 in sales. She gained experience in sales supervision, merchandising, and as sales manager. From time to time, she had worked in payroll and done other clerical functions in personnel. On April 1, 1995, she became human resources manager at Respondent's Clackamas Town

Center location. Previously, most personnel matters were handled by Respondent's Chicago or Tucker, Georgia, offices. Between March 1, 1995 and April 1, 1995, while she was transitioning from sales manager to human resources manager, Jerkins was made aware of Complainant's situation by store manager Frank Bonser, by Bettendorf, and by loss prevention manager Robert Snider. All were asking human resources for assistance on how to proceed because they saw Complainant as permanently disabled and unable to perform "essential functions" of his position as an automotive SSR.

47) At the time she became human resources manager, Jerkins had no experience or training in compliance with state or federal injured worker or disability law and regulations. She was unaware of the significance of Complainant being termed "medically stationary" or of the letter generated by Kemper Insurance stating in part:

"We have been advised that Dr. S. Anderson M.D., attending physician has released Layne Woods to return to regular work. Attached is a copy of the worker's limitations. In accordance with ORS 656.340 and OAR 436- 120-020(4), American Manufacturers Mutual requests you determine whether or not suitable employment is available and if so that he be re-instated or re-employed. This is a demand for re-instatement or re-employment under the laws administered by the Oregon Bureau of Labor, ORS 659.420."

Jerkins had no experience or training in eligibility standards or requirements for vocational assistance of injured workers. She believed that the finding of permanent partial disability of 14% disqualified Complainant from his position, which Bettendorf and Brown said involved stocking work and loading and unloading merchandise. In actions regarding Complainant, she consulted store manager Frank Bonser and relied on the advice and instructions of District Human Resources Manager Mike Schwartz. Jerkins discussed available positions at the Clackamas store with Bettendorf, Brown, and Bonser. They did not identify any accommodation of Complainant's limitations in his then current position. She gathered information about Complainant from Bonser,

Bettendorf, Brown and Snider and forwarded to Schwartz such information as he requested. Neither Jerkins nor any of the other managers involved sought any further clarification of the return to work note, the Notice of Closure, the physical capacity summary, or the physician's closing examination report. Brown, Bettendorf, and Jerkins did not explore accommodation of Complainant's condition in his SSR position; they did talk about available positions in the store.

48) Respondent's position description for "Automotive Service Support Representative" (SSR) listed several "essential functions" of the position. Complainant never provided cashiering support, responded to customer phone inquiries, or tested or installed non-transportation batteries, despite the listing of these duties as essential. Also included as "essential functions" was "Can perform any of the duties as outlined in the stock replenishment job description." Respondent's position description for "Automotive Replenishment Associate" listed many of the replenishment and stocking duties also performed by the SSR. Both job description listed receiving, shipping, stocking and replenishing as "essential functions", but did not outline any minimum physical capacity necessary to perform such functions. Neither indicated that continuous or heavy lifting was involved in or necessary to perform such functions. Complainant had not seen either job description while employed by Respondent.

49) Schwartz advised Jerkins that Complainant could not continue in his then current position and, since there were no positions available in the store in the same or a comparable capacity, Complainant was to be placed on "illness leave" so that he could go through vocational rehabilitation.

50) On April 20, 1995, Complainant was called to a meeting in Bonser's office. Bettendorf, Jerkins, Brown and Complainant attended. Bonser left as they arrived. The purpose of the meeting was to inform Complainant of his employment status.

51) Jerkins recorded her recollection of the meeting in a memorandum which she drafted in January 1996 after learning that Complainant had filed a discrimination complaint. The memorandum stated:

"Re: Layne Woods

"In April of 1995 I had conversations with Kemper Insurance, our Worker's Comp carrier, to determine the status of Layne Woods. According to the physician's findings Layne had been determined to be permanently partially disabled and not able to lift. With the physical activities of his current job, he would not be able to return to the same position without causing further injury to himself. At that time there was (*sic*) no other comparable positions available in our Automotive Department that did not have those physical requirements. We made arrangements through Kemper for a Vocational Rehabilitation counselor to contact Layne and have him participate in vocational rehabilitation since we had nothing available for him. Layne was then placed on an illness Leave of Absence, which is his current employment status.

"Gary Bettendorf, Ron Brown and myself (*sic*) sat down with Layne to discuss his situation. We explained to him that for his safety, based on the permanent partial disability this would not allow him to return to his current position because of possible exposure to further injury. At the time we did not have any other comparable positions available and the next step in the process was for him to be contacted by (*sic*) a vocational rehabilitation counselor and go from there. We repeatedly asked Layne if he had any questions regarding the process and made it perfectly clear he was not being terminated. I told Layne I was available anytime, as did Gary and Ron, to call if he had any questions or if we could be of any help. We told Layne he would be put on an Illness Leave of Absences (*sic*) during this process, maintaining his employment with Sears. We repeatedly asked Layne if he had any questions regarding the situation, and to my knowledge answered them to his satisfaction, again stating that if he had questions later we were available at anytime to try and answer them for him.

"Lisa Jerkins Human Resources Manager"

52) At the April 20 meeting, Jerkins informed Complainant that Complainant had to be retrained because he was unable to perform all of his job functions, that he could not do the lifting functions of his job. He believed that Bettendorf's explanation, at the meeting, of what would happen included the elimination of his position. His understanding at the time was that he was being laid off for vocational rehabilitation and

that he would get retraining. Complainant believed he was told he could pursue his drafting training. He believed there were other jobs, such as cashier, available, but none were offered. He did not discuss the lifting aspect of the job. He was told to turn in his uniforms and go home. He did so, but remained uncertain and confused.

53) Beyond Jerkins' after-the-fact memo and oral testimony by Respondent's management employees to the effect that there were no available jobs Complainant could do, nothing on this record either confirms or negates Respondent's efforts to identify other positions within its work force for which Complainant was qualified or which could accommodate the lifting limitations. Similarly, nothing on this record either confirms or negates any assessment of accommodation of those limitations in his SSR position.

54) Complainant continued to be confused about his status following his departure from Respondent's employ. He consulted an attorney who instructed him to call Respondent and verify his status. About two weeks after April 20, Complainant telephoned Jerkins who told him he was on a medical leave. He also reported that he had not yet been contacted about vocational rehabilitation. She said she would have loss prevention contact Kemper again.

