



## 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.



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

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

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

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

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

#### 18 **FINDINGS OF FACT – PROCEDURAL**

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

23 2) Within one year of the filing of the verified written complaint, the Agency's  
24

1 Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in  
2 which it found substantial evidence that HMI committed unlawful employment practices  
3 (retaliation and termination because of Mahlke's whistleblowing) in violation of ORS  
4 659A.199. (Testimony of Perez; Ex. A9)

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

15 4) The Formal Charges alleged that HMI violated ORS 659A.199(1) and  
16 OAR 839-010-0010(1) by discharging Mahlke because he opposed an unlawful practice  
17 and evidence that he reasonably believed was a violation of state or federal law. The  
18 Formal Charges sought damages for lost wages in the amount of "at least \$15,000,"  
19 out-of-pocket expenses in an amount estimated to be "at least \$15,000" and mental  
20 and/or emotional distress in the amount of "at least \$30,000.00." The Formal Charges  
21 also asked that HMI and its managers, supervisors and human resources personnel be  
22 trained, at HMI's expense, "on workplace retaliation and whistleblowing" and that HMI  
23 be declared in violation of the applicable laws and rules, and be enjoined from violating  
24

1 laws. (Ex. X2b)

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

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

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

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

14 "Under OAR 839-050-0190, the ALJ may consolidate two or more cases  
15 'when the [ALJ] determines that the cases involve common questions of law or  
16 fact.'"

16 "Questions of Law"

17 "Each of the six cases includes a charge that HMI violated ORS  
18 659A.199(1) and OAR 839-010-0100(1) by retaliating against each complainant  
19 because, in good faith, they reported information they believed was evidence of a  
20 state or federal law, rule or regulation.<sup>1</sup> Accordingly, there appear to be some  
21 common questions of law.

20 "Questions of Fact"

21 "While the Complainants in each case were all employed by HMI and  
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23 <sup>1</sup> Two cases (103-20 and 03-21) also include alleged violations of ORS 659A.030(1)(f) and OAR 839-050-  
24 0125(2),(3).

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

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

9 \*\* \* \*

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

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

20 *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 245, 254 (2001), *rev'd on*  
21 *other grounds*, 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d  
22 280 (2004). Similarly, the forum concludes that consolidating these six cases  
23 into one hearing would not result in a 'substantial gain of efficiencies' and,  
24 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)

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

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

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

13          12)    The Agency and HMI stipulated to the following:

- 14           a. The alleged violations are within the jurisdiction of the Bureau of Labor
- 15           and Industries.
- 16           b. At all times material, HMI was subject to ORS chapter 659A and OAR
- 17           chapter 839.
- 18           c. On November 14, 2019, Mahlke filed a verified written complaint in Civil
- 19           Rights Division Case No. STEMWB191114-11749.
- 20           d. Mahlke is an "aggrieved person" as defined in OAR 839-003-0005(2).
- 21           e. Mahlke was an "employee" as defined in ORS 659A.001(3).
- 22           f. Mahlke was an at-will employee.
- 23           g. At all times material, Mahlke was an employee of HMI.
- 24           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)

1           13) On March 31, 2022, the ALJ notified the parties by email that although  
2 Attorney Sheryl Willert is designated as "*pro hac vice*" counsel, it did not appear that *pro*  
3 *hac vice* documents were filed in this matter. The ALJ's email further stated: "Please  
4 take note of the attached instructions. Pursuant to OAR 839-050-0110(1) and OAR  
5 839-050-0020(13), Ms. Willert will need to submit the information described in the  
6 attached documents."

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

8           "Attached please find the documents that I submitted to the Agency in April,  
9 2021. My office staff reported to me that they inquired about the Pro Hac status  
10 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."

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

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

23           14) The hearing in this matter was held on April 6-8, 2022. At the start of  
24

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

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

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

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

21  
22 \_\_\_\_\_  
23 <sup>2</sup> The interim order indicated that if the ALJ's inference was incorrect, then HMI should file a supplement  
24 to clarify the record.



1 The Agency filed its brief regarding pattern and practice evidence on April 22,  
2 2022, and HMI submitted its response on May 6, 2022. The Agency's rebuttal brief was  
3 filed on May 13, 2022. (Forum File)

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

#### 8 FINDINGS OF FACT – THE MERITS

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

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

#### 15 *Barnette's Supervision of Mahlke and Warning* 16 *(November 6, 2017 – March 1, 2018)*

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

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

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

5           "I know I stated this several times yesterday, but engineering needs to follow the  
6 quality process that are in place with regards to the quality of the engineering  
7 packages. I have attached the instructions that I recently wrote to help plus  
8 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."

