CHRISTINA E. STEPHENSON
Labor Commissioner

JESSICA N. GIANNETTINO VILLATORO
Deputy Labor Commissioner

BUREAU OF LABOR AND INDUSTRIES

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON

In the Matter of:	Case No. **17-21**
HENKELS & McCOY, INC.,	FINDINGS OF FACT CONCLUSIONS OF LAW OPINION ORDER
Respondent.	

SYNOPSIS

The Formal Charges alleged that Respondent discriminated against and terminated Complainant because he made reports of a violation of state or federal law, rule or regulation, in violation of ORS 659A.199(1) and OAR 839-010-0100(1). The forum concluded that the Agency failed to prove the alleged violations by a preponderance of the evidence and dismissed all charges.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 6-8, 2022, via the Zoom video conference application.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Rachel Diamond-Cuneo, an employee of the Agency.

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Respondent Henkels & McCoy, Inc. ("HMI") was represented by its attorney, David Worley. Complainant John Mahlke ("Mahlke") was present throughout the hearing; Geraldine "Gerri" Burt ("Burt") (HMI's Head of Human Resources) and Nick Sacco (assistant to HMI's counsel) were also present throughout the hearing. Senior Civil Rights Investigator Lloyd Perez ("Perez") was also present for portions of the hearing.

The Agency called Perez, John Mahlke ("Mahlke"), Mitchell Cook ("Cook"), and Anna King ("King") as witnesses.

HMI called Gerri Burt ("Burt"), Sylvie La ("La"), Dane Richman ("Richman"), Richard "Rick" Gutshall ("Gutshall"), Kenneth Villatoro ("Villatoro"), and Nickolette Fritz ("Fritz") as witnesses.

The forum received into evidence: (a) Administrative exhibits X1 through X14, (b) Agency exhibits A1-A9 and (c) HMI exhibit R13 (for purposes of impeachment and to refresh Richman's recollection).

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

FINDINGS OF FACT – PROCEDURAL

1) Mahlke filed a verified written complaint with the Agency's Civil Rights Division on November 14, 2019, alleging that HMI engaged in unlawful employment practices based on his whistleblowing activities by retaliating against him and terminating him from employment. (Stipulation; Ex. A1)

2) Within one year of the filing of the verified written complaint, the Agency's

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Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found substantial evidence that HMI committed unlawful employment practices (retaliation and termination because of Mahlke's whistleblowing) in violation of ORS 659A.199. (Testimony of Perez; Ex. A9)

3) On April 1, 2021, the forum issued a Notice of Hearing to HMI, the Agency, and Complainant stating the time and place of the hearing as August 3, 2021, beginning at 9:30 a.m., at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, 10th floor, Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal Charges, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0445. (Ex. X2)

4) The Formal Charges alleged that HMI violated ORS 659A.199(1) and OAR 839-010-0010(1) by discharging Mahlke because he opposed an unlawful practice and evidence that he reasonably believed was a violation of state or federal law. The Formal Charges sought damages for lost wages in the amount of "at least $15,000," out-of-pocket expenses in an amount estimated to be "at least $15,000" and mental and/or emotional distress in the amount of "at least $30,000.00." The Formal Charges also asked that HMI and its managers, supervisors and human resources personnel be trained, at HMI's expense, "on workplace retaliation and whistleblowing" and that HMI be declared in violation of the applicable laws and rules, and be enjoined from violating

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laws. (Ex. X2b)

5) On April 20, 2021, HMI filed an answer in which HMI denied that HMI had committed the alleged violations. (Ex. X3)

6) After the Agency and HMI's counsel indicated by email that they consented to accept filings by email, the ALJ issued an interim order on April 21, 2021, stating that parties could file documents by email and containing instructions for the temporary filing procedures. (Ex. X5)

7) On April 21, 2021, the Agency moved to consolidate six cases that all involved the same respondent, HMI. HMI did not object to consolidating the cases for prehearing and discovery purposes, but objected to consolidating the cases for hearing. At the request of the ALJ, the parties filed supplemental briefing on May 14, 2021, and May 21, 2021.

The ALJ issued an interim order on August 9, 2021, which stated, in part:

> "Under OAR 839-050-0190, the ALJ may consolidate two or more cases 'when the [ALJ] determines that the cases involve common questions of law or fact."
>
> "*Questions of Law*
>
> "Each of the six cases includes a charge that HMI violated ORS 659A.199(1) and OAR 839-010-0100(1) by retaliating against each complainant because, in good faith, they reported information they believed was evidence of a state or federal law, rule or regulation.[1] Accordingly, there appear to be some common questions of law.
>
> "*Questions of Fact*
>
> "While the Complainants in each case were all employed by HMI and

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[1] Two cases (103-20 and 03-21) also include alleged violations of ORS 659A.030(1)(f) and OAR 839-050-0125(2),(3).

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some worked on the same projects, not all of the factual issues are the same.

"One of the Agency's primary arguments is that each of the Complainants will testify as a witness in many of the other cases. However, while it may be more convenient for the Agency and its witnesses to testify in one proceeding, that fact alone does not determine the outcome of the motion. In particular, the forum is examining whether there are common issues of admissible evidence in each case that make holding one consolidated hearing the most efficient and fair solution for resolving the cases.

"* * *

"Based on the summaries of the facts of each case provided by the parties, it appears that although there are some similarities between the cases, the actual termination decisions (the basis of the retaliation allegations) differed factually and many do not involve the same decision makers. The forum noted the following when examining a similar issue in the past:

> '[A]lthough there are common questions of law and may be some common questions of fact in the two cases, there are also significant dissimilarities. These dissimilarities lead the forum to conclude that consolidation of the cases would not necessarily result in any substantial gain of efficiencies or savings of time for the participants or the forum.'

In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 254 (2001), *rev'd on other grounds*, 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004). Similarly, the forum concludes that consolidating these six cases into one hearing would not result in a 'substantial gain of efficiencies' and, indeed, could potentially cause confusion in the record when attempting to keep the facts straight for each case. It is also unclear as to whether evidence that is admissible in one case would also be admissible in all of the other cases. Therefore, the Agency's motion to consolidate the cases for hearing is DENIED."

(Exs. X4-X9)

8) The forum issued an interim order on September 8, 2021, rescheduling the hearing dates of the six cases in which HMI was a respondent. The hearings were set to begin on Tuesday, November 30, 2021, and continue until December 17, 2021, and were to take place on consecutive days in the following order: 40-21, 16-21, 18-21, 17-21 and 03-21. The interim order also required case summaries in this matter to be filed on November 23, 2021. (Ex. X10)

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9) On October 13, 2021, the forum issued an interim order stating that, due to ongoing COVID-19 requirements and state office closures, the hearing in this matter would be conducted by video conference. Further instructions regarding participation in a video conference hearing were attached to the interim order. (Ex. X11)

10) Following a prehearing telephone conference, on December 3, 2021, the parties filed a joint motion requesting a postponement of the hearing to allow more time to attempt to negotiate a settlement. The dates for the six cases involving HMI were set to begin on March 29, 2022, in the following order: 103-20, 40-21, 16-21, 18-21, 17-21 and 03-21. (Ex. X12)

11) The Agency and HMI filed their case summaries on March 15, 2022. HMI filed an Amended Case Summary on March 28, 2022, and submitted additional exhibits for filing on April 6, 2022. (Exs. X13-X14)

12) The Agency and HMI stipulated to the following:

a. The alleged violations are within the jurisdiction of the Bureau of Labor and Industries.
b. At all times material, HMI was subject to ORS chapter 659A and OAR chapter 839.
c. On November 14, 2019, Mahlke filed a verified written complaint in Civil Rights Division Case No. STEMWB191114-11749.
d. Mahlke is an "aggrieved person" as defined in OAR 839-003-0005(2).
e. Mahlke was an "employee" as defined in ORS 659A.001(3).
f. Mahlke was an at-will employee.
g. At all times material, Mahlke was an employee of HMI.
h. At all times material, HMI was an active foreign business corporation incorporated in Pennsylvania.
i. HMI is an "employer" within the meaning of ORS 659A.001(4) and OAR 839-005-0003(5).
j. HMI employs one or more persons in the state of Oregon.
k. On or about November 6, 2017, HMI hired Mahlke to work as a senior outside plant engineer.
l. HMI terminated Mahlke's employment on March 19, 2019.

(Ex. X13; Hearing Record)

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13) On March 31, 2022, the ALJ notified the parties by email that although Attorney Sheryl Willert is designated as "*pro hac vice*" counsel, it did not appear that *pro hac vice* documents were filed in this matter. The ALJ's email further stated: "Please take note of the attached instructions. Pursuant to OAR 839-050-0110(1) and OAR 839-050-0020(13), Ms. Willert will need to submit the information described in the attached documents."

Willert replied to the ALJ's email that same day, stating:

> "Attached please find the documents that I submitted to the Agency in April, 2021. My office staff reported to me that they inquired about the Pro Hac status and they advised that they were told not necessary. That must have been a miscommunication. Here is the paperwork. The answers to the questions remain the same."

The documents attached to Willert's email were labeled with Case No. 03-21 and enclosed documentation that satisfied the requirements of OAR 839-050-0020(13) and UTCR 3.170.