55) Shortly after May 4, 1995, Complainant received a letter from Respondent's "Associate Service Center" in Tucker, Georgia, informing him of his rights under the federal Family and Medical Leave Act of 1993 (FMLA). Complainant took the May FMLA notice to Jerkins, who attempted to explain it. Because he had never requested leave of any kind, it only served to confuse him further<sup>2</sup>

56) Complainant was subsequently contacted by Lori Hansen, a vocational rehabilitation counselor. Hansen told Complainant that it would be difficult to place him in vocational rehabilitation because the employer was only obligated to bring the worker back to 80% of the worker's pre-injury wages. Complainant was making \$6.06 per hour

when he last worked in April, 1995.<sup>3</sup> Hansen told him that 80% of his regular wage was close to minimum wage and that there were many minimum wage jobs available. About two weeks after meeting with Hansen, Complainant received a letter stating he was ineligible for vocational rehabilitation services.

57) In April 1995, Oregon statute provided that an injured worker was eligible for vocational rehabilitation services at the employer's expense if unable to return to the worker's previous employment or any other available employment because of a substantial handicap to employment characterized by the worker's lack of physical capacity, knowledge, skill or abilities to be employed in suitable employment, which in turn was partly defined as

"Employment that produces a wage within 20 percent of that currently being paid for employment which was the worker's regular employment."

Anything over 80% of Complainant's prior wage would be "within 20%." In April 1995, Oregon statute provided that the minimum wage rate in Oregon was \$4.75 per hour.<sup>4</sup>

58) Jerkins did not know at the time that Complainant had been denied vocational rehabilitation training. She had referred the matter to Respondent's loss prevention office and believed it was the responsibility of that office. She did not follow up with loss prevention or with Complainant.

59) Had Complainant remained employed with Respondent after April 25, 1995 and worked the number of hours per week he worked before his injury, he would have earned a minimum of \$18,034.56 by September 25, 1996

60) On or about June 2, 1995, Complainant filed for unemployment compensation. He outlined his injury history and stated

"I was released for regular duties with restrictions. So I was unable to fulfill all of my job duties. So I was involuntarily layed (sic) off for Vocational Rehabilitation"

On June 14, 1995 Respondent's response to notice of filing of Complainant's claim for unemployment benefits was:

"Claimant on a leave of absence due to disability/illness."

61) Beginning in May, 1995, using newspaper help wanted ads and Oregon State Employment Service referrals, Complainant, by his count, through telephone contact, resume or formal application inquired about between 50 and 100 jobs in the Portland area. During his search for alternative employment, Complainant reported to prospective employers his status with Respondent, with the result that prospective employers wanted clarification before proceeding further. The prospective employer would advise him to clear up his status with Respondent and return. Complainant did not know how to change his status with Respondent, short of quitting, which he did not want to do since he believed he had done nothing wrong and did not want to give up any right to employment or benefit he might still have.

62) In late March 1996, Complainant received a notice from Respondent's Georgia office that his leave of absence would expire on April 26, 1996. He telephoned Jerkins, who told him she would get that date extended, which she did. Complainant was capable of working and had called Jerkins to find out whether, given Respondent's decision to terminate his leave, it would re-employ him.

63) In early September 1996 Complainant received a notice from Respondent's Georgia office that his illness leave of absence would expire on September 26, 1996. A short time later, he received a form headed "Application for Complete Withdrawal -- Employment Terminated" regarding Respondent's Savings and Profit Sharing Fund. It showed a date of employment termination for Complainant of September 26, 1996.

64) When Complainant first reported that he had gotten medical attention through worker's compensation and Bettendorf mentioned that would affect the accident free incentive bonus, Complainant felt anger because the accident was not his fault and he felt as if he had "aced" his co-workers out of something and thus felt ashamed that he'd been injured. He felt badly for the same reasons when Bryant learned he had gone on compensation and accused him of "blowing" the incentive bonus. When Complainant returned to light duty with restrictions, he was hurt by Brown's remark about "you can't do the job." He wanted to take it as a joke, but had already heard of the remarks that had been made in his absence. He was embarrassed in front of others by being referred to as "Lazy Layne" and was insulted and angered by accusations of "milking the system" and being a "faker." The meeting of April 20 totally puzzled Complainant. He hadn't asked for any sort of leave and had the impression that the "layoff" was somehow unfair. He did not understand how he could be retrained if he was not eligible for vocational assistance. He didn't know how to amend his status, that is, how to get off the "illness leave." When he was unable to find other work or obtain reassignment with Respondent, he felt totally frustrated, hurt, betrayed, and depressed and experienced extreme self-doubt. His income consisted of unemployment compensation, which ran out after 26 weeks. He described his earnings situation as "a financial disaster," and had to rely on his mother for support.

65) Most of Complainant's testimony was substantially credible. The ALJ carefully observed his demeanor and evaluated the credibility of his testimony based upon its inherent probability, its internal consistency, whether it was corroborated, whether it was contradicted by other evidence, and whether or not human experience demonstrated it was logically incredible.<sup>5</sup> Complainant's testimony at hearing was at times inconsistent. He had a tendency to respond to questions without first being

certain of their content. He was approximate rather than precise on the dates of occurrences, but his reaction to what happened was credible. He appeared to be a singularly unsophisticated individual with limited understanding of his post-injury employment status with Respondent, of the extent of any physical limitations resulting from his injury, and of his available options. He repeatedly stated that he was unaware of how to change his "medical leave" or "illness leave" status, and clearly believed he had somehow been disadvantaged. He testified on direct that he expressed this belief in the April 20 meeting by saying he thought he was being "reamed." Later, on rebuttal, he testified that he stated on April 20 that he thought he was being "shafted." While the two terms apparently have the same meaning to Complainant, their interchange led the ALJ to suspect they were after the fact characterizations of the overall result of the meeting and not contemporaneous evaluations announced to the other participants at the time. The credibility of his job search was undermined when he unaccountably continued to report his status with Respondent as "medical leave" even after the September 1996 total severance of employment.