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

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

13           "This is feedback on John Mahlke.

14           "Last Thursday, Feb 15 I held a group session to review packages from all the  
15 subs. [Mahlke] paired off [with] me, Dustin and Ron. We went through the  
16 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.

- 17           • [Mahlke] started off the meeting by saying 'My wife is a B so I might as  
18 well be a B today.' To me, he meant Bitch. It was an odd comment to  
make.
- 19           • He [sic] behavior was obnoxious and rude at time[s], as well as  
argumentative.
- 20           • As we reviewed the FTQ360 inspection record from the subs, I showed  
21 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.
- 22           • [Mahlke] commented how he doesn't do this, that he just puts a  
23 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  
24 must indicate which quality checkpoint item is wrong and attach the

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

- 6 • I then showed the group how to take a package that was sent back to us  
7 with correction and mark the OPN checkpoint item as QC after the sub  
8 had marked the READY FOR REVIEW checkbox. I explained how critical  
9 it is for us to keep accurate quality records. We want to understand what  
10 the common quality failures are by checkpoint and to see how subs are  
11 performing.
- 12 • At one point as I was scrolling down an inspection record looking for the  
13 fiber size correct checkpoint, and [Mahlke] said "If you cannot find the fiber  
14 size, then how do you expect me to find it." That was just plain rude.
- 15 • Through the whole 4-5 hour session he continually interrupted and  
16 complained. Mentioned several times how he has been getting his ass  
17 chewed for not getting work out and he's tired of it. Also eluded to not  
18 even coming into work on Friday.
- 19 • [Mahlke] set a tone in the meeting that was hostile and not pleasant to be  
20 around him. I did my best to handle his disrespectful behavior by being  
21 understanding *[sic]* and encouraging him and firmly stating we needed to  
22 do things the quality way. It was exhausting to keep this up.
- 23 • The next day I sent out detailed quality instructions for the second time to  
24 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 get  
another job. All of this while Natalie is in the office trying to get her work  
out.

22 "His behavior needs to immediately change."

23 (Ex. A5, pp. 14-15)

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

4           8)     On February 22, 2018, at 11:45 a.m. Hamel sent an email to Barnette  
5 forwarding an email exchange between her and Mahlke in which she gave Mahlke  
6 instructions for correcting and resending an inspection record. In the email to Barnette,  
7 Hamel stated that Mahlke "is completely ignoring the quality procedures and I have sent  
8 several emails about this. Please can you get this corrected? I am having to review  
9 every single detail of this work and this is insubordination on his part." (Ex. A5, pp. 16-  
10 17)

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

14           "Dave. I just got off the phone with [Mahlke] to speak to him about what his  
15 issues were with JIRA and FTQ360. First, what is puzzling is him saying he is  
16 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.

17           "He was very frustrated and argumentative and making excuses. I'm only trying  
18 to help him follow our process. He said he's just trying to get work out, he said  
19 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  
20 about what is wrong and going back later to fix up the paperwork, he said he's  
21 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.

22           "He said Dustin was having trouble. I asked Dustin and that was way over a  
23 month ago and that was also because he wasn't using Chrome. He is trying to  
divert his own failings to the process.

1 "I will help him in any way I can. He still doesn't believe that doing the official  
2 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.

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

4 (Ex. A5, p. 18)

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

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

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

18 "Work Quality

19 "A written process on how to conduct the FTQ360 inspection and how to update  
20 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.

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

1 "Conduct

2 "[Mahlke] has shown to be argumentative and disrespectful to other managers,  
3 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.'

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

6 "GOALS:

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

12 "ACTIONS TO ACHIEVE GOALS:

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

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

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

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

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

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

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

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

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

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22  
23 <sup>3</sup> Based on testimony from various witnesses, the forum infers that Balthuis was the onsite director for the  
24 Portland Verizon project and that he was located in the Clackamas office.