At the start of the hearing in Case No. 16-21, the ALJ discussed HMI's submission with the parties. Willert confirmed the information she sent by email, and clarified that HMI wanted the forum to admit her *pro hac vice* in all of the six HMI cases, including this Case No. 17-21. HMI further stated that Attorney David Worley would serve as local counsel following the withdrawal of attorney Bryan Churchill. The Administrative Prosecutor stated that the Agency had no objection to HMI's request for *pro hac vice* admission. Based on all of this information, the ALJ granted HMI's request and admitted Attorney Sheryl Willert as *pro hac vice* attorney in all of the above-captioned cases, with Oregon attorney David Worley as local counsel. (Forum File)

14) The hearing in this matter was held on April 6-8, 2022. At the start of

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hearing, pursuant to ORS 183.415(7), the ALJ orally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Hearing Record)

15) On April 12, 2022, HMI filed a Notice of Withdrawal and Substitution of Counsel, stating that Worley was withdrawing as counsel and attorney Thomas Ped was appearing in the case. (Forum File)

16) The ALJ issued an interim order on April 15, 2022, which summarized rulings made on the record during the hearing in BOLI Case No. 03-21 on April 1, 2022, regarding the representation of HMI and addressed the recently filed Notice of Withdrawal and Substitution of Counsel. The interim order stated that the forum inferred from the Notice of Withdrawal and Substitution of Counsel that HMI was seeking to have Ped serve as local counsel for Willert[2] and ruled that Willert was admitted *pro hac vice* with Ped currently serving as local counsel. (Forum File)

17) On May 3, 2022, the ALJ issued an interim order summarizing rulings made on the record at the conclusion of the hearing and permitting the Agency to submit a brief explaining its position on how the forum should analyze pattern and practice evidence on or before April 22, 2022. HMI's response to the Agency's brief was due on or before May 6, 2022, and the Agency's rebuttal brief was due on or before May 13, 2022. The Agency's brief and HMI's response were to be no longer than 10 pages, and the Agency's rebuttal brief was to be no longer than three pages.

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[2] The interim order indicated that if the ALJ's inference was incorrect, then HMI should file a supplement to clarify the record.

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The Agency filed its brief regarding pattern and practice evidence on April 22, 2022, and HMI submitted its response on May 6, 2022. The Agency's rebuttal brief was filed on May 13, 2022. (Forum File)

18) On August 21, 2023, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed exceptions on August 30, 2023, and HMI submitted exceptions on August 31, 2023.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, HMI was an active foreign business corporation incorporated in Pennsylvania, with headquarters in Blue Bell, Pennsylvania. (Stipulation; Ex. A5, p. 1)

2) HMI was an engineering and utility construction company that was hired to work on a project to install fiber optic cable for Verizon. (Testimony of Mahlke; Ex. A5, p. 1)

Barnette's Supervision of Mahlke and Warning
(November 6, 2017 – March 1, 2018)

3) On or about November 6, 2017, HMI hired Mahlke to work as a senior outside plant engineer on the Verizon project at HMI's office in Clackamas, Oregon. Mahlke was an at-will employee. He reported to Engineering Manager Dave Barnette ("Barnette"). (Stipulation; Testimony of Mahlke; Ex. A5, p. 2)

4) HMI used database software programs called FTQ360 and JIRA to track the progress on the Verizon project. Part of Mahlke's job duties as an engineer included entering photographs and other information into these databases in a timely manner. (Testimony of Mahlke)

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5) On February 16, 2018, Quality Manager Connie Hamel ("Hamel") sent a detailed email to Mahlke and other HMI employees with the subject line: "IMPORTANT: QUALITY PROCESS MUST BE FOLLOWED FOR ENGINEERING." The email began by stating:

> "I know I stated this several times yesterday, but engineering needs to follow the quality process that are in place with regards to the quality of the engineering packages. I have attached the instructions that I recently wrote to help plus instructions for the subs. It is [HMI] engineering responsibility to ensure that the subs follow the quality process we have outlined. Additionally, [HMI] engineering must follow established processes as well. I am always happy to help where I can."

The email went on to include eight bullet points with instructions explaining how to enter information into the FTQ system. (Ex. A5, pp. 10-12)

6) At 11:56 a.m., on February 20, 2018, Hamel sent an email to Barnette, with the subject line of "Confidential." The email stated:

> "This is feedback on John Mahlke.
>
> "Last Thursday, Feb 15 I held a group session to review packages from all the subs. [Mahlke] paired off [with] me, Dustin and Ron. We went through the normal [Quality Control] process of processing FTQ360 inspection record sent from the sub and the updates needed to JIRA and sharepoint. Here are my observations from that meeting. Dustin and Ron can also provide their own feedback, but Dustin has confirmed what I observed.
>
> - [Mahlke] started off the meeting by saying 'My wife is a B so I might as well be a B today.' To me, he meant Bitch. It was an odd comment to make.
> - He [*sic*] behavior was obnoxious and rude at time[s], as well as argumentative.
> - As we reviewed the FTQ360 inspection record from the subs, I showed the small group how to go review the drawing and the checkpoint items. If something was not correct or needed a change, I demonstrated how to mark it as OPN and put a comment about what needed to be changed.
> - [Mahlke] commented how he doesn't do this, that he just puts a description of the problem in the Notes section of the inspection record and sends the redline drawings. I said no, you cannot just do that, you must indicate which quality checkpoint item is wrong and attach the

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redline drawing to the inspection record. He argued that it was too much work and that he has had problems in the past with attaching drawings. I reiterated what was supposed to be done and if he ever had problems I would help him. He argued with me about, quite disrespectful in how he did it. I finally said firmly, you must do it, it is the quality process.

- I then showed the group how to take a package that was sent back to us with correction and mark the OPN checkpoint item as QC after the sub had marked the READY FOR REVIEW checkbox. I explained how critical it is for us to keep accurate quality records. We want to understand what the common quality failures are by checkpoint and to see how subs are performing.
- At one point as I was scrolling down an inspection record looking for the fiber size correct checkpoint, and [Mahlke] said "If you cannot find the fiber size, then how do you expect me to find it." That was just plain rude.
- Through the whole 4-5 hour session he continually interrupted and complained. Mentioned several times how he has been getting his ass chewed for not getting work out and he's tired of it. Also eluded to not even coming into work on Friday.
- [Mahlke] set a tone in the meeting that was hostile and not pleasant to be around him. I did my best to handle his disrespectful behavior by being understanding [*sic*] and encouraging him and firmly stating we needed to do things the quality way. It was exhausting to keep this up.
- The next day I sent out detailed quality instructions for the second time to all of engineering. I expected him to immediately make changes and follow the quality process, yet he has already not done so (see other email).
- I also want to remind you of his very disrespectful behavior exhibited to you and I in your office about a month ago when I discovered he hadn't been updating JIRA with information or moving things through the workflow. He sat there and came up with all kinds of excuses and was argumentative and I did my best to be empathetic and encouraging. I even wrote up a detailed step by step procedure on what to do in JIRA and printed it for him and emailed it to him. You said he later came to apologize for his behavior, but he never apologized to me.
- Behind closed doors he says he's getting beat up by you for production footage. I have said he may misunderstand as I believe [Barnette] wants quality footage, not footage that gets rejected by [Verizon] or [HMI's construction group]. He has mentioned that maybe he should got get another job. Al of this while Natalie is in the office trying to get her work out.

"His behavior needs to immediately change."

(Ex. A5, pp. 14-15)

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7) Hamel sent a second email to Barnette on February 20, 2018, regarding errors made by Mahlke and stated, in part, "I cannot trust any of the MGC data from [Mahlke] at this point." (Ex. A5, p. 13)

8) On February 22, 2018, at 11:45 a.m. Hamel sent an email to Barnette forwarding an email exchange between her and Mahlke in which she gave Mahlke instructions for correcting and resending an inspection record. In the email to Barnette, Hamel stated that Mahlke "is completely ignoring the quality procedures and I have sent several emails about this. Please can you get this corrected? I am having to review every single detail of this work and this is insubordination on his part." (Ex. A5, pp. 16-17)

9) At 1:16 p.m. on February 22, 2018, Mahlke sent an email to Hamel, stating that JIRA and FTQ were not working. Hamel forwarded Mahlke's email to Barnette at 2:30 p.m., and stated:

> "Dave. I just got off the phone with [Mahlke] to speak to him about what his issues were with JIRA and FTQ360. First, what is puzzling is him saying he is having problems, yet he is able to use FTQ360 to mark something at FTQ. I said, if you are there you just need to select OPN instead of FTQ.
>
> "He was very frustrated and argumentative and making excuses. I'm only trying to help him follow our process. He said he's just trying to get work out, he said he's chained to his desk, eats lunch at his desk, he said he will do whatever short cuts are needed to get the work out even if that means sending emails to subs about what is wrong and going back later to fix up the paperwork, he said he's having all kinds of problems with JIRA and FTQ360. He couldn't really elaborate. I asked him if he was using Chrome browser and he said he didn't know about that. And I said yes you do, I helped you make this change a while back, because FTQ360 doesn't run on IE and JIRA needs Chrome too. I asked him to set his default browser to Chrome and he said he would.
>
> "He said Dustin was having trouble. I asked Dustin and that was way over a month ago and that was also because he wasn't using Chrome. He is trying to divert his own failings to the process.

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"I will help him in any way I can. He still doesn't believe that doing the official paperwork and quality are important. He still says he is being pushed for footage. I told him Dave isn't pushing that, he is pushing quality footage.