66) The testimony of Gary Bettendorf was not totally credible. He did not recall how he learned of the lifting limitation and limited hours when Complainant returned on light duty. He did not recall seeing any written limitation, but testified that he assigned duties to Complainant in keeping with Complainant's restrictions. He did not recall seeing any written lifting limitation when Complainant was released to full time work or who made the decision to place Complainant on leave. He stated that he probably asked for a doctor's evaluation, but did not recall if one was received, although he talked to Complainant about limitations. He stated he was told that Complainant was partially disabled but not by whom, unless it was by Complainant or loss prevention. He had no recall of requiring a doctor's excuse for Complainant's late March-early April

illness but testified that it was policy to require it after three consecutive days absence and that he had required it of others. He acknowledged that he spoke once with Bryant about Complainant's concerns, but had no recall of a second instance claimed by Complainant or of any complaint of harassment by Brown. He did not recall the terms "lazy Layne" or "milking the system" in reference to Complainant. The forum has accepted Bettendorf's testimony as credible only where it was uncontroverted or was corroborated by credible testimony or inference.

67) The testimony of Lisa Jerkins was substantially credible. Her testimony was consistent with her acknowledged lack of expertise and specific recall. She admitted her limited knowledge of injured worker and disability law and regulations and that she was guided by the recommendations of others in regard to Complainant's employment status. She acknowledged that her memorandum regarding the April 20, 1995 meeting with Complainant was not written contemporaneous to the event but over eight months later, and that it did not necessarily report everything that was said. She testified that there was no specific follow-up on Complainant's status and that since she did not know for two years that Complainant was not eligible for vocational rehabilitation, she had no reason to determine why. She acknowledged that there was no separate medical assessment of Complainant's actual job duties as an SSR. There was no reason to find her testimony anything but credible.

68) The testimony of Duane Martin was credible. Part of his testimony regarding Brown's frequent inquiries about Complainant's return from time loss was confirmed by Brown himself. Martin's testimony regarding the remarks of Bryant was uncontroverted. This forum will not assume that his testimony was rendered untrustworthy from the mere fact of his blood relationship to Complainant, particularly where Respondent chose not to test his statements through cross-examination. The

ALJ was not sufficiently impressed by other evidence or his demeanor so as to cause a finding that his testimony was anything but credible.

69) The testimony of Ronald Brown was not totally credible. Brown admitted that he inquired often of Martin about Complainant's condition during his absence on time loss, although denying he ever referred to Complainant as lazy or suggested that Complainant's absence due to injury was not legitimate. He specifically denied asking others to unload because "Lazy Layne won't," or that he called Complainant "candy ass." He acknowledged citing Complainant for two instances of tardiness in April which he attributed to a general tightening up on attendance. He acknowledged that others cited for tardiness around that time were sales staff or installers whose tardiness directly affected delivery of customer service. He attempted to justify the use of a Josh Reinertson, an installer who was habitually tardy in September-October 1995, as a comparator to Complainant in April by testifying that Reinertson had previously been a replenishment associate while Complainant was employed. He stated that Complainant repeatedly told him that Complainant could no longer do all of the SSR job, but this record does not otherwise reflect that Complainant stated anything beyond a lifting limitation. The forum has accepted Brown's testimony as credible only where it was uncontroverted or was corroborated by credible testimony or inference.

70) Michael Knight and Christopher Wendt were both former employees of Respondent presented as Agency witnesses. Both were discharged over inaccurate or false employment applications. Knight had failed to answer a question on his application about whether he had been convicted of a crime involving dishonesty within seven years of the application. Wendt had answered the same question on his application in the negative. Each had in fact been convicted of such a crime within the designated time frame. Each was equivocal when confronted on cross-examination with the reason

for discharge and Wendt initially testified falsely. They were roommates, and Knight was a friend of Complainant and Martin. The ALJ has considered the convictions and that a witness found to be false in part of his testimony is to be distrusted in others. The testimony of these witnesses was given no weight where it conflicted with credible evidence, but was accorded some weight where it tended to corroborate other credible testimony.

### **ULTIMATE FINDINGS OF FACT**

1) At times material herein, Respondent was a foreign corporation operating retail stores in Oregon, utilizing the personal service of six or more employees and reserving to itself the right to control the means by which such service was performed.

2) Complainant was employed by Respondent between June 1993 and April 1995. His principal duties in Respondent's automotive center were receipt, storage, display, and inventory of tires and tire related items. He maintained tire storage and display areas, tracked the timeliness of service orders, and procured parts from sources outside the store.

3) Complainant's immediate supervisors were auto center manager Gary Bettendorf and assistant manager Ron Brown. He was also subject to the direction of technician coordinator Doug Bryant.

4) In September 1994, while driving his own vehicle to obtain parts, Complainant sustained a compensable injury for which he initiated a workers' compensation claim.

5) Because a workers' compensation claim would negatively affect each employee's accident free bonus, Complainant's supervisors attempted to discourage him from filing a claim.

6) While he was drawing time loss due to his injury, Complainant was the subject of negative comment by at least two of his supervisors regarding the genuineness of his absence, of his temporary disability, and of his injured worker status.

7) Complainant returned to work in November with a limited duty medical release. The same individuals continued frequently to question the genuineness of his temporary disability and injured worker status.

8) Complainant found the comments about his time loss, his disability and his injured worker status to be unwelcome and offensive and that they created a hostile and offensive work environment.

9) A reasonable person in Complainant's situation would have found such remarks unwelcome and offensive creating a hostile and offensive work environment.

10) Complainant was declared medically stationary in February 1995 with a permanent partial disability rating of 14%, and was released to full time work with a lifting limitation.

11) Because of the permanent partial disability rating and lifting limitation, Complainant's supervisors assumed he could not perform the duties of his pre-injury position. Respondent did not accommodate the limitation and did not offer him an alternate position.

12) Complainant had no disciplinary or absentee record until April 1995 when he received two deficiency memoranda for tardiness from Brown. He was also required by Bettendorf to supply a doctor's excuse at his own expense as a condition of his return to work after a brief illness.

13) On April 20, 1995, Complainant was advised in a meeting with Bettendorf, Brown, and Respondent's human relations manager that he was being placed on an illness leave because Respondent had no positions available in which he would not risk

further injury due to the lifting restrictions and his permanent partial disability. Respondent stated that Complainant would be referred for vocational rehabilitation. Several weeks later, Respondent's insurer informed Complainant that he was not eligible for vocational rehabilitation.