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

8 *Mahlke Reports*  
9 *Mid-March 2018 – June 2018*

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

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

18 *Performance Evaluation*  
19 *April 30, 2018*

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



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

6 *Engineering Department Restructuring*  
7 *June 12, 2018 – July 2018*

8 21) Sometime between March and August of 2018, Barnette promoted  
9 Engineer Natalie Foret ("Foret") to an Engineering Supervisor position, and she  
10 exercised some supervisory authority over Mahlke. (Testimony of Mahlke; Ex. A5, pp.  
11 6, 25, 37)

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

17 23) Hamel<sup>4</sup> emailed HR Specialist La on June 25, 2018, at 6:13 a.m., stating:

18 "Hi Sylvie,

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

24  
\_\_\_\_\_  
23 <sup>4</sup> The forum infers that Hamel had supervisory authority over Mahlke during this period of time.

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

3 "Background story:

4 "On Friday June 8<sup>th</sup> I told John that we were putting 5 desks into this office, per  
5 Dave [Barnette], there were 3 more engineers that were going to sit in there. If  
6 he didn't have a chance to move all of his stuff into boxes, then it would be done  
7 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.

8 "John returned back to work on Monday June 18<sup>th</sup>. He never once came to me to  
9 indicate that he was unhappy about the desk situation. Erica and I had unloaded  
10 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.

11 "After Erica told me about the altercation with [Mahlke], I went to Paul Bulthuis.  
12 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.

13 "I would like you to please do an investigation with Erica on this and [Mahlke].  
14 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."

15 (Ex. A5, p. 36)

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

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

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

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

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

22 30) Chosa forwarded Smith's email to HR Specialist La on October 3, 2018.  
23 He told La that he was "[l]ooking to make a change in personnel, [Mahlke] has  
24

1 repeatedly ignored following our engineering process.” Chosa’s email further stated  
2 that there were “several additional complaints from staff” about Mahlke’s “work not  
3 being done correctly,” and that Mahlke “continually passes his task[s] to others.” Chosa  
4 informed La that he would like to discuss removing Mahlke from his team. La told  
5 Chosa that she needed supporting details before action was taken. On October 9,  
6 2018, La sent Chosa a template for a performance improvement plan (“PIP”) for Chosa  
7 to complete and list action plans for Mahlke to complete. (Testimony of La; Ex. A5, p  
8 51)

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

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

20 33) La met with Chosa and Foret from 10:38 – 11:03 a.m. on October 12,  
21 2018, to discuss their concerns with Mahlke’s performance. During the meeting, Chosa

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22  
23 <sup>5</sup> Mahlke denied slamming Foret’s office door, but admitted that the door “pick[ed] up steam” from a  
24 breeze when he closed it. (Testimony of Mahlke)

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

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

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

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

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

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

1 2018. The subject line read: "Information from John Mahlke, OSP Eng., One Fiber  
2 Project, Portland, OR," and included the following statements:<sup>6</sup>

3 "I premise this missive with a phone call I placed Friday \* \* \* with the woman \* \* \*  
4 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.

5 "First and foremost I do not want to seem as though I am assaulting the [HMI]  
6 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  
7 to add to, and espouse, each and every day. I truly like the company a lot!

8 \* \* \*

9 \* \* \* 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.

10 \* \* \* To date the actual fiber that is in the ground is around 20 miles. We were to  
11 have several hundred miles by this time by project design. \* \* \* I questioned  
12 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  
13 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].

14 "Over all [sic] I am not happy the way that Dave Barnette ended up treating me. I  
15 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  
16 Verizon. His actions were not directly malicious, but rather denied me to be the  
type of stakeholder that I am on this project.

17 "The political and managerial infighting around here was legendary. Paul Balthus  
18 was the director, David Barnette was the engineering manager, Ken Murray was  
the Project Manager, and Connie Hamel was the Quality Control Manager. Each  
19 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  
20 office like that before, particularly with a big time entity such as [HMI].

21 \* \* \*

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22  
23 <sup>6</sup> 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.

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

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

16 \* \* \*

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

19 \* \* \*

20 "Presently my boss, Carl Chosa who is the new engineering manager, has  
21 threatened to write me up on one occasion and on another occasion to fire me.  
22 Both occasions have happened in the last week. I have consistently asked for  
23 help for my workload which as time goes on appears to me to be a way to  
24 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. \* \* \*



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

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

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

12       (Ex. A5, pp. 5-9)

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

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

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

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

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

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

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

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

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

19 The PIP stated that "it has become evident" that Mahlke had "not been  
20 performing to the standards expected." It noted that on March 3, 2018, he was given a  
21 verbal warning for issues related to performance, that Chosa had counseled Mahlke  
22 "multiple times on performance" and "[t]o date, there has not been an acceptable level  
23 of improvement."  
24

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

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

- 6 "1. Maintain professional communications both oral and written with co-workers,  
supervision and customers.
- 7 2. Complete all assigned project work in a thorough and detailed manner on time  
including but not limited to:
  - 8 • Entering complete and accurate information into JIRA
  - 9 • Reviewing prints for quality assurance/control prior to sending them to  
others
- 10 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
- 11 4. Arrive on time and/or advise if not working."