"His attitude is not good and he doesn't speak very respectful to me."

(Ex. A5, p. 18)

10) Hamel emailed Barnette on February 23, 2018, and forwarded an email exchange between her and Mahlke. She explained to Barnette that she helped Mahlke again with his "issues" with FTQ360 and JIRA, and reiterated that Mahlke needed to use the Chrome web browser as it is more compatible with "most modern web sites." She also told Barnette, "I also explained that quality is important and [Mahlke] needs to take the time to do it right." (Ex. A5, p. 21)

11) On March 1, 2018, Barnette delivered a document titled "Employee Written Warning" to Mahlke. The word "Oral" was handwritten on the top of the Warning. The information in the Warning was typed by La, Human Resources Specialist for HMI's Clackamas office, with input from Barnette. The "Type of Violation" was identified as "Work Quality" and "Conduct." La was also present when Barnette delivered the Warning to Mahlke. Hamel was not present.

The "Supervisor's Statement" in the Warning stated:

"Work Quality

"A written process on how to conduct the FTQ360 inspection and how to update JIRA has been drawn up and distributed to be followed. It has been observed that [Mahlke] has not followed this quality process. Therefore, work has been rejected by Verizon.

"[Mahlke] is also not managing the subcontractors assigned to him to the fullest expectation. It was told that dates with subcontractors can be negotiated, however [Mahlke] has not been following up with the subcontractors to meet the deadlines.

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"Conduct

"[Mahlke] has shown to be argumentative and disrespectful to other managers, such as being rude when interrupting a conversation and making comments such as, 'If you cannot find the fiber size, then how do you expect me to find it.'

"This is an opportunity to re-evaluate your process and tasks and adjust for improvement. Below are goals to reach and actions to help you reach the goals.

"GOALS:

- To follow the procedures for FTQ360 and JIRA as instructed in the guidelines provided
- Ensure projects that move through the workflow assignment are correct
- Manage and follow-up with subcontractors more often to ensure they meet their deadlines
- Be more aware of your demeanor and attitude and adjust accordingly
- Review the Code of Conduct again

"ACTIONS TO ACHIEVE GOALS:

- Management to provide information and guides to follow process and process deficiencies
- Review progress with supervisor weekly for a month
- Code of Conduct is available online and printed with HR"

The bottom of the warning contained the following question: "Is employee receiving Disciplinary Action?" In response the question, a checkmark was placed on the line before "No." (Testimony of La; Ex. A5, pp. 23 -24)

12) The Warning had a section titled "Employee Statement," which provided the opportunity for Mahlke to mark whether he agreed or disagreed with the Supervisor's Statement. Mahlke did not place a checkmark before either the "agree" or "disagree" option, and wrote the following: "I am somewhere in between." Mahlke wrote this because he felt that the "accusations" in the Warning originated from Hamel, and that she was not qualified to make the accusations because she was not his supervisor. (Testimony of Mahlke; Ex. A5, p. 23)

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13) After the statement reading "I have read this Employee Warning Notice and understand it," the Warning was signed by Mahlke, Barnette and Paul Balthuis.[3] (Ex. A5, p. 24)

14) Mahlke agrees that the requests made by management in the Warning were not unreasonable. (Testimony of Mahlke)

15) The Warning was issued before Mahlke raised any issues regarding safety, illegal dumping or worksites not being properly cleaned. (Testimony of Mahlke)

16) Mahlke believed that criticism from Hamel precipitated the warning because it happened "a day or two" after he was "curt" and "short" with Hamel in an email. He admitted that he said something similar to the quoted remarks in the Warning regarding "how do you expect me to find" the fiber size. However, he believed that Hamel's criticisms of him constituted "harassment." (Testimony of Mahlke)

17) Mahlke submitted a written response to the Warning that was slightly over two pages long in which he "reject[ed] being written up." The response had a typewritten date of "Thursday, March 1, 2018," and handwriting on top of the first page reads: "Received: 3/5/18."

The first paragraph stated that he was "blind-sided" by the Warning, and that "it was both embarrassing and humiliating to [him] because the abstract nature of what I was being charged with was largely hypocritical and abstract." He also wrote that he "was being used as a scapegoat for the vastly disorganized mess that is the present state of [the Verizon] project."

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[3] Based on testimony from various witnesses, the forum infers that Balthuis was the onsite director for the Portland Verizon project and that he was located in the Clackamas office.

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Several paragraphs of the response mentioned Hamel, and included statements such as she "attack[ed] me so blatantly in her complaint today" and that Hamel's criticism is "largely unfounded." He concluded the response, stating, "I do not make the personal connection as to why it was exploded up to a level where it can be damaging to me, by employee standing, and all the other factors involved. Unfortunately I take away the feeling that this person is out to get me, despite the complexity and challenges that our work project dictates." (Ex. A5, pp, 25-27)

Mahlke Reports
Mid-March 2018 – June 2018

18) During the first or second quarter of 2018 (after he received the Warning on March 1, 2018), Mahlke spoke to Barnette about safety conditions at a job site in Beaverton. Mahlke does not know if Barnette took any action in response to the concerns Mahlke raised. (Testimony of Mahlke)

19) At some point after the March 2018 Warning, Mahlke raised concerns about a subcontractor called Empire during daily engineering meetings. Mahlke reported that he saw "unfilled bore pits" on Butner Road in Beaverton. He did not feel that his reports were taken seriously. (Testimony of Mahlke)

Performance Evaluation
April 30, 2018

20) Barnette completed a mid-year performance evaluation for Mahlke for the time period of November 2, 2017, to April 30, 2018. Barnette evaluated Mahlke on two "Mid-Year Major Job Elements." The first element was titled "Quality check designs" and Barnette wrote that Mahlke "performs this function. The engineering lead and I will redevelop a roster to equally distribute work load across all OSP engineers." For the

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second element, "Supplier Working Relationship," Barnette wrote that Mahlke "strives to perform his duties of managing subcontractors. There are still challenges within this job elements [*sic*] that need work, and a plan will [be] developed to facilitate growth." Mahlke provided his electronic signature at the bottom of the evaluation to acknowledge that he received it. (Testimony of Burt; Ex. A5, pp. 29-32)

Engineering Department Restructuring
June 12, 2018 – July 2018

21) Sometime between March and August of 2018, Barnette promoted Engineer Natalie Foret ("Foret") to an Engineering Supervisor position, and she exercised some supervisory authority over Mahlke. (Testimony of Mahlke; Ex. A5, pp. 6, 25, 37)

22) In order to "become more efficient" and "increase the resources" on the Verizon project, HMI restructured the Engineering Department on June 12, 2018. This led to changes as to which manager supervised each employee. An email on this topic from Duke Horan, Senior Director – Telecom, noted that HMI was starting to miss commitment dates and that the project was "behind schedule." (Ex. A5, p. 34)

23) Hamel[4] emailed HR Specialist La on June 25, 2018, at 6:13 a.m., stating:

> "Hi Sylvie,
>
> "On Thursday June 21st around 2pm, Erica reported an incident to me that she had with John Mahlke earlier in the day. She said she went into this office to speak to him about something and he blew up at her, was very angry that she had emptied his desk out into a box. He was very rude and used unprofessional language and behavior and kicked her out of his office.

[4] The forum infers that Hamel had supervisory authority over Mahlke during this period of time.

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"She would have reported it to me earlier but I had back to back meetings all day. She is unwilling to work with John Mahlke anymore based on his unprofessional and rude behavior.

"Background story:

"On Friday June 8th I told John that we were putting 5 desks into this office, per Dave [Barnette], there were 3 more engineers that were going to sit in there. If he didn't have a chance to move all of his stuff into boxes, then it would be done for him. I also commented to him that he had reams and reams of paper prints and that he didn't need to store those on top of his desk anymore, that they were all scanned and attached to FTQ360 records. He said no he had to keep hard copies. As his manager, I gave him notice about the desk change.

"John returned back to work on Monday June 18th. He never once came to me to indicate that he was unhappy about the desk situation. Erica and I had unloaded his desk and his side cabinet into two big boxes. We did it as delicately as possible. Erica then built his replacement desk for him.

"After Erica told me about the altercation with [Mahlke], I went to Paul Bulthuis. He informed me that [Mahlke] was complaining in his office about the desk move. I informed [Bulthuis] that I had already told [Mahlke] and Ron about the change in seating.

"I would like you to please do an investigation with Erica on this and [Mahlke]. It's completely unacceptable for [Mahlke] to behave that way to a fellow employee. It's a repeat of his past behavior and it's got to stop."

(Ex. A5, p. 36)

24) La investigated the move of Mahlke's office items. Mahlke stated that he was on vacation from June 11-15, 2018, and that when he returned his desk was "trashed," and that his personal items had been moved and he could not find them. Hamel said that she informed Mahlke of the office changes prior to his items being moved, but Mahlke denied that he had been informed. La had all of the managers involved speak to their employees. The issue did not come back to La's attention and she assumed it had been resolved. (Testimony of La; Ex. A, p. 35)

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25) Hamel emailed La on June 25, 2018, at 6:20 a.m. The subject line read "One-on-One with John Mahlke" and the first line stated that it was "[f]or HR records." In the email, Hamel stated she "had been noticing some performance issue[s]" with Mahlke after he transferred over to her department to do field walk outs, and that she spoke to Mahlke about the following issues:

- Mahlke needed "to stay focused on his assigned tasks. * * * He was getting involved in other things that took him away from being productive on the constructability field walk outs."
- Mahlke need "to complete paperwork in the field. [Hamel] explained that he had a phone and a laptop, that he can use FTQ360 to do the inspection record" and can send the record in for resolution from the field.
- "It wasn't up to [Mahlke] to figure out how to solve the problem with the route. [Mahlke] would spend hours talking to [other employees] about jobs and how to solve them." Hamel explained that Mahlke should just make observations and send his observations to "Nate" to figure out how to resolve issues.
- Hamel explained to Mahlke "that he was a valuable member of the team and [Hamel] wanted to see him succeed in his role."