14) Complainant's leave continued after vocational rehabilitation was no longer possible. Respondent took no action to clarify or modify his status.

15) Complainant applied for unemployment compensation and diligently sought replacement employment. Respondent stated to the employment department that Complainant was "on a leave of absence due to disability/illness." He continued to seek replacement employment until September 1996 when Respondent terminated his leave status.

16) Complainant suffered severe emotional distress from the suggestion that he had deliberately deprived the work unit of the accident free bonus, from the negative comment regarding the genuineness of his time loss claim, and from the continued questioning of the genuineness of his disability and limited duty. He was embarrassed in front of others and was insulted and angered by the accusations regarding his worker's compensation status and made to feel ashamed that he'd been injured. He suffered emotional distress from Respondent's failure to discuss accommodation of his restrictions or to discuss other positions.

17) Complainant was severely upset emotionally by the manner in which his tenure with Respondent was interrupted and terminated; he felt he was betrayed. He felt totally frustrated, hurt, depressed, and experienced extreme self-doubt. His distress continued as he searched for employment saddled with the status of "illness leave," a status he could not get modified or corrected.

18) Complainant lost wages of \$18,034.56 between April 25, 1995 and September 25, 1996.

### CONCLUSIONS OF LAW

1) At times material herein, ORS 659.010 provided in part:

"As used in ORS 659.010 to 659.110, 659.400 to 659.460 and 659.545, unless the context requires otherwise:

" \* \* \* \* \*

"(6) 'Employer' means any person \* \* \* who in this state \* \* \* 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.

" \* \* \* \* \*

"(12) 'Person' includes one or more \* \* \* corporations \* \* \*."

" \* \* \* \* \*

"(14) 'Unlawful employment practice' includes only those unlawful employment practices specified in ORS \* \* \* 659.330, \* \* \* 659.410, \* \* \* 659.425 \* \* \* "

Respondent was an employer subject to ORS 659.010 to 659.110, 659.400 to 659.460 and 659.505 to 659.545 at all times material herein.

2) ORS 659.040 (1) provides:

"Any person claiming to be aggrieved by an alleged unlawful employment practice, may \* \* \* make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the \* \* \* employer \* \* \* alleged to have committed the unlawful employment practice complained of \* \* \* no later than one year after the alleged unlawful employment practice."

Under ORS 659.010 to 659.110 and 659.400 to 659.460, the Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein.

3) The actions, inactions, statements and motivations of Gary Bettendorf, Ronald Brown, Douglas Bryant and Lisa Jerkins are properly imputed to Respondent herein.

4) At times material herein, ORS 659.410 provided, in part:

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

Respondent subjected Complainant to a course of conduct by his supervisors designed to harass, embarrass, humiliate and intimidate him which conduct was offensive and unwelcome, and created a hostile, intimidating, and offensive work environment because he invoked and utilized the workers' compensation statutes, all in violation of ORS 659.410.

5) Except for the harassment described in Conclusion of Law 4) above, Complainant was not treated differently from workers who had not invoked and utilized the workers' compensation statutes and Respondent did not violate ORS 659.410 in that respect.

6) Respondent effectively terminated Complainant's employment when, because he invoked and utilized the workers' compensation statutes, Complainant was placed on illness leave to obtain vocational rehabilitation and was provided no alternative when he was not eligible for vocational rehabilitation and his tenure was thus ended in violation of ORS 659.410.

7) At times material herein,<sup>6</sup> ORS 659.400 provided :

"As used in ORS 659.400 to 659.460, unless the context requires otherwise:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment or is regarded as having such an impairment.

"(2) As used in subsection (1) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

"(b) 'Has a record of such an impairment' means has a history of, or has been misclassified as having such an impairment.

"(c) 'Is regarded as having an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment.

"(3) 'Employer' means any person who employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard."

and ORS 659.425 provided, in part:

"(1) For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for an employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

"\* \* \* \* \*

"(c) An individual is regarded as having a physical or mental impairment."

Respondent regarded Complainant as having a substantially limiting physical impairment and barred Complainant from employment because of Respondent's erroneous perception in violation of ORS 659.425(1)(c).

8) At times material herein, ORS 659.330 provided:

"(1) It is an unlawful employment practice for an employer to require an employee, as a condition of continuation of employment, to pay the cost of any medical examination or the cost of furnishing any health certificate.

"(2) Notwithstanding subsection (1) of this section, it is not an unlawful employment practice for an employer to require the payment of medical examination or health certificate costs:

"(a) From health and welfare fringe benefit moneys contributed entirely by the employer; or

"(b) By the employee if the medical examination or health certificate is required pursuant to a collective bargaining agreement, state or federal statute or city or county ordinance.

"(3) Complaints may be filed by employees, and this section shall be enforced by the Commissioner of the Bureau of Labor and Industries in the same manner as provided in ORS 659.040 to 659.110 and 659.121 for the enforcement of an unlawful employment practice. Violation of subsection (1) of this section subjects the violator to the same civil and criminal remedies and penalties as provided in ORS 659.010 to 659.110, 659.121 and 659.470 to 659.545."

Respondent violated ORS 659.330(1) when it required that Complainant pay the cost of a medical examination and furnish a health certificate as a condition of continued employment.

### **OPINION**

The Agency's Specific Charges alleged that Respondent violated of ORS 659.410 by subjecting Complainant to harassment, by treating him differently in terms and conditions of employment, and by terminating his tenure as an employee, all because he invoked and utilized the workers' compensation statutes. The Specific Charges alleged further that Respondent barred from employment in violation of ORS 659.425(1)(c) because Respondent erroneously regarded Complainant as having a substantially limiting physical impairment, and finally, that Respondent violated ORS 659.330 by requiring Complainant to pay for a medical examination and health certificate as a condition of returning to work.