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

15 45) Chosa's bi-weekly PIP meetings with Mahlke were to be held on the same  
16 day of the week and time unless the employee was told otherwise. Chosa held PIP  
17 meetings with Mahlke on the following dates: October 26, 2018; November 12 and 30,  
18 2018; and December 7 and 14, 2018. La was present at each PIP meeting. She took  
19 notes and completed typewritten PIP tracking forms for each meeting. When  
20 necessary, she revised the tracking forms after she typed them for clarification.

21 The tracking form La completed on November 30, 2018, indicates, "Due to the  
22 error in quality control, meetings will now be weekly until the plan is scheduled to end on  
23 12/15/2018."  
24

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

3           The tracking form with a meeting date of December 14, 2018, includes "Closing  
4 Comments" which state: "Carl: We have a better understanding of how things are done  
5 and have improved our process. I know that [Mahlke] gets overwhelmed and he just  
6 needs to reach out and ask for help." Under the signature line, there is a typewritten  
7 note indicating that Mahlke was presented with a copy of the final plan on December 18,  
8 2018, but he "refused to sign and doesn't feel that the plan no longer applies to him  
9 [sic]" since Chosa is no longer working for HMI. (Testimony of La; Ex. A5, pp. 57-68)

10          46) Mahlke received his 2018 Year End Performance Evaluation sometime  
11 during the last two weeks of November 2020. Mahlke's manager, Chosa, was a  
12 contract employee and, thus, did not have access to HMI's personnel records system.  
13 Accordingly, Hart completed the evaluation with input from Chosa.<sup>7</sup> The bottom of the  
14 evaluation indicates that Mahlke provided "[e]lectronic signature confirmation" at the end  
15 beneath the Employee Acknowledgement section. (Testimony of Burt; Ex. A5, pp. 38-  
16 44)

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

20          48) In the Overall Rating category, Hart rated Mahlke as "2 – Needs  
21 improvement" and wrote that Mahlke "has issues with highly stress[ed] workload and  
22

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

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

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

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

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

13 “Firstly I do not even know who did my review. The overall tone is highly  
14 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.

15 “It pays no attention to the training/on-boarding assistance I have provided to  
16 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.”

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

18 50) In early December of 2018, Mahlke contacted Gerri Burt, HMI’s Director of  
19 Human Resources and Payroll for the West Region, by telephone and “unloaded” on  
20 her about his performance evaluation. Mahlke spoke in a loud and aggressive tone,  
21 and told Burt that he did not agree with the evaluation. Burt told him that he could  
22 access his review on the computer, and make comments in response to it. Mahlke  
23 responded that he would like to talk to her in person, and Burt set up an in-person  
24

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

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

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

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

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

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

1 each meeting. Hart and Mahlke signed the tracking forms for both meetings on January  
2 18, 2019. During the meeting held on January 11, 2019, Hart asked Mahlke "to write a  
3 list of things that he is working on to go over next week." Mahlke did not have the list  
4 and, at the next week's meeting, was told that he did not meet that expectation.  
5 (Testimony of La; Ex. A5, pp. 71-74)

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

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

12 54) Richman held PIP meetings with Mahlke on January 25, 2019, February 1,  
13 8 and 19, 2019, and March 4, 2019. La attended each of these meetings, took notes  
14 and prepared typewritten PIP tracking forms for each meeting. (Testimony of La; Ex.  
15 A5, pp. 75-82)

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

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

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

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

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

16 "I am pretty sure you would not remember who I am, but here goes:

17 "I am writing you here this Saturday morning after another lousy night of sleep  
18 with my morale probably at the very lowest point it has been since I got on the  
19 Fiber One project here in Portland, Oregon. It is affecting the life with my family,  
20 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.

21 "I have been on the project solidly since Oct/Nov 2017. I have endured multiple  
22 management changes and tried to roll with these changes as best I can, but I am  
at the end of my rope now.