(Ex. A5, p. 33)

Events Leading up to Performance Improvement Plan with Chosa as Supervisor
July 2018 – October 12, 2018

26) In July of 2018, Mahlke was assigned to the "core" engineering group, and Engineering Manager Carl Chosa took over as Mahlke's supervisor. Chosa served as Mahlke's supervisor until December of 2018. (Testimony of Burt)

27) Sometime in July or August of 2018, Mahlke saw a 500-foot cable that appeared to be improperly coiled in a manhole in downtown Portland, and reported this to Chosa. Mahlke thought that the amount of cable was excessive for the work on the project and that it could be evidence that someone at HMI was fraudulently misrepresenting to Verizon the amount of cable that had been laid. Mahlke did not recall if he communicated that thought to Chosa. Chosa agreed with Mahlke that the

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amount of cable in the manhole was highly irregular, and Chosa brought it to the attention of Project Director Eric Hart ("Hart"). Mahlke does not know what, if any, actions were taken in response to the cabling issues he raised. He did not sit in on meetings that discussed these issues, and it was not his responsibility to address the issue. However, he felt that Hart came by his office to talk with him more frequently after he reported the cabling issue. (Testimony of Mahlke)

28) On August 1, 2018, Engineering Supervisor Foret sent an email to La with documentation of a coaching session she had with Mahlke. During the coaching session, Mahlke admitted that he had a conversation with Edwards, the employee who assisted Hamel in moving items from Mahlke's desk in June. Mahlke told Edwards that he was still frustrated by the June incident because his family photos were thrown in a box, and he asked Edwards: "If your boss walked off a cliff, would you follow." Foret's email to La also contained a sentence, stating, "Side note: Carl Chosa has confirmed from his interactions with [Mahlke], [that Mahlke] will need to be release[d] from this project and/or fired." (Ex. A5, p. 37)

29) On October 3, 2018, Chosa received an email from Quality Coordinator Tanya Smith ("Smith"). Smith asked Chosa what the process was for "submitting prints to permitting." She told Chosa, "We keep getting prints back from permitting that [Mahlke] hasn't QC'ed first. Just today, permitting sent back 3 jobs that [Portland Bureau of Transportation] rejected. I feel like he ignores the correction requests * * * ." (Ex. A5, p. 52)

30) Chosa forwarded Smith's email to HR Specialist La on October 3, 2018. He told La that he was "[l]ooking to make a change in personnel, [Mahlke] has

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repeatedly ignored following our engineering process." Chosa's email further stated that there were "several additional complaints from staff" about Mahlke's "work not being done correctly," and that Mahlke "continually passes his task[s] to others." Chosa informed La that he would like to discuss removing Mahlke from his team. La told Chosa that she needed supporting details before action was taken. On October 9, 2018, La sent Chosa a template for a performance improvement plan ("PIP") for Chosa to complete and list action plans for Mahlke to complete. (Testimony of La; Ex. A5, p 51)

31) Chosa held a one-on-one meeting with Mahlke on October 10, 2018, to discuss JIRA database entries, notes, files and drawings. Chosa told Mahlke that he needed to (1) complete JIRA database entries, (2) stop passing off his work to others and (3) "QC [Quality Control]" engineering prints before they are sent to the permitting department. (Testimony of La; Ex. A, p. 54)

32) Four hours after a team meeting on October 11, 2018, Mahlke came to Engineering Supervisor Foret's office and told her that he was frustrated and not receiving support. Foret told HR Specialist La that Mahlke slammed her office door when he entered the room.[5] Mahlke admitted to Foret that he had trouble keeping up with everything in the database and felt as if people talked to him like he was a child. (Testimony of La; Ex. A, p. 54)

33) La met with Chosa and Foret from 10:38 – 11:03 a.m. on October 12, 2018, to discuss their concerns with Mahlke's performance. During the meeting, Chosa

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[5] Mahlke denied slamming Foret's office door, but admitted that the door "pick[ed] up steam" from a breeze when he closed it. (Testimony of Mahlke)

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and Foret told La about their communications with Mahlke on the previous two days. Chosa told La that Mahlke was "overwhelmed" and that Mahlke's faults were affecting the team because his work had to be reassigned to others to complete. During this meeting, a decision was made to place Mahlke on a PIP, to be implemented on Monday, October 15, 2018. This was the conclusion based on discussions that had been occurring overall the course of several days. (Testimony of La; Ex. A, p. 54)

Mahlke's Contact with Rick Gutshall
Approximately October 12 -15, 2018

34) The days leading up to Friday, October 12, 2018, were "terrible" and "tenuous" for Mahlke. Sometime that day, he called HMI's headquarters in Blue Bell, Pennsylvania, and told the woman who answered that he had concerns about the Verizon project. She provided him with the telephone number and email address for Rick Gutshall. (Testimony of Mahlke)

35) That afternoon, Mahlke left work at around three or four in the afternoon to attend a dental appointment. After the appointment, Mahlke started drafting an email to Gutshall. (Testimony of Mahlke)

36) Gutshall was the Senior Director of Construction for the Verizon One Project, and his office was at HMI's headquarters in Blue Bell, Pennsylvania. The Verizon project encompassed several locations, including Portland, San Diego and Detroit. As the person in charge of construction, Gutshall's responsibilities included guiding onsite management and making suggestions for the work. In October of 2018, Gutshall split his work time roughly equally between Portland, San Diego, Detroit and HMI's headquarters in Pennsylvania. (Testimony of Gutshall; Ex. A5, p. 2)

37) Mahlke sent the email to Gutshall at 3:28 p.m. on Sunday, October 14,

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2018. The subject line read: "Information from John Mahlke, OSP Eng., One Fiber Project, Portland, OR," and included the following statements:[6]

> "I premise this missive with a phone call I placed Friday * * * with the woman * * * at the Blue Bell desk. * * * I mentioned my concern for this project and she gave me your phone number and e-mail address to correspond.
>
> "First and foremost I do not want to seem as though I am assaulting the [HMI] family. I feel firmly a part of it, enjoy the way me and my family have been treated, and have great respect for the safety/integrity first culture that I myself try to add to, and espouse, each and every day. I truly like the company a lot!
>
> "* * *
>
> "* * * At the time I was hired the project was seven months old and only 7 miles of fiber had been signed off by Verizon as approved. Thats [*sic*] 1 mile of fiber per month. We were in trouble at that point in time.
>
> "* * * To date the actual fiber that is in the ground is around 20 miles. We were to have several hundred miles by this time by project design. * * * I questioned when [Foret] continued to allow a company called Vantage Point to not include any underground utilities on their drawings. They never did include those (as the others did), and to date all of their drawings are unable to be permitted. They are useless and wasted money. It could be to the tune of several hundred thousand dollars. Vantage Point it no longer a resource for [HMI].
>
> "Over all [*sic*] I am not happy the way that Dave Barnette ended up treating me. I will tell you first hand that he never yelled at me but he also never included me in on the on boarding meeting for new subcontractors or more direct meetings with Verizon. His actions were not directly malicious, but rather denied me to be the type of stakeholder that I am on this project.
>
> "The political and managerial infighting around here was legendary. Paul Balthus was the director, David Barnette was the engineering manager, Ken Murray was the Project Manager, and Connie Hamel was the Quality Control Manager. Each of these people did not like each other and it was abundantly clear. * * * There was a lot of yelling and very foul language publicly. I had never worked in an office like that before, particularly with a big time entity such as [HMI].
>
> "* * *

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[6] For the sake of brevity, the entire four-and-a-half-page email is not included in this Order. Repetitive statements and background information that is not relevant to this proceeding have been omitted.

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"I find it painfully hard to work for Carl Chosa. He is actively demeaning to his employees, explosive and derisive in engineering meetings without any regard or direct knowledge of personal workloads or the true time economics involved with each part of the project. He thinks that being threatening is the way that problems get solved. His knowledge of the softwares [sic] and systems that we use, 'being down in the weeds,' is not what he focuses on so the hearsay that he gets from others is what drives his decisions. He does not like me at all. I discovered this several weeks ago when I made a small meeting with him * * *. He spent the whole time being negative to any suggestions that I had and summarily treated me like a 12 year old. * * * My mother taught me and I learned through life that when people single you out to always be nasty to you (as is the case with Mr. Chosa) that they want to basically fight you. He has singled me out to pick on, and that is a battle I fight every day. It is readily apparent in engineering meetings where he belittles me before the entire engineering staff. I do not understand this. I am kind of losing my will to want to go to work and it is debilitating with who I am and what I would like to accomplish. A couple of weeks ago I met with our client, Verizon, * * * and asked them if I could come to work for them on the client side. I am still investigating that potential * * *.