#### **1. Harassment based on invoking and utilizing workers' compensation statutes (ORS 659.410).**

The Agency's Specific Charges alleged that Respondent violated of ORS 659.410 by subjecting Complainant to harassment, offensive and unwelcome conduct

which harassed, embarrassed, humiliated and intimidated him creating a hostile, intimidating, and offensive work environment because he invoked and utilized the workers' compensation statutes. This forum has previously found that "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 Central Oregon Building Supply, Inc.*, 17 BOLI 1, 9 (1998)

To establish a prima facie case of harassment (i.e., hostile environment harassment by supervisory employees 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 was 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. *Central Oregon Building Supply, supra*; (1998); OAR 839-005-0010; *In the Matter of Kenneth Williams*, 14 BOLI 16, 24 (1995)

Respondent employed six or more persons including Complainant who applied for benefits and invoked and utilized the worker's compensation procedures. In the absence of his manager, Bettendorf, and the assistant manager, Brown, Complainant reported his auto accident on the job to Bryant, who often assigned him work. Bryant<sup>7</sup> attempted to discourage him from filing a workers' compensation claim. Bryant and Bettendorf reminded him that the filed claim would negatively affect each employee's

accident free bonus. Once the claim was filed, Bryant told him he had "blown" the chance for the bonus. While he was drawing time loss due to his injury, he was the subject of negative comment by Brown and Bryant regarding the genuineness of his absence and temporary disability. These remarks were relayed to him by his brother, a fellow employee, at or near the times they occurred. He returned to work with a light duty medical release in November which limited his work time to four hours per day. When he returned on limited duty, Brown greeted him with a demeaning comment, questioning his usefulness. Bryant and Brown continued questioning the genuineness of Complainant's temporary disability. Complainant found the comments unwelcome and abusive and that their conduct created a hostile and offensive work environment.

A month or so after Complainant's return on light duty, Bryant told him to unload a tire truck. When Complainant said he couldn't, Bryant intimated he was faking and called Brown. Triggered by Bryant's report of Complainant's refusal to unload, which Complainant based on his light duty restrictions, Brown commented unfavorably about Complainant when informed by Complainant that the work was outside his medical restrictions. Other employees overheard Bryant's and Brown's comments about Complainant.

Complainant told Bettendorf of the comments. Credible evidence showed that Bettendorf immediately took care of Complainant's first complaint about Bryant, telling Bryant to be more sensitive to Complainant's condition. There was no evidence of timely or appropriate corrective action related to Brown's conduct toward Complainant or related to Complainant's subsequent complaint of Bryant's repeated comments.

Complainant testified credibly that the negative comments upset him and made him ashamed that he had been injured, even though it was not his fault. He was hurt, insulted embarrassed and angered by being referred to as "Lazy Layne" and by the

suggestions that he couldn't do the job, that he was faking, and that he was "milking the system."

At hearing, Respondent's witnesses denied that any harassment occurred. Bettendorf admitted to only one instance of counseling Bryant and had no recollection about any accusation against Brown. Brown denied any negative comment, although admitting he often inquired of Martin about Complainant's return from time loss. Bryant was not a witness. The preponderance of available evidence favored the Agency's position that Complainant was harassed for invoking and utilizing the workers' compensation statutes.

In an effort to question the seriousness of Complainant's emotional distress, Respondent presented credible evidence that Complainant attended company functions after April 1995 and was apparently friendly toward Respondent's personnel. Complainant apparently enjoyed his job and wanted to return to it, and was led to believe by Respondent that he was still an employee. The forum finds nothing inconsistent in his activities.

## **2. Different Treatment based on invoking and utilizing workers' compensation statutes (ORS 659.410).**

Except for the disparaging comments included in the harassment described above, Complainant was not treated differently from workers who had not invoked utilized the workers' compensation statutes. There was credible evidence that only Sweek made parts runs in the company vehicle, that others were subject to the rule of providing medical verification of illness after a three day absence and that the three day provision was known to others in the work force, and that others were subject to disciplinary procedures regarding tardiness. Brown threatened other employees with attendance problems with increasingly severe sanctions in the event of further violation.

The Agency did not establish by a preponderance that Complainant was demonstrably treated differently in those particular terms and conditions of employment

**3. Termination of tenure as an employee based on invoking and utilizing workers' compensation statutes (ORS 659.410).**

The Agency alleged that Complainant was placed on medical leave and urged to seek vocational rehabilitation, effectively terminating his employment, because he invoked and utilized the workers' compensation statutes and that his tenure was thus ended in violation of ORS 659.410.

A preponderance of evidence indicates that Respondent placed Complainant on an illness leave for the purported purpose of retraining him through vocational rehabilitation. Respondent took this step because Complainant had received a permanent partial disability rating of 14% and had a lifting limitation as a result of a compensable injury sustained in Respondent's employ for which he had invoked and utilized the Oregon Workers' Compensation law. The leave would end when Complainant was retrained or when he somehow obtained a medical evaluation of recovery, i.e., a release without restrictions. But it was determined that Complainant was not eligible for vocational rehabilitation. Unaccountably, Respondent did not follow up, even though it consistently advised Complainant that he was still a Sears employee. Complainant sought other work within the supposed limitations, but his "illness leave" status made him unemployable as a practical matter. He was in the position of being employed but unable to work for the employer, and, because he was employed, being unable to work elsewhere. A "Catch 22." Thus the "illness leave" status was in reality a termination of his tenure with Respondent.

A permanent partial disability rating is by no means an indication of a worker's ability to work. It does not necessarily establish a worker's inability to perform a job.<sup>8</sup> It

is an evaluation of the loss of earning capacity attributable to a particular injury, or as in Complainant's case, an "Unscheduled disability of 14% equal to 44.8 degrees for injury to the neck, body part code 200." Such a rating in no way delineates what the individual can or cannot do.

Accordingly, placing Complainant on "illness leave" for retraining and leaving him there when retraining was no longer an option and no other realistic options existed, because he had received a workers' compensation permanent partial disability rating, had the effect of ending Complainant's tenure as Respondent's employee because he had invoked and utilized the workers' compensation statutes. This violated ORS 659.410(1).

**4. Barring from employment an individual regarded as having a physical impairment (ORS 659.425(1)(c)).**

The Agency alleged that Complainant was barred from employment because of respondent's erroneous perception and treatment of Complainant as having a substantially limiting physical impairment in violation of ORS 659.425(1)(c).