23 "I want to sit down and talk with you for an hour. That is simply all that I ask. If  
24 you want to fire me after that hour – that is fine. I am a grown up originated



1 Upstate New Yorker. I have lived (home owner/property owner) and working in  
2 the Portland, Oregon/Vancouver, WA metro area for 22 years. That includes a  
3 huge array of business contacts and relationships. [KM] was hired the same day  
4 I was and he had that job that I wanted and knew I would excel at.

5 "Currently I am building relationships with ODOT, the Portland & Western  
6 Railroad, Trimet, and Northwest Natural Gas.

7 "These out of town people don't know my town and don't have my relationships.  
8 I am fully astonished how much time and energy and MONEY we have wasted to  
9 prop up a few stubborn egos (within our own office) who have led us on a terrible  
10 path. This culture is still alive today and is pretty much following the same sad  
11 path.

12 "I have a lot to discuss and am very, very serious in my intention, my nature, my  
13 application and my transparency to others.

14 "I need to be able to sleep at night and be a good father to my [children]. I think  
15 my wife would like to have one night where I am not wearing this place home.  
16 Please let me know when we can talk, as it is truly my last resort."

17 (Ex. A8, p. 11)

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

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

(Ex. A8, p. 11)

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

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

1 "maintain professional communications" category:

2 "Last week [Mahlke] was seen as abrupt and frustrated, so much that it surprised  
3 others. Saying that he wanted to take it outside. [Mahlke] was joking by acting  
4 like someone from New York. [Mahlke] stated that people don't know how to  
5 take me. [Mahlke] understands that things may be misunderstood.

6 "When asked by [Richman] who he contacted in construction regarding when he  
7 had gotten information from, he said that he could not give a contact because [of]  
8 tension in the yard. [Mahlke] admitted that he did not handle that right.

9 "When asked if [Mahlke] followed up on an email chain \* \* \*, he said it is a  
10 function of management, with no further details. He did not communicate who it  
11 was with, and why it is with them, or respond \* \* \* other than he was working on  
12 it. He said he was not able to explain what he was doing with it from when he  
13 was working on it to the time it was a function of management. It is  
14 management's issue is not a proper response [and] it should be discussed  
15 further.

16 "This week [Mahlke] did not meet the expectations for communication."

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

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

24 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

Richman called Mahlke. Mahlke did not return Richman's call and did not talk to Richman about why he missed the meeting.<sup>8</sup> 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: <sup>9</sup>	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 <ul style="list-style-type: none"><li>JIRA – required to make daily entries. If changes are made to be made [sic] in JIRA it must be updated.</li><li>Quality control – continue to check work before sending it to others</li><li>To take ownership of responsibilities</li></ul> [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.	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: <ul style="list-style-type: none"><li>Manage HR Green, using JIRA/FTQ360/Sharepoint<ul style="list-style-type: none"><li>He has very poor follow through on getting answers for requests on statuses or dates from the subcontractors he manages.</li><li>He continues to work on things not assigned to him or HR Green</li></ul></li><li>Update JIRA records<ul style="list-style-type: none"><li>He is still not updating his assignments in JIRA</li><li>He unassigned all JIRA entries</li></ul></li></ul>
Reiterated the [Mahlke] does not	

<sup>8</sup> 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.

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

1 2 3 4 5 6 7 8 9 10	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 <ul style="list-style-type: none"> <li>• Work on getting priorities done first <ul style="list-style-type: none"> <li>◦ He continually focuses on nonpriority routes after numerous requests to stay on track</li> </ul> </li> <li>• Keep [Richman] in the loop on anything that he needs <ul style="list-style-type: none"> <li>◦ Did not follow up with [Richman] on why he missed his PIP meeting on 3/15/19</li> </ul> </li> <li>• Follow protocol <ul style="list-style-type: none"> <li>◦ He does not follow protocol when doing reroutes</li> <li>◦ He went directly to Wendy from Verizon instead of going through Nickolette</li> <li>◦ He sent prints directly to Permitting without doing the QC process</li> </ul> </li> </ul>
11 12 13 14 15 16 17	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 <ul style="list-style-type: none"> <li>• [Mahlke] assigned the Shute site design to MGC a subcontractor <ul style="list-style-type: none"> <li>◦ MGC is no longer on the books doing new work for us as of Q2/Q3 2018</li> <li>◦ Shute was a new site, added in Q4 2018</li> </ul> </li> <li>• [Mahlke] told the Scheduling team to reassign a work package to a new subcontractor because he could not find the prints, numerous times</li> </ul>
18 19 20 21 22	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.
23 24	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.