"Probably my best friend at [HMI] * * * was Henry 'Hank' Lawrence. He was fired two weeks ago because he probably went overboard giving a subcontractor boring crew a hard time for not properly covering bore pits with cold patch nightly, but also dumping spoils in a Verizon yard (subject to fine). We had already gotten shut down in Washington County Oregon, on another occasion, for leaving a bad mess. Hank's style was cowboy and crass but he was THE most knowledgeable person on this entire build. * * * We went out at night on a couple of occasions to interact with the subs doing our fiber pulls downtown, and to properly represent our company in a professional and inquisitive manner.

"* * *

"We are losing employees right now at the rate of one employee/week. Morale is very low and several people have told me that they are actively looking for other work. I share that sentiment.

"* * *

"Presently my boss, Carl Chosa who is the new engineering manager, has threatened to write me up on one occasion and on another occasion to fire me. Both occasions have happened in the last week. I have consistently asked for help for my workload which as time goes on appears to me to be a way to scapegoat the performance we have put in at this point. If I am let go then that is yet another experienced person 'driven' from the project. I wish the newcomers a lot of luck because it is an unholy mess. * * *

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"[An engineer who was leaving employment told me] that he has never worked for such a 'S**t show' of a project.

"I am sorry for the strange flow of all this information but I needed to leave record with you. * * * It is very important for me to put this in front of you because I can not and will not be run off this project just because someone is out to get me. That is the feeling of this place right now. I really need to talk with you or other people in our organization because Verizon is an excellent client and we are not doing our best. This hurts to say we are not doing our best. I would not be writing this if I did not care 100%.

"Thank you and at your service,
Jon Mahlke."

(Ex. A5, pp. 5-9)

38) Mahlke wrote the email to Gutshall as a "vehicle" to "get a result" and to "bring Gutshall to the table by any means necessary." He admitted that some of his comments were "knee jerk." For example, although he used the words "crass" and "cowboy" to describe Lawrence, Mahlke did not believe that to be true. (Testimony of Mahlke)

39) After receiving the email, Gutshall contacted Mahlke, and let him know he was coming to town and would like to meet with him. Gutshall took Mahlke to dinner approximately two weeks after the email was sent, and they discussed the "majority" of the topics raised in Mahlke's email. (Testimony of Gutshall, Mahlke)

40) Gutshall spoke to Project Manager Gil Cheves ("Chéves") the next business day to investigate the issues Mahlke raised in the email. Gutshall felt that if the content in the email was true, then there were "major issues" to be addressed. Like Gutshall, Cheves traveled among the cities with Verizon project sites during that time period. Cheves is the only person Gutshall spoke to directly about Mahlke's email. Cheves may have followed up with higher "up the food chain" executives about the

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email, but he would not have "taken it down" to other employees because Gutshall was the person tasked with following up with Mahlke and others. (Testimony of Gutshall)

41) After his dinner meeting with Mahlke, Gutshall spoke to other team members to gather more information. Gutshall talked to Construction Manager Clarence Haley, Quality Manager Hamel, Safety Manager Parsons and Project Manager Cheves. He also spoke to other supervisors about parts of the email because it was everyone's job to have safety at the forefront of their work. (Testimony of Gutshall)

42) Gutshall was not involved in the decision to place Mahlke on a PIP or to terminate his employment, and he did not have direct knowledge of the reasons for these actions. (Testimony of Gutshall)

43) Gutshall does not remember ever speaking to Project Director Hart about Mahlke's email and does not believe he would have done so. (Testimony of Gutshall)

Performance Improvement Plan and Tracking Meetings with Chosa
(October 15, 2018 – December 14, 2018)

44) Chosa presented Mahlke with a written PIP on Monday, October 15, 2018. HR Specialist La was present when Chosa delivered the PIP to Mahlke. Mahlke signed it in her presence.

The PIP stated that "it has become evident" that Mahlke had "not been performing to the standards expected." It noted that on March 3, 2018, he was given a verbal warning for issues related to performance, that Chosa had counseled Mahlke "multiple times on performance" and "[t]o date, there has not been an acceptable level of improvement."

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The PIP further stated that the plan would be in place from October 15 – December 15, 2018, and that Chosa and Mahlke would meet every other week to review Mahlke's progress and "ensure" his success.

Under the section labeled "Specific Areas of Required Improvement," the PIP stated that Mahlke needed to do the following to meet the expectations of the plan:

> "1. Maintain professional communications both oral and written with co-workers, supervision and customers.
> 2. Complete all assigned project work in a thorough and detailed manner on time including but not limited to:
> - Entering complete and accurate information into JIRA
> - Reviewing prints for quality assurance/control prior to sending them to others
>
> 3. Be held accountable for assigned work and not delegate it to others. If help is needed, notify Carl Chosa and/or Natalie Foret to reassign workload
> 4. Arrive on time and/or advise if not working."

The "Consequences" section stated that if significant improvement was not made, "disciplinary action up to and including termination may occur." (Testimony of La; Ex. A5, p. 56)

45) Chosa's bi-weekly PIP meetings with Mahlke were to be held on the same day of the week and time unless the employee was told otherwise. Chosa held PIP meetings with Mahlke on the following dates: October 26, 2018; November 12 and 30, 2018; and December 7 and 14, 2018. La was present at each PIP meeting. She took notes and completed typewritten PIP tracking forms for each meeting. When necessary, she revised the tracking forms after she typed them for clarification.

The tracking form La completed on November 30, 2018, indicates, "Due to the error in quality control, meetings will now be weekly until the plan is scheduled to end on 12/15/2018."

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Mahlke refused to sign the tracking form for the December 7, 2018, meeting. He told La that he did not agree with the PIP.

The tracking form with a meeting date of December 14, 2018, includes "Closing Comments" which state: "Carl: We have a better understanding of how things are done and have improved our process. I know that [Mahlke] gets overwhelmed and he just needs to reach out and ask for help." Under the signature line, there is a typewritten note indicating that Mahlke was presented with a copy of the final plan on December 18, 2018, but he "refused to sign and doesn't feel that the plan no longer applies to him [*sic*]" since Chosa is no longer working for HMI. (Testimony of La; Ex. A5, pp. 57-68)

46) Mahlke received his 2018 Year End Performance Evaluation sometime during the last two weeks of November 2020. Mahlke's manager, Chosa, was a contract employee and, thus, did not have access to HMI's personnel records system. Accordingly, Hart completed the evaluation with input from Chosa.[7] The bottom of the evaluation indicates that Mahlke provided "[e]lectronic signature confirmation" at the end beneath the Employee Acknowledgement section. (Testimony of Burt: Ex. A5, pp. 38-44)

47) Prior to the manager's evaluation, Mahlke had an opportunity to rate his own performance. He rated his performance as "5 – Fully Exceeds" for the Overall Rating and in each specific category. (Testimony of Burt; Ex. A5, pp. 38-44)

48) In the Overall Rating category, Hart rated Mahlke as "2 – Needs improvement" and wrote that Mahlke "has issues with highly stress[ed] workload and

[7] The first page of the evaluation lists Dane Richman as Mahlke's manager, which was not correct. Burt credibly testified that Richman's name is on the document because he was the manager at the time the evaluation was printed.

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completely grasping the technology we are currently using (JIRA). Need to assess if [Mahlke] is in the right position to be successful."

Hart rated Mahlke as "3 – Fully meets" in the categories of "Instructions & Safety Commitment," "Quality check designs" and "Team Player."

Hart gave Mahlke a rating of "2 – Needs improvement" in the categories of "Supplier Working Relationship," "Competencies," "Action Oriented," "Decision Quality," "Perseverance, "Problem Solving/Critical Thinking" and "Technical Learning." For each of these categories Hart also included a written explanation for the rating. (Testimony of Burt; Ex. A5, pp. 38-44)

49) HMI employees have the opportunity to enter information into the "Employee Acknowledgement" portion of the evaluation after they receive it. Mahlke provided the following input in that section:

> "Firstly I do not even know who did my review. The overall tone is highly negative and it depicts me as an individual that is not the least bit tuned into the project, and the complexities of its planning and execution.
>
> "It pays no attention to the training/on-boarding assistance I have provided to new people coming into engineering * * *. I have taken pride in trying to help people, so when I see a misinformed review that is covered in the six (6) sections."

(Testimony of Burt; Ex. A5, pp. 38-44)

50) In early December of 2018, Mahlke contacted Gerri Burt, HMI's Director of Human Resources and Payroll for the West Region, by telephone and "unloaded" on her about his performance evaluation. Mahlke spoke in a loud and aggressive tone, and told Burt that he did not agree with the evaluation. Burt told him that he could access his review on the computer, and make comments in response to it. Mahlke responded that he would like to talk to her in person, and Burt set up an in-person

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meeting with him at the Clackamas office. Mahlke accepted the electronic meeting invitation Burt sent him. Burt's office was in California, and she travelled to the Portland area to meet Mahlke in the Clackamas office. When Burt arrived at the Clackamas office on the day of the meeting, Mahlke was in the building. Mahlke left the office 30 minutes before the start of the meeting and did not appear at the scheduled time. Burt emailed Mahlke asking where he was, and told him that she would be in the Clackamas office for another day if he wanted to talk. Mahlke did not respond to Burt's email and did not explain why he missed the meeting. (Testimony of Burt; Ex. A7, p. 1)

Hart's Supervision of Mahlke and Continuation of the PIP
(December 28, 2018 – January 18, 2019)

51) Project Director Hart met with Mahlke on December 28, 2018, to let Mahlke know that he would now be the evaluator for Mahlke's PIP plan. La was also present at this meeting and took notes.