According to the medical evidence in the record, Complainant had physical impairment that limited his ability to perform some functions of his job some of the time. However, Respondent erroneously treated Complainant as if he was disabled not only from his position as a automobile service support representative but from any other position that involved loading, unloading, or stocking. The basis for this belief was the capacity assessment and medical release accompanying Kemper's letter of February 20, 1995, and the report of Dr. Anderson's closing examination of February 17. But those documents did not provide the type of individual assessment required of employers in determining whether an employee can perform the duties of a position. There was no indication anywhere in the documentation or testimony that the physician

was aware of the actual work done by Complainant, outside of the general area of "lifting." There was insufficient evidence upon which to determine where along the charted spectrums of "Maximum-Occasional-Frequent" (as to lifting) and "minimal-occasional-frequent-continuous" (regarding positions) Complainant's duties actually fell. There was evidence that the average tire weighed about 40-45 pounds. 45 pounds was the most Complainant was to lift and carry "occasionally," and 20 pounds was the most he was to lift and carry "frequently," according to the physical capacity summary dated February 3. After consulting with the physical therapist, Dr. Anderson's February 17 opinion placed these limits at 50 pounds and 25 pounds, respectively. There was evidence that immediately prior to his injury, he was only required to move tires occasionally.

If truckloads of tires arrived twice a week, unloading them occupied a maximum of 40% of Complainant's time, even if each took all day. The record reflects that it could take ten minutes to an hour to unload each truckload, but generally Complainant spent from one half to three quarters of an hour on each load, and an equal time to put the tires away. Thus the time that Complainant would be engaged in lifting to the capacity of [45--50] pounds would be well under the occasional ("up to 33%") limit.

Jerkins was of the opinion that Complainant's stated permanent partial disability operated to disqualify him from his former position and from all other stocking positions as well. She testified to her understanding that the workers' compensation disability rating was an indication of a limitation on Complainant's ability to work. That is incorrect. Complainant received compensation for "unscheduled disability of 14 % equal to 44.8 degrees for injury to the neck, \* \* \* ." The mere finding of degrees of disability is not a reliable indicator of a recovering injured worker's actual capacity. "[A] finding that a [worker] is permanently partially disabled does *not* mean, necessarily, that

he is totally unable to work." *Chavez v. Boise Cascade Corporation*, 92 Or App 508, 759 P2d 297 (1988) (emphasis in original); *aff'd, Chavez v. Boise Cascade Corporation*, 307 Or 632, 772 P2d 409 (1989).<sup>9</sup> Complainant's assigned degree of disability was not a physical impairment which substantially limited employment, but he was treated by Respondent as if it were such an impairment.

Jerkins and Brown testified to the effect that Complainant was placed on illness leave as a means to keep him from injuring himself further. That reason was memorialized in Jerkins January 1996 memo. But whether a worker is at risk of injury or reinjury, i.e., "present risk of probable incapacitation," is a medical question rather than a personnel decision. To deny the opportunity to work when a risk of incapacitation is less than probable would contravene the policy of Oregon law. *In the Matter of WS, Inc.*, 13 BOLI 64, 83-84 (1994) It is a decision for experts. *In the Matter of Pacific Motor Trucking*, 3 BOLI 100, 111-113 (1982) *aff'd, Pacific Motor Trucking v. Bureau of Labor and Industries*, 64 Or App 361, 668 P2d 446 (1983); *rev den* 295 Or 773, 670 P2d 1036 (1983).

By regarding Complainant as having a physical impairment based on a permanent partial disability rating or upon an unsupported fear of injury or reinjury, and denying him employment opportunity, Respondent violated ORS 659.425(1)(c).

**5. Requiring an employee to pay the cost of a medical examination and furnish a health certificate as a condition of continued employment (ORS 659.330).**

The Agency alleged that due to a 2 day absence from work in March 1995 Complainant was required to pay for a medical examination as a condition of returning to work, a violation of ORS 659.330.

The statute makes it an unlawful employment practice to require

an employee to pay the cost of any medical examination or the cost of furnishing a health certificate as a condition of continuation of employment. The uncontroverted evidence was that Bettendorf told Complainant that he must bring in a doctor's excuse in order to return to work after Complainant had been off with the flu. Complainant paid for the resulting examination and return to work slip. There was no evidence presented that this cost was payable from any fringe benefit contributed entirely by Respondent, nor was there any evidence that the examination and/or certificate was required by collective bargaining or by federal, state, or local ordinance. These are affirmative defenses. Accordingly, the forum finds that Respondent violated ORS 659.330.

#### **Respondent's motion for summary judgment**

Subsequent to the hearing, on May 16, 1997, Respondents by fax filed exceptions to the ALJ's order denying summary judgment. Those exceptions reiterate Respondent's arguments that the Agency may not proceed to hearing on those portions of the administrative complaint not supported by its Administrative Determination, and that in particular, the disability portion of the Specific Charges was not "like or reasonably related" to the disability allegations of the administrative complaint. The forum has reviewed the portion of the pre-hearing order set out at Findings of Fact -- Procedural 9 and finds no reason to alter its prior opinion. Respondent's exception to the ruling is overruled.

#### **Damages**

Awards for mental suffering damages depend on the facts presented by each complainant. 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, insult, anger, shame as described in the Findings of Fact. The harassment started when Complainant filed his workers' compensation insurance claim in September 1994 and continued on a frequent basis until he was placed on "illness leave" the following April. The emotional effect of the manner of his separation from active employment began with illness leave and persisted up to the hearing. He felt betrayed, totally frustrated, depressed, and experienced extreme self-doubt. His emotional state was negatively impacted by his economic situation. Respondent is directly liable for any damage flowing from Complainant's emotional distress.

Because the forum has found that Complainant's termination of employment with Respondent was unlawful, Respondent is liable for Complainant's loss of wages from April 25, 1995 to September 25, 1996, when Complainant's meaningful job search ceased.

The amounts awarded to Complainant in the order below are compensation for his wage loss, for the unlawful medical expense, and for the mental suffering and are a proper exercise of the Commissioner's authority to eliminate the effects of the unlawful practices found.

### **Respondent's exceptions**

In its first exception, Respondent argues that the Agency lacked authority to bring and pursue Specific Charges that included allegations which the Agency's investigator had found no substantial evidence to support. The Forum rejects that argument for the reasons stated in the ninth procedural finding of fact, *supra*. It is worth noting that Respondent argues only that the plain language of ORS 659.050(1) precludes the Agency from pursuing charges related to allegations that the investigator found no

substantial evidence to support. Respondent does not argue that the Agency's action deprived it of due process; nor does it argue that it was in any way prejudiced by the scope of the Specific Charges.