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

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

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

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

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

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

16 *Post-Termination*

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

23 71) Mahlke felt depressed after his termination, and "really messed up." He  
24

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

2 *Co-Workers' Reports of Safety Concerns*

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

15 73) Anna King worked as an Associate Project Manager from July 2018 to  
16 January 11, 2019, in the Construction group. Her work involved coordinating projects,  
17 developing work plans and maintaining accurate records. King and others (including  
18 Hart, Gutshall, other construction project managers, the safety supervisor and foremen)  
19 "openly talked about" safety concerns regarding Empire, a subcontractor on the Verizon  
20 project, including the dumping of construction debris or "spoils" on private property that  
21 had not been designated for that purpose. King does not know what HMI did in  
22 response to the concerns raised about Empire, but she presumed that Empire was "let  
23 go" from the project. King also spoke up in meetings about work on the project that HMI  
24

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

4 *Credibility*

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

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

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

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20  
21 <sup>10</sup> The forum did not credit King's testimony regarding her subjective beliefs as to whether she was terminated for a different reason.

22 <sup>11</sup> 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.

1 interacted with Gerri Burt. Mahlke denied that he used that word or that he “unloaded”  
2 on Burt.

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

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

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

- 23 • While another witness was testifying, Mahlke interrupted, exclaiming,  
24 “Bullshit.”



- 1 • Mahlke laughed in response to a question from HMI's counsel about his performance review.
- 2 • 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.
- 3 • 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.

4  
5 Mahlke's behavior during the hearing lent credibility to the testimony of HMI witnesses  
6 such as La, Richman, and Burt, all of whom described his behavior as rude and  
7 disruptive in the workplace.

8  
9 76) One final key credibility determination relates to the testimony of Richman  
10 and La in regard to Mahlke missing the PIP meeting immediately prior to his  
11 termination. Mahlke testified that it was "well communicated" that he was going to be  
12 working in the field and would miss the meeting. Specifically, Mahlke testified that he  
13 spoke to Richman that morning "face-to-face" and said that he was going out in the field  
14 with another employee to inspect sites, and that he would miss the PIP meeting.  
15 Mahlke testified that Richman told him that it was alright to miss the meeting and that  
16 the work took priority. In contrast, Richman and La testified that Richman tried to reach  
17 Mahlke on his cell phone when he did not appear at the meeting, and that Mahlke did  
18 not respond to Richman's voicemail message. In his testimony, Mahlke did not explain  
19 or otherwise address why he did not return Richman's message, and why he did not  
20 address the issue with Richman when he came into the office the following Monday.  
21 Due to Mahlke's lack of explanation and the inconsistencies in other areas of Mahlke's  
22 testimony described above, the forum finds the testimony of Richman and La to be  
23 more credible than the testimony of Mahlke.  
24

1 **CONCLUSIONS OF LAW**

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

4 2) At all times material herein, HMI was an employer as defined in ORS  
5 659A.001(4)(a) and employed Mahlke. (Stipulation)

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

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

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

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

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

18 **OPINION**

19 The Agency alleges that HMI violated ORS 659A.199(1) and OAR 839-010-  
20 0100(1) by discriminating against and terminating Mahlke because he made good faith  
21 reports of information he believed to be evidence of a violation of state or federal law.

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

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

1 regard to promotion, compensation or other terms, conditions or privileges of  
2 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.”

3  
4 OAR 839-010-0100(1) interprets ORS 659A.199 as:

5 “(1) ORS 659A.199 prohibits any employer with one or more employees in  
6 Oregon from discharging, demoting, suspending, or in any manner discriminating  
or retaliating against an employee with regard to promotion, compensation or  
7 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.”

8 The “good faith” requirement in ORS 659A.199 is met when the whistleblower has a  
9 reasonable belief that the information reported has occurred and that the information, if  
10 proven, constitutes evidence of a violation of a state or federal law, rule or regulation.

11 *In the Matter of Horizontal Motorsports, Inc.*, 37 BOLI 205, 216 (2020).

12 The Agency's prima facie case consists of the following elements: (1) HMI was  
13 an employer as defined by statute; (2) HMI employed Mahlke; (3) Mahlke, in good faith,  
14 reported information to someone that he believed was evidence of a violation of a state  
15 rule; (4) HMI discharged Mahlke and/or discriminated against him with regard to  
16 promotion, compensation or other terms, conditions or privileges of employment; (5)  
17 HMI discharge and/or discrimination of Mahlke was because of his report(s). *Id.*; ORS  
18 659A.199(1).