During the meeting Mahlke expressed frustration, and said he did not think he should be under the plan and he thought that the time period of the PIP had ended. Mahlke also mentioned that he had spoken to Gutshall because he felt like no one was listening to him, and that Chosa had acted "cowboyed and stupid" towards him. Mahlke did not elaborate on what he had discussed with Gutshall.

Hart told Mahlke that he intended to be fair and, if there were no issues, then the PIP meetings would be simple. He expressed that he felt that Mahlke was accomplishing something at HMI, and that Mahlke could talk to him if he needed anything. (Testimony of La; Ex. A, pp. 69-70)

52) Hart held PIP meetings with Mahlke on January 11 and 18, 2019. La attended these meetings, took notes and prepared typewritten PIP tracking forms for

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each meeting. Hart and Mahlke signed the tracking forms for both meetings on January 18, 2019. During the meeting held on January 11, 2019, Hart asked Mahlke "to write a list of things that he is working on to go over next week." Mahlke did not have the list and, at the next week's meeting, was told that he did not meet that expectation. (Testimony of La; Ex. A5, pp. 71-74)

Richman's Supervision of Mahlke and Termination
(January 25, 2019 – March 19, 2019)

53) Dane Richman was hired by HMI on January 17, 2019, and began supervising Mahlke's work on or about January 25, 2019. Richman's supervision of Mahlke included evaluating Mahlke's progress on the PIP. (Testimony of La, Richman; Ex. A5, p. 75)

54) Richman held PIP meetings with Mahlke on January 25, 2019, February 1, 8 and 19, 2019, and March 4, 2019. La attended each of these meetings, took notes and prepared typewritten PIP tracking forms for each meeting. (Testimony of La; Ex. A5, pp. 75-82)

55) During one of the PIP meetings, Mahlke raised his voice to La and asked her, "Why are you even here?" (Testimony of La)

56) During the PIP meeting held on February 1, 2019, Mahlke told Richman that he "still feels disciplined for something that a previous manager had against him. HR doesn't do anything about his performance review. He was singled out for JIRA records that were not updated when everyone else's wasn't either." In response, Richman "reiterated that his goal is to move forward and work on priorities." (Testimony of Richman; Ex. A, p. 77)

57) During the PIP meeting on February 8, 2019, Richman spoke to Mahlke

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about an incident in which Mahlke said he was "going out to the parking lot with someone." Mahlke told Richman that "he was only joking and will apologize if someone took it out of context." Richman also told Mahlke that he did not meet an expectation on the spreadsheet that Richman mentioned the previous week. Mahlke told Richman about "the investigation about [Hamel] when she destroyed his desk" in June, and that he thinks "we are making him be seen as an aggressive person and people are in danger being around him." Mahlke also told Richman that the PIP meetings were "pissing [him] off every week." He felt he was being "discriminated against" and "harassed," and that he was "going to take the 5th" at the next meeting and asked if he needed a lawyer. Richman "reiterate[d] that the meeting should be a positive mentality. But [Mahlke] repeats that he will just keep his mouth shut." Mahlke did not tell Richman that he believed he was being retaliated against for making safety complaints or that he was a whistleblower. (Testimony of La, Richman; Ex. A5, pp. 78-79)

58) On Saturday, February 9, 2019, Mahlke sent an email to Paul Henkels, Jr., an HMI corporate executive in Blue Bell, Pennsylvania. The email stated:

> "I am pretty sure you would not remember who I am, but here goes:
>
> "I am writing you here this Saturday morning after another lousy night of sleep with my morale probably at the very lowest point it has been since I got on the Fiber One project here in Portland, Oregon. It is affecting the life with my family, my weekends, and now everything. I think the level of low morale is prevalent throughout the entire office and the common terminology for this whole scenario from everyone is a 'sh*t show.' In my midst, in the last year, I have seen 20 people (conservatively speaking) leave or be let go.
>
> "I have been on the project solidly since Oct/Nov 2017. I have endured multiple management changes and tried to roll with these changes as best I can, but I am at the end of my rope now.
>
> "I want to sit down and talk with you for an hour. That is simply all that I ask. If you want to fire me after that hour – that is fine. I am a grown up originated

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> Upstate New Yorker. I have lived (home owner/property owner) and working in the Portland, Oregon/Vancouver, WA metro area for 22 years. That includes a huge array of business contacts and relationships. [KM] was hired the same day I was and he had that job that I wanted and knew I would excel at.
>
> "Currently I am building relationships with ODOT, the Portland & Western Railroad, Trimet, and Northwest Natural Gas.
>
> "These out of town people don't know my town and don't have my relationships. I am fully astonished how much time and energy and MONEY we have wasted to prop up a few stubborn egos (within our own office) who have led us on a terrible path. This culture is still alive today and is pretty much following the same sad path.
>
> "I have a lot to discuss and am very, very serious in my intention, my nature, my application and my transparency to others.
>
> "I need to be able to sleep at night and be a good father to my [children]. I think my wife would like to have one night where I am not wearing this place home. Please let me know when we can talk, as it is truly my last resort."

(Ex. A8, p. 11)

59) Mahlke felt that the email to Henkels mirrored the email he sent to Gutshall in 2018 in that it was a means to get Henkels to respond to him. He did not want to "go for broke" in the email and wanted "the real punches" to come out in the discussion. (Testimony of Mahlke)

60) Henkels responded to Mahlke's email on Monday, February 11, 2019, stating, "I'm travelling today and tomorrow but plan to attend the Clackamas staff meeting on Wednesday morning. Maybe we can find some time after the meeting." (Ex. A8, p. 11)

61) Mahlke "tried to" discuss the email with Henkels when Henkels was at the Clackamas office, but Mahlke felt that Henkels was "dismissive" and the meeting did not last long. (Testimony of Mahlke)

62) La noted the following on the February 19, 2019, PIP form, in the

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"maintain professional communications" category:

> "Last week [Mahlke] was seen as abrupt and frustrated, so much that it surprised others. Saying that he wanted to take it outside. [Mahlke] was joking by acting like someone from New York. [Mahlke] stated that people don't know how to take me. [Mahlke] understands that things may be misunderstood.
>
> "When asked by [Richman] who he contacted in construction regarding when he had gotten information from, he said that he could not give a contact because [of] tension in the yard. [Mahlke] admitted that he did not handle that right.
>
> "When asked if [Mahlke] followed up on an email chain * * *, he said it is a function of management, with no further details. He did not communicate who it was with, and why it is with them, or respond * * * other than he was working on it. He said he was not able to explain what he was doing with it from when he was working on it to the time it was a function of management. It is management's issue is not a proper response [and] it should be discussed further.
>
> "This week [Mahlke] did not meet the expectations for communication."

During the February 19 meeting, Mahlke explained to Richman "that he's burnt [*sic*] out and can't do red line drawings every day, however, that is part of his job." The PIP form also noted that Mahlke "took his name out of JIRA, unassigning himself" to a task and that Mahlke assigned work to a subcontractor that HMI is no longer giving work to. (Testimony of La; Ex. A5, pp. 79-80)

63) On March 8, 2019, Richman approved a change to the PIP review process to meet every other week. (Ex. A5, p. 84)

64) Mahlke was scheduled for a PIP meeting with Richman on Friday, March 15, 2019, but did not appear. Both Richman and La were present at the meeting, and they expected Mahlke to be there. Richman called Mahlke to find out where he was. Mahlke did not answer the call and Richman left a message. La was present when

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Richman called Mahlke. Mahlke did not return Richman's call and did not talk to Richman about why he missed the meeting.[8] Richman informed La that on Monday, March 18, 2019, Mahlke did not talk to Richman about why he missed the meeting. Richman told La that he wanted to end Mahlke's employment because he was not meeting expectations. On March 19, 2019, La completed a PIP tracking form with information provided to her by Richman, which stated:

Expectation: [9]	**Status/Results**
1. Continue to maintain professional communications both oral and written with co-workers, supervis[ors] and customers	[Mahlke] does not meet the expectation for communication as he does not answer questions. If asked a question, he talks in circles and does not give an answer.
2. Complete all assigned work in a thorough and detailed manner on time • JIRA – required to make daily entries. If changes are made to be made [*sic*] in JIRA it must be updated. • Quality control – continue to check work before sending it to others • To take ownership of responsibilities [Mahlke] is responsible to manage his time and workload to get all his work complete, not to focus on only one task but able to work on all. Reiterated the [Mahlke] does not	Continuing from our last meeting (3/1/2019), [Richman] expected [Mahlke] to uphold the same expectations to complete work assignments, however, since our last meeting there have been several occasions that [Mahlke] did not meet his expectations, listed below: • Manage HR Green, using JIRA/FTQ360/Sharepoint o He has very poor follow through on getting answers for requests on statuses or dates from the subcontractors he manages. o He continues to work on things not assigned to him or HR Green • Update JIRA records o He is still not updating his assignments in JIRA o He unassigned all JIRA entries

[8] As discussed in further detail in Finding of Fact # 76, the forum did not find Mahlke's testimony explaining why he missed the meeting to be credible.

[9] The text in the table is a direct quote from the March 19, 2019, PIP tracking form, unless otherwise indicated by brackets.