Respondent's reading of ORS 659.050(1) is too narrow. That statute merely provides that if the investigator finds substantial evidence to support *any* allegation set forth in the complaint, the Agency may investigate and pursue any of those allegations, including ones which the investigator did not initially determine were supported. Because the Agency's investigation continues past the substantial evidence determination, the Specific Charges may include charges supported by evidence that the investigator did not discover.<sup>10</sup> The only limitation is that the Specific Charges be "reasonably related" to the allegations in the initial complaint.<sup>11</sup> Respondent's first exception is denied.

Paragraph D of the Specific Charges alleges that Respondent "barr[ed] Complainant from employment based on Respondent's erroneous perception and treatment of Complainant as having a substantially limiting physical impairment" caused by a neck injury. In its second exception, Respondent argues that this allegation is not "reasonably related" to any of the allegations in Complainant's complaints. That is not correct. The initial complaint accused Respondent of harassing Complainant both because he had filed a workers' compensation claim related to his on-the-job neck/back injury and because of his vision impairment. Complainant further alleged that Respondent laid him off (placed him on medical leave) because of *both* the back/neck injury and the visual impairment. Thus, the allegations in the complaint and those in Paragraph D of the Specific Charges both concern discrimination based on Complainant's on-the-job neck injury. The allegations are "reasonably related" and Respondent's second exception is denied.

Respondent claims in its third exception that the Agency did not prove a violation of ORS 659.330(1). According to Respondent, the evidence demonstrates only that it required Complainant to *provide* a medical certificate before returning to work, not that it required Complainant to *pay* for it. Respondent's argument fails because the Forum has inferred from evidence in the record that Respondent did require Complainant to pay for the certificate, as discussed in section 5 of the opinion, *supra*. The exception is denied.

In its fourth exception, Respondent argues that ORS Chapter 659 does not authorize the Commissioner to award economic or non-economic damages for a violation of ORS 659.330(1). That is not correct. The same remedies are available for violation of ORS 659.330(1) as are available in other cases of unlawful employment practices:

"Complaints may be filed by employees, and this section shall be enforced by the Commissioner of the Bureau of Labor and Industries in the same manner as provided in ORS 659.040 to 659.110 and 659.121 for the enforcement of an unlawful employment practice. Violation of subsection (1) of this section subjects the violator to the same civil and criminal remedies and penalties as provided in ORS 659.010 to 659.110, 659.121 and 659.470 to 659.545."

ORS 659.330(3). It is well-established that 659.010(2) and 659.060(3) authorize the Commissioner to award economic and non-economic damages designed "to eliminate the effects of any unlawful practice found \* \* \*." ORS 659.010(2); see *Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189, 192-93 (1985); *Montgomery Ward and Co. v. Bureau of Labor*, 42 Or App 159, 600 P2d 452, 454 (1979), *rev den* 288 Or 81; *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 124, 139-40 (1997). The Commissioner's award of \$40.00 eliminates the effect of Respondent's unlawful requirement that Complainant pay for a medical certificate before returning to work, and is authorized under Chapter 659. The exception is denied.

The Forum proposed an award of \$30,000.00 for mental suffering associated with all the unlawful employment practices committed by Respondent. In its fifth exception, Respondent claims that no evidence in the record establishes that Complainant suffered mental distress as the result of having been required to pay \$40.00 for a medical certificate in violation of ORS 659.330(1). Respondent is correct, and the order has been amended accordingly. In its ninth exception, Respondent argues more generally that the record does not contain evidence of suffering severe enough to justify an award of \$30,000.00.

In light of Respondent's exceptions, the Forum has reconsidered the evidence related to mental suffering and finds that a total award of \$30,000.00 still is appropriate. Complainant suffered harassment from September 1994 to April 1995 that caused him embarrassment, shame, anger, insult, and hurt feelings.<sup>12</sup> The Forum finds that \$10,000.00 will adequately compensate Complainant for that emotional distress. Complainant suffered more severe mental distress as a result of being placed on "illness leave" and being unable to gain employment. Complainant was very frustrated, hurt, and depressed. He felt betrayed and experienced extreme self-doubt. These effects of Respondents' unlawful employment practices persisted during the entire period Complainant remained on leave. The Forum finds that \$20,000.00 will appropriately compensate Complainant for that mental distress. Respondent's ninth exception is denied.

The Forum determined that Respondent unlawfully had discriminated against Complainant based on its erroneous perception that he was substantially limited in the major life activity of employment. In its sixth exception, Respondent argues that the Forum applied an incorrect legal standard in reaching that conclusion. According to Respondent, to establish that Respondent believed Complainant was substantially

limited in the major life activity of employment, the Agency had to prove that he was treated as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills and abilities." 29 CFR § 1630.2(j)(3)(i)." Respondent argues that the ALJ did not apply this standard, but focused only on whether Respondent erroneously perceived that Complainant was not able to perform the specific job he previously had held.

The quoted portion of Respondent's statement of law is essentially correct. Under Oregon law in effect at material times, to be substantially limited in the life activity of employment, a person had to be "unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." *In the Matter of Parker-Hannifin Corporation*, 15 BOLI 245, 265 (1997). The "class of jobs" had to be related to the person's chosen line of work. "For an individual without a clear career direction or who is changing career paths, the connection could be to a class of jobs encompassing the type of labor sought or obtained (*i.e.*, manual labor requiring heavy lifting)." *Id.* at 265 n\*.

Respondent's error lies in its characterization of the facts and the application of the law to those facts. Respondent did not place Complainant on medical leave because it believed he was unable to perform just the one job he had held prior to his injury. Rather, the evidence establishes that Respondent placed Complainant on "illness leave" because it erroneously believed his neck injury substantially limited his performance of *any* work that involved a particular type of labor -- stocking and/or lifting.<sup>13</sup> Because Respondent treated Complainant as being substantially limited in that class of jobs, Complainant was protected by *former* ORS 659.400(2)(c)(A), and

Respondent violated *former* ORS 659.425(1)(c) by barring Complainant from employment on that basis. Respondent's sixth exception is denied.