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

21 With respect to Element 3 (Good Faith Report), under ORS 659A.199, an  
22 employee “report[s]” information when the employee communicates information to  
23 “anyone” that the employee believes is evidence of a violation of state law. The record  
24

1 included evidence of Mahlke's reports of the following:

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

20 Reports 1 - 4 from the list above concerned various issues regarding safety and  
21 contract compliance issues on the Verizon project. Neither Mahlke nor the Agency cited  
22 to any specific laws or regulations that Mahlke believed were being violated.  
23 Nevertheless, the forum infers that Mahlke believed that the safety and compliance  
24 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

---

<sup>12</sup> Mahlke testified that this report occurred sometime after the Warning he received on March 1, 2018.  
(See Finding of Fact # 18)

<sup>13</sup> See also ORS 165.080 (relating to criminal falsification of business records).

1 his opinions of mismanagement.

2 To demonstrate Element 4 (causation), the Agency must prove that an unlawful  
3 motive "was a substantial factor" in HMI's decisions to (1) implement the PIP on October  
4 15, 2018, (2) give Mahlke a negative performance evaluation in late November of 2018,  
5 (3) "reinstate" the PIP in January of 2019 and/or (4) terminate his employment on March  
6 19, 2019. "[I]n other words," the Agency must prove that Mahlke "would have been  
7 treated differently in the absence of the unlawful motive." *In the Matter of Horizontal*  
8 *Motorsports, Inc.*, 37 BOLI at 217 (quoting *Harper v. Mt. Hood Cmty. Coll.*, 283 Or App  
9 207, 214, 388 P3d 1170, 1174 (2016)). See also *Crosbie v. Asante*, 322 Or App 250,  
10 256, 519 P3d 551, 556 (2022), *rev den*, 370 Or 827 (2023) (noting that the proponent of  
11 a discrimination claim under Oregon law must prove that "the protected trait or activity  
12 was a 'substantial factor'" in the adverse decision); *Ossanna v. Nike, Inc.*, 365 Or 196,  
13 214, 445 P3d 281, 292 (2019) (recognizing that the causation standard for assessing  
14 violations of ORS 659A.199(1) is "the substantial-factor standard of causation").

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

21 In contrast, HMI questioned Mahlke's credibility and pointed out, among other  
22 things, that Mahlke testified that the email he sent to Gutshall contained statements he  
23 did not believe to be true and that it was a piece of "marketing" to get Gutshall to meet  
24

1 with him.

2 First, with respect to the PIP issued on October 15, 2018, the record is replete  
3 with evidence that HMI had been addressing performance issues with Mahlke well in  
4 advance of that date, and that the wheels were in motion to deliver the PIP to Mahlke  
5 prior to his email to Gutshall and their subsequent meeting. (See Findings of Fact ##  
6 28-33). Additionally, with respect to the Warning issued to Mahlke in March of 2018,  
7 Mahlke agreed that all of the requests made of him were reasonable. (See Findings of  
8 Fact # 14). Accordingly, the forum concludes that there is insufficient evidence to  
9 establish that Mahlke's reports were a substantial factor in the issuance to the  
10 performance improvement plan.

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

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22  
23 <sup>14</sup> As explained in Finding of Fact # 75, Mahlke displayed disruptive behavior during the hearing in this  
24 matter.

1 HMI employees and not completing work in a timely manner.

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

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

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

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

24

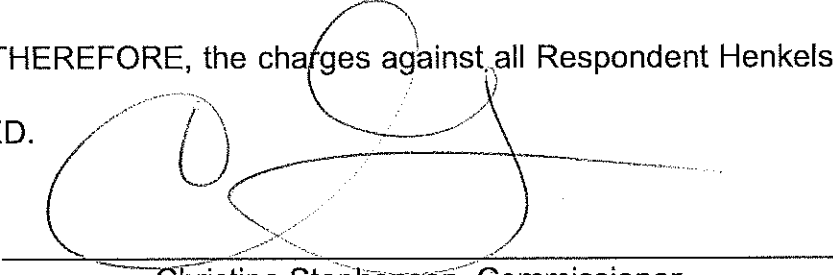
**Exceptions to the Proposed Order**

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