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have the authority to approve invoices but can let people know it is cleared to be invoiced.	from his name if the subcontractor was no longer active
	• Work on getting priorities done first
	  ○ He continually focuses on nonpriority routes after numerous requests to stay on track
	• Keep [Richman] in the loop on anything that he needs
	  ○ Did not follow up with [Richman] on why he missed his PIP meeting on 3/15/19
	• Follow protocol
	  ○ He does not follow protocol when doing reroutes
	  ○ He went directly to Wendy from Verizon instead of going through Nickolette
	  ○ He sent prints directly to Permitting without doing the QC process

3. Do not delegate work to others and ask for help
 	
Continue to use Tony as a resource for help. When working on each project, ensure all records are up to date
 	
[Mahlke] can go to [Richman] and [Hart] to ask for help
	[Mahlke] did not meet his expectation to not delegate work to others
	
	• [Mahlke] assigned the Shute site design to MGC a subcontractor
	  ○ MGC is no longer on the books doing new work for us as of Q2/Q3 2018
	  ○ Shute was a new site, added in Q4 2018
	• [Mahlke] told the Scheduling team to reassign a work package to a new subcontractor because he could not find the prints, numerous times

4. Arrive on time	7am-4pm 3/15/19: [Mahlke] missed the scheduled PIP meeting. He was out in the field and [Richman] called and left a message, however did not hear back from him. On Monday (3/18/19), he did not say anything about it to [Richman]. By not attending the meeting, he did not meet the expectation.
5. Meetings will be weekly until [Richman] says otherwise.	3/8/19: [Richman] decided to meet every other week. However, within the 2 weeks that we did not meet, he showed that he does not maintain his expectations.

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(Testimony of Richman, Burt; Ex. A5, pp. 85-86)

65) Richman did not find Mahlke to be capable and adept at telecommunications work. He also observed Mahlke act in a belittling and condescending manner toward La during PIP meetings. (Testimony of Richman)

66) Richman contacted Burt regarding severing Mahlke's employment. Richman told Burt that Mahlke's performance was not improving, that Mahlke did not seem to care about the PIP and that Mahlke did not show up for his last PIP meeting. Burt told Richman that she supported the decision to terminate Mahlke. (Testimony of Burt)

67) HMI terminated Mahlke's employment at HMI on March 19, 2019. (Stipulation)

68) Hart informed Mahlke of the decision to terminate his employment. (Testimony of Mahlke)

69) At the time of Mahlke's termination, his annual salary was $72,000. (Testimony of Mahlke)

Post-Termination

70) After his termination, Mahlke immediately started looking for a new position. He worked on a six-month contract for PGE from April to October, 2019, making $35,000 during that time. At the time of the hearing, he was working for a company he described as "wonderful." He started that position in February of 2020, and his rate of pay is higher than what he made when he worked at HMI. (Testimony of Mahlke)

71) Mahlke felt depressed after his termination, and "really messed up." He

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continues to feel the effects and feels "jaded." (Testimony of Mahlke)

Co-Workers' Reports of Safety Concerns

72) Mitchell Cook worked as a General Foreman on the Verizon project in HMI's Construction group from April to December 2018. Cook had many concerns regarding the work done by Empire, a subcontractor. His concerns included Empire performing work without a permit, Empire not properly locating utilities before performing boring work, laying pipes deeper than called for in construction plans, traffic control setups and Empire dumping spoils into storm drains and on vacant lots. Cook reported his concerns on multiple occasions to Construction Manager Clarence Haley, Hamel, Hart, Gutshall, Safety Manager Dave Parsons and Mahlke. Cook observed that a lot of people in the company were aware of concerns with Empire. He was told that HMI was looking into the issues, but he observed that the problems continued. HMI informed Cook that his employment was ending due to a lack of work, but he disagreed that there was a lack of work. (Testimony of Cook)

73) Anna King worked as an Associate Project Manager from July 2018 to January 11, 2019, in the Construction group. Her work involved coordinating projects, developing work plans and maintaining accurate records. King and others (including Hart, Gutshall, other construction project managers, the safety supervisor and foremen) "openly talked about" safety concerns regarding Empire, a subcontractor on the Verizon project, including the dumping of construction debris or "spoils" on private property that had not been designated for that purpose. King does not know what HMI did in response to the concerns raised about Empire, but she presumed that Empire was "let go" from the project. King also spoke up in meetings about work on the project that HMI

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reported to Verizon as completed, but had not yet been done. King was told that she was laid off due to lack of work,[10] but she observed that the work on the Verizon project was "ramping up" at the time her employment ended. (Testimony of King)

Credibility

74) The forum did not find Mahlke to be a credible witness due to several instances in which he contradicted his own statements. Following are examples of some of the inconsistent statements.

In the October 15, 2018, email that Mahlke wrote to Gutshall (Ex. A5, p. 8), Mahlke described the "style" of a co-worker (Hank Lawrence) as "cowboy and crass." However, during cross examination Mahlke said that he did not believe Lawrence to be "crass" or "cowboy," and that he used those words as a "vehicle" to "get a result" and to "bring Gutshall to the table by any means necessary." Mahlke also testified that he did not write anything in the document he believed to be false, but later said that the statement about Lawrence was "one of those gray matter things," "I do not believe [Lawrence] was crass" and "[t]hat's what I wrote, but I don't believe it to be the case." He also said that maybe the email was a "knee jerk" reaction.

Mahlke's testimony also conflicted with a direct quote attributed to him by Investigator Perez in Perez's notes reflected in Exhibit A7.[11] More specifically, Perez used quotation marks around the word "unloaded" when Mahlke described how he

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[10] The forum did not credit King's testimony regarding her subjective beliefs as to whether she was terminated for a different reason.

[11] The forum infers that it is more likely than not that Mahlke used the word "unloaded" because Investigator Perez used quotation marks around the word in his interview notes, and did not use quotation marks around other words in the notes. (*See* Ex. A7, p. 1). In its closing argument, the Agency asked the forum to disregard the directly quoted language. However, the Agency, not HMI, offered this exhibit into evidence and called Investigator Perez to testify.

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interacted with Gerri Burt. Mahlke denied that he used that word or that he "unloaded" on Burt.

Mahlke testified that Hamel gave him an oral warning in March of 2018 (A5, p. 25), stating, "Yes ma'am. It came from her." However, the oral warning was signed by Balthuis and Barnette. Hamel's signature was not on the document and Mahlke admitted that Barnette gave him the Warning document. Furthermore, Hamel was not present when Barnette gave Mahlke the Warning.

Another inconsistency relates to Mahlke's response to a question from HMI's counsel about a statement in the Warning in which the Warning indicated that Mahlke was "argumentative and disruptive to other managers." It particular, the Warning stated that Mahlke made the following comment to Hamel: "If you cannot find the fiber size, then how do you expect me to find it." When HMI's counsel asked Mahlke if he made the statement about the fiber size, Mahlke responded, "In a conversation, no ma'am." HMI's counsel then followed up and asked whether he "made the statement regardless of whether it was in writing or otherwise." In response, Mahlke admitted that he probably said a paraphrased version of the statement in an email to Hamel. (Testimony of Mahlke)

75) Additionally, there were multiple exhibits and testimony from several witnesses indicating that Mahlke was disruptive and rude to other HMI employees. There were several instances during the hearing when Mahlke displayed behavior that was consistent with the rude and disrespectful behavior described by HMI employees, which included the following:

- While another witness was testifying, Mahlke interrupted, exclaiming, "Bullshit."

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- Mahlke laughed in response to a question from HMI's counsel about his performance review.
- In response to several questions during cross examination posed to him by HMI's counsel, Mahlke responded "end of statement" at the conclusion of his answers.
- Mahlke had to be cautioned more than once by the ALJ to answer the questions posed to him by the Administrative Prosecutor after he gave long answers that did not respond to the questions asked.

Mahlke's behavior during the hearing lent credibility to the testimony of HMI witnesses such as La, Richman, and Burt, all of whom described his behavior as rude and disruptive in the workplace.

76) One final key credibility determination relates to the testimony of Richman and La in regard to Mahlke missing the PIP meeting immediately prior to his termination. Mahlke testified that it was "well communicated" that he was going to be working in the field and would miss the meeting. Specifically, Mahlke testified that he spoke to Richman that morning "face-to-face" and said that he was going out in the field with another employee to inspect sites, and that he would miss the PIP meeting. Mahlke testified that Richman told him that it was alright to miss the meeting and that the work took priority. In contrast, Richman and La testified that Richman tried to reach Mahlke on his cell phone when he did not appear at the meeting, and that Mahlke did not respond to Richman's voicemail message. In his testimony, Mahlke did not explain or otherwise address why he did not return Richman's message, and why he did not address the issue with Richman when he came into the office the following Monday. Due to Mahlke's lack of explanation and the inconsistencies in other areas of Mahlke's testimony described above, the forum finds the testimony of Richman and La to be more credible than the testimony of Mahlke.

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CONCLUSIONS OF LAW

1) At all times material herein, HMI was an active foreign business corporation incorporated in Pennsylvania. (Stipulation)

2) At all times material herein, HMI was an employer as defined in ORS 659A.001(4)(a) and employed Mahlke. (Stipulation)

3) Mahlke is an "aggrieved person" as defined in OAR 839-003-0005(2).