In its seventh exception, Respondent argues that no evidence in the record supports the finding that Respondent terminated Complainant because he invoked and utilized the workers' compensation system. That is not correct. Paragraph 3 of the opinion explains some of the reasons the Forum inferred that Respondent placed Complainant on "illness leave" because of his utilization of the workers' compensation system. In addition, the Forum notes that, had Complainant not utilized the workers' compensation system, he would not have received the partial permanent disability award. Respondent's misunderstanding of the significance of that award contributed to its decision to place Complainant on illness leave. That, too, supports the inference that Complainant's utilization of the workers' compensation system led to his termination. So does the uncontested finding that Respondent harassed Complainant because he pursued a workers' compensation claim.

The Forum proposed an award of \$18,074.56 for Complainant's lost wages. In its eighth exception, Respondent argues that Complainant failed to mitigate these damages because he did not clarify his medical leave status after prospective employers told him that they could not hire him so long as he remained on leave. In essence, Respondent attempts to hold Complainant responsible for its own misunderstanding of the workers' compensation, disability, and leave laws. It was Respondent's human resources manager who placed Complainant on an ill-defined leave status that rendered him unemployable. It is not reasonable to punish Complainant for failing to clarify his employment status when Respondent did not understand it, either. Moreover, Complainant did once attempt to clarify his status. After he had been on leave for one year, he received notice that his leave was going to

be terminated. Complainant was capable of working and contacted Respondent's human resources department to learn whether Respondent might re-employ him.<sup>14</sup> Instead, Respondent extended Complainant's leave, with the effect that he remained unemployable until September 1996. Given the confusion caused by Respondent's lack of understanding of workers' compensation and disability law, Complainant did all that reasonably could be expected of him in terms of trying to become employed. The exception is denied.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2), in order to eliminate the effects of the unlawful practices found, and as payment of the damages awarded for violations of ORS 659.410(1), ORS 659.425(1), and ORS 659.330, Respondent SEARS, ROEBUCK and COMPANY is hereby ordered to:

1) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for LAYNE C. WOODS, in the amount of:

a) EIGHTEEN THOUSAND SEVENTY-FOUR DOLLARS AND FIFTY-SIX CENTS (\$18,074.56), less lawful deductions, representing \$18,034.56 in wages lost by Complainant between April 25, 1995 to September 25, 1996 while his tenure as an employee was unlawfully terminated in violation of ORS 659.410(1) and while he was unlawfully barred from employment in violation of ORS 659.425(1)(c), and \$40.00 Complainant was unlawfully required to pay for a medical exam and certificate on or about April 3, 1995, in violation of ORS 659.330(1), plus

b) TEN THOUSAND DOLLARS (\$10,000.00), representing compensatory damages for the mental and emotional distress suffered by LAYNE C. WOODS as a result of Respondent's violations of ORS 659.410(1) (terms and conditions), plus

c) TWENTY THOUSAND DOLLARS (\$20,000.00), representing compensatory damages for the mental and emotional distress suffered by LAYNE C. WOODS as a result of Respondent's violations of ORS 659.410(1) (termination) and ORS 659.425(1)(c), plus

d) Interest at the legal rate from September 25, 1996, on the sum of \$18,034.56 until paid, plus

e) Interest at the legal rate from April 3, 1995, on the sum of \$40.00 until paid, plus

f) Interest at the legal rate on the sum of \$30,000.00 from the date of the Final Order herein until Respondent complies therewith, and

2) Cease and desist from discriminating against any employee in terms and conditions and tenure of employment based upon the employee's having filed for benefits or invoked or utilized the Oregon workers' compensation law, or upon the employee's disability, and cease and desist from requiring a medical examination or health certificate at the employee's expense as a condition of continued employment.

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<sup>1</sup>No copy of the written interim "light duty" medical release appears in this record. The limitations are taken from the testimony.

<sup>2</sup>Throughout the proceeding and during his search for other employment after leaving Respondent, Complainant consistently referred to his status in testimony and documents as being on "medical leave."

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Just as consistently, Respondent's agents and counsel have referred to his status in testimony and documents as being on "illness leave."

<sup>3</sup>Complainant's actual earnings from mid-June, 1994, when his base rate was raised to \$6.06, to September 19, 1994, when he was injured, were \$6.70 per hour for an average of 40 hours per week, due to Respondent's incentive bonus plan, which factored departmental sales together with hours worked. The forum's calculations use the basic rate of \$6.06.

<sup>4</sup>ORS 658.340 (1993); ORS 653.025 (1993); Effective June 7, 1995, ORS 658.340 was extensively revised and provided that the wages referred to were weekly wages.

<sup>5</sup>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).

<sup>6</sup>The statutory protection for disabled persons in employment was substantially rewritten by the 1997 Oregon legislature. See chapter 854, Or Laws 1997, which amended ORS 659.400 and 659.425 and added ORS 659.436 to 659.449. Statutes are quoted as they appeared at the time of the alleged offenses.

<sup>7</sup>The forum includes Bettendorf, Brown, and Bryant as Complainant's supervisors. See Finding of Fact -- the Merits 3.

<sup>8</sup>*Chavez v. Boise Cascade Corporation*, 92 Or App 508, 759 P2d 297 (1988); *aff'd*, *Chavez v. Boise Cascade Corporation*, 307 Or 632, 772 P2d 409 (1989)

<sup>9</sup>The term "disability" has a different meaning in the workers' compensation context than it does under the Americans with Disabilities Act.

<sup>10</sup>*Cf. School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135, 1139 (1975) (in rejecting contention, under earlier statutory scheme whereby Attorney General filed formal charges after an investigation by the Commissioner, that the formal charges should be limited to matters in the complainant's original complaint: "It is not reasonable to assume that the legislature intended to prevent

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the Attorney General from including in his formal charge other discriminatory practices found to exist [during the Commissioner's investigation] which affect the complainant.").

<sup>11</sup>*Id.*

<sup>12</sup>The findings regarding Complainant's mental suffering are supported not only by Complainant's own testimony, but also by the testimony of Martin.

<sup>13</sup>Section 4 of the opinion has been slightly modified to clarify this point.

<sup>14</sup>Finding of Fact No. 62 has been amended to include this information.