4) Mahlke, acting in good faith and while employed by HMI, reported information that he believed was evidence of violations of a state law, rules or regulations.

5) HMI did not terminate Mahlke, because of his good faith reports and did not violate ORS 659A.199(1) and OAR 839-010-0100(1).

6) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein. ORS 659A.800 - ORS 659A.865. (Stipulation)

7) Under ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charges against any respondent not found to have engaged in any unlawful practice charged.

OPINION

The Agency alleges that HMI violated ORS 659A.199(1) and OAR 839-010-0100(1) by discriminating against and terminating Mahlke because he made good faith reports of information he believed to be evidence of a violation of state or federal law.

ORS 659A.199(1) states, in pertinent part:

"It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with

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> regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."

OAR 839-010-0100(1) interprets ORS 659A.199 as:

> "(1) ORS 659A.199 prohibits any employer with one or more employees in Oregon from discharging, demoting, suspending, or in any manner discriminating or retaliating against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported information to anyone that the employee believes is evidence of a violation of any state or federal law, rule or regulation."

The "good faith" requirement in ORS 659A.199 is met when the whistleblower has a reasonable belief that the information reported has occurred and that the information, if proven, constitutes evidence of a violation of a state or federal law, rule or regulation. *In the Matter of Horizontal Motorsports, Inc.*, 37 BOLI 205, 216 (2020).

The Agency's prima facie case consists of the following elements: (1) HMI was an employer as defined by statute; (2) HMI employed Mahlke; (3) Mahlke, in good faith, reported information to someone that he believed was evidence of a violation of a state rule; (4) HMI discharged Mahlke and/or discriminated against him with regard to promotion, compensation or other terms, conditions or privileges of employment; (5) HMI discharge and/or discrimination of Mahlke was because of his report(s). *Id.*; ORS 659A.199(1).

Elements 1 and 2 are not in dispute. (*See* Procedural Finding of Fact # 12 (Stipulation))

With respect to Element 3 (Good Faith Report), under ORS 659A.199, an employee "report[s]" information when the employee communicates information to "anyone" that the employee believes is evidence of a violation of state law. The record

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included evidence of Mahlke's reports of the following:

1. In the first or second quarter of 2018,[12] Mahlke spoke to Barnette about safety concerns he had with a job site in Beaverton.
2. In July or August of 2018, Mahlke spoke to Chosa and Hart about 500 feet of fiber optic cable that he saw coiled in a manhole in downtown Portland. Because the length of the cable was highly irregular, Mahlke suspected that someone at HMI was fraudulently misrepresenting to Verizon the amount of cable that had been laid. (*See* Finding of Fact # 27)[13]
3. During daily engineering meetings, Mahlke discussed concerns he had about a subcontractor (Empire), and in particular spoke about an unfilled bore pit he saw on Butner Road. He was concerned about a collapse taking place on a major road, which would constitute a safety concern.
4. In Mahlke's email to Gutshall on October 14, 2018, and their follow-up dinner meeting, Mahlke discussed concerns about the Verizon project, including not property covering bore pits and dumping spoils in a manner that was subject to fine, and was therefore a violation of a rule, law or ordinance.
5. Mahlke's email to Paul Henkels, Jr. on February 11, 2019, and their subsequent discussion.

Reports 1 - 4 from the list above concerned various issues regarding safety and contract compliance issues on the Verizon project. Neither Mahlke nor the Agency cited to any specific laws or regulations that Mahlke believed were being violated. Nevertheless, the forum infers that Mahlke believed that the safety and compliance concerns he raised were unlawful under various state and local construction codes. Given his experience in the engineering and construction industry, the forum concludes that he had a reasonable belief that he was reporting unlawful activity.

With respect to Report # 5 (email and discussion with Henkels), there is no evidence in the record that Mahlke reported any construction safety or compliance issues. Rather, Mahlke appears to be discussing his own workplace dissatisfaction and

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[12] Mahlke testified that this report occurred sometime after the Warning he received on March 1, 2018. (*See* Finding of Fact # 18)

[13] *See also* ORS 165.080 (relating to criminal falsification of business records).

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his opinions of mismanagement.

To demonstrate Element 4 (causation), the Agency must prove that an unlawful motive "was a substantial factor" in HMI's decisions to (1) implement the PIP on October 15, 2018, (2) give Mahlke a negative performance evaluation in late November of 2018, (3) "reinstate" the PIP in January of 2019 and/or (4) terminate his employment on March 19, 2019. "[I]n other words," the Agency must prove that Mahlke "would have been treated differently in the absence of the unlawful motive." *In the Matter of Horizontal Motorsports, Inc.*, 37 BOLI at 217 (quoting *Harper v. Mt. Hood Cmty. Coll.*, 283 Or App 207, 214, 388 P3d 1170, 1174 (2016)). *See also Crosbie v. Asante*, 322 Or App 250, 256, 519 P3d 551, 556 (2022), *rev den*, 370 Or 827 (2023) (noting that the proponent of a discrimination claim under Oregon law must prove that "the protected trait or activity was a 'substantial factor'" in the adverse decision); *Ossanna v. Nike, Inc.*, 365 Or 196, 214, 445 P3d 281, 292 (2019) (recognizing that the causation standard for assessing violations of ORS 659A.199(1) is "the substantial-factor standard of causation").

In its closing argument, the Agency argued that the forum should infer causation due to the following: the timing of the PIP following Mahlke's email to Gutshall, reinstatement of the PIP and the termination after months of reports. The Agency also contended that there was a pattern of retaliation and pointed to the testimony of Cook and King who testified that they were informed that they were terminated due to lack of work after they made reports of safety concerns.

In contrast, HMI questioned Mahlke's credibility and pointed out, among other things, that Mahlke testified that the email he sent to Gutshall contained statements he did not believe to be true and that it was a piece of "marketing" to get Gutshall to meet

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with him.

First, with respect to the PIP issued on October 15, 2018, the record is replete with evidence that HMI had been addressing performance issues with Mahlke well in advance of that date, and that the wheels were in motion to deliver the PIP to Mahlke *prior to* his email to Gutshall and their subsequent meeting. (*See* Findings of Fact ## 28-33). Additionally, with respect to the Warning issued to Mahlke in March of 2018, Mahlke agreed that all of the requests made of him were reasonable. (*See* Findings of Fact # 14). Accordingly, the forum concludes that there is insufficient evidence to establish that Mahlke's reports were a substantial factor in the issuance to the performance improvement plan.

Second, with respect to the November 2018 performance evaluation and continuation of the PIP in January of 2019, the record includes voluminous documentation of efforts made to work with Mahlke to improve his performance, as well as reports HMI received about Mahlke's conduct from other employees. The reports about his conduct included raising his voice at other employees, slamming Foret's office door and joking about taking someone outside to the parking lot when they disagreed. Mahlke's own testimony and emails demonstrate that he was frustrated with his work environment for reasons that do not include safety issues. Moreover, throughout the course of his employment, he was evaluated or supervised by at least five different managers and supervisors who documented similar issues with his performance relating to the inability to correctly use HMI's databases, being disrespectful[14] to other

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[14] As explained in Finding of Fact # 75, Mahlke displayed disruptive behavior during the hearing in this matter.

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HMI employees and not completing work in a timely manner.

Finally, the record shows that Mahlke's supervisor at the time of his termination (Richman) had been working with him on many of the same issues that had been noted by previous supervisors when Mahlke failed to attend a scheduled PIP meeting. Mahlke did not return Richman's voicemail asking where he was and did not otherwise explain his absence to Richman.

While there is evidence that Mahlke reported some safety issues throughout his employment, when there is such a high volume of documentation of Mahlke's performance issues, the forum is unable to draw the conclusion that any of Mahlke's reports influenced HMI's decisions regarding his employment.

The testimony of Cook and King regarding the ending of their employment after their reports of safety concerns did not assist Mahlke's case. Cook and King testified that they were told their positions ended due to lack of work, and there is no evidence that any of the same people who made decisions about Mahlke were involved in the ending of their positions. Also, unlike Cook and King, after Mahlke reported safety concerns, he was not terminated due to lack of work. To the contrary, his supervisors worked with him for many months to attempt to improve his performance. In addition, Mahlke's performance issues were extensively documented, and his first Warning issued on March 1, 2018, preceded any complaints of safety violations. (*See* Finding of Fact # 18)

Accordingly, the forum concludes that the Agency did not meet its burden of proof to establish that Mahlke was disciplined or terminated because he made reports of unlawful activity.

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Exceptions to the Proposed Order

Most of the Agency's Exceptions request that the forum make corrections to scrivener's errors in the Proposed Order. The exceptions that accurately reflect the evidence at hearing are GRANTED as reflected in this Final Order. The Agency's exceptions which state that Case No. 03-21 is not against HMI are DENIED as the Agency issued Formal Charges in Case No. 03-21 against HMI and entered into a settlement agreement with HMI in that case.

HMI filed one exception in response to the Agency's Exception No. 16 regarding the testimony of Cook and King. The reference to the testimony of Cook and King was amended in this Final Order to reflect that Cook and King testified that they were "informed" that they were terminated due to lack of work. No additional changes were made in response to these exceptions.

ORDER

NOW, THEREFORE, the charges against all Respondent Henkels & McCoy Inc. are DISMISSED.

Christina Stephenson, Commissioner
Bureau of Labor and Industries

ISSUED ON: 10/12/23

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