

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST
COMMISSION and PETER D. McGRATH,
Complainant,

Docket No. 96-SEM-0839
96-BEM-3805
96-BEM-3806
96-BEM-3807
96-BEM-3808
96-BEM-3809
96-BEM-3810
96-BEM-3811
96-BEM-3812

v.

LOCAL UNION NO. 12004, UNITED
STEELWORKERS OF AMERICA,
STEPHEN T. BRADLEY, GARY S. BUMA,
PAUL P. EDMONDS, CHARLES H. GRANT
RAYMOND L. LAHAIR, JR., CHARLES
McNEIL, RONALD F. MEZZANO, THOMAS
NUGENT and THOMAS ST. PIERRE,
Respondents

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

Appearances: Donald C. Keavany, Jr., Esq., for Complainant.
Terence E. Coles, Esq., for Respondent.

I. PROCEDURAL HISTORY

On June 5, 1996, Complainant, Peter McGrath, filed his initial complaint (96-SEM-0839) with the Massachusetts Commission Against Discrimination (the “Commission”), against individual members of Local Union No. 12004, United Steelworkers of America (the “Union” or the “Local”).¹ In his initial complaint, Complainant alleged that the individual Respondents engaged in unlawful harassment on the basis of sex and sexual orientation in violation of G.L. c. 151B, § 4(2); intimidated, threatened and interfered with the exercise of his rights protected under c. 151B in

¹ In his initial complaint, Complainant named all of the individual Respondents named in this proceeding except for Thomas Nugent.

violation of § 4(4A); and, aided and abetted acts forbidden under c. 151B in violation of § 4(5). On November 1, 1996, Complainant filed additional complaints with the Commission directly against the Union and all of the above-named individual Respondents, which again asserted claims of unlawful harassment based on his sexual orientation. The Commission then consolidated all of the above-identified complaints.

On July 8, 1999, the Investigating Commissioner found probable cause to credit Complainant's allegations. Respondents subsequently filed a Motion to Dismiss on the ground that Complainant's complaints were pre-empted by the National Labor Relations Act ("NLRA"). Respondents also argued that the Union could not be held vicariously liable for the harassing acts of its members under c. 151B; and, further, that the individual members could not be held liable for sexual orientation-based harassment under §§ 4(4A) and 4(5). On December 11, 2001, the Full Commission denied Respondents' Motion to Dismiss in its entirety. McGrath v. United Steelworkers of America, Local 12004, 23 MDLR 326 (2003).

On May 13, 2003, the Commission certified the case for Public Hearing. On ten (10) separate days during the period of August through December 2003, a Public Hearing was held before me in various locations in Worcester, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the Public Hearing, and the stipulations of the parties. I have likewise considered the proposed Findings of Fact and Conclusions of Law submitted by the parties after the Public Hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are

rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

A. THE PARTIES

1. Complainant, Peter McGrath is a gay male who currently resides in California. From 1980 to October 1997, Complainant was employed with the Commonwealth Gas Company (“ComGas”), a utility with a number of facilities in Massachusetts. At ComGas, Complainant held a number of supervisory positions including the position of Manager of Commercial and Industrial Sales, which he held from 1993 until he resigned from ComGas in October 1997.

2. Respondent, Local 12004, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of G.L. c. 151B, § 1(3). At all pertinent times hereto, the Union was the collective bargaining representative for the production and clerical unit workers employed at ComGas. In particular, the Union represented the ComGas employees subjected to a “lockout” that lasted from March 31, 1996 to September 8, 1996.

3. Respondent Stephen T. Bradley is an individual who worked at ComGas from 1970 until his retirement in 2000 and at all pertinent times hereto, was a member of the Union. Bradley had served as a steward for Local 12004 from March 31, 1996 to September 1996 (i.e., during the lockout). Bradley previously served as President of the Local from 1994 until he resigned from the position in 1995 for health reasons.

4. Respondent Gary Buma is an individual who worked at ComGas from 1979 to

the present time and, at all pertinent times hereto, has been a member of the Union.

Buma has never held any official position with the Union.

5. Respondent Paul P. Edmunds is an individual who worked at ComGas from 1986 to the present and, at all pertinent times hereto, has been a member of the Union.

Edmunds has never held any official position with the Union.

6. Respondent Charles H. Grant, Jr., is an individual who worked at ComGas from 1986 to the present and, at all pertinent times hereto, has been a member of the Union.

Grant has never held any official position with the Union.

7. Respondent Raymond Lahair, Jr., is an individual who worked at ComGas from 1980 to the present and, at all pertinent times hereto, has been a member of the Union. Lahair served as Chief Steward and as a member of the Local's Executive Board during the period of January 1, 1996 through December 31, 1996. In his official capacity and on behalf of the Union, Lahair signed a collective bargaining agreement with ComGas in September 1996.

8. Respondent Charles McNeil is an individual who worked at ComGas from 1987 to the present and, at all pertinent times hereto, has been a member of the Union. McNeil has never held any official position with the Union.

9. Respondent Ronald Mezzano is an individual who worked at ComGas from 1982 until his retirement in 2003. At all pertinent times during his employment at ComGas, Mezzano was a member of the Union. Mezzano has never held any official position with the Union.

10. Respondent Thomas St. Pierre is an individual who worked at ComGas from 1982 to the present; and, at all pertinent times hereto, has been a member of the Union. St. Pierre has never held any official position with the Union.

11. Respondent Thomas Nugent is an individual who worked at ComGas from 1992 to the present; and, at all pertinent times hereto, has been a member of the Union. Nugent served as a Steward of the Local from January 1, 1996 through December 31, 1996. He also served as a “Strike Captain” during the ComGas lockout.

12. All of the individual Respondents, with the exception of Bradley, worked on street crews in the ComGas distribution department, where they were responsible for installing and repairing gas lines and services. Bradley worked as a clerk in ComGas’ dispatch area.

13. All of the following pertinent individuals served as officers in the Union throughout 1996: Lowell Alexander held the position of President; Kathleen Laflash served as Vice-President;² Michael Walsh held the position of Recording Secretary; and John McNair served as a Chief Steward. In their respective official capacities, all of these individuals sat on the Local’s Executive Board throughout 1996, and all signed a collective bargaining agreement with ComGas on behalf of the Union in September 1996.

B. COMPLAINANT’S EXPERIENCES AT COMGAS PRIOR TO THE LOCKOUT

14. Complainant began his employment with ComGas in the spring of 1980 as a temporary employee. Shortly thereafter, he obtained the full-time position of Dispatcher

² Laflash replaced Alexander as President of the Union in January 1997 and has continued in the position to the present date.

in ComGas' Southboro office. From 1980 to 1986, Complainant was a member of the Union. He also served as a Steward for the Union for a brief period of time in the mid-1980's. In March 1984, he transferred to the Dedham office where he worked as a Serviceman. In 1986, Complaint received his first promotion to a supervisory position. From 1986 to 1993, he received numerous promotions, almost on an annual basis. In October 1993, Complainant was promoted to Manager of Commercial and Industrial Sales and he held that position until he resigned from ComGas in October 1997.

15. As Manager of Commercial and Industrial Sales, Complainant had numerous responsibilities related to the sale of gas services to commercial and industrial customers. His duties included speaking at public events on behalf of ComGas, overseeing the work of technical sales engineers, and visiting prospective clients out in the field. It is undisputed that McGrath received exceptional job performance reviews in 1994 and 1995. Complainant testified that prior to the lockout, he considered himself a high functioning and excellent employee. Moreover, he claimed that prior to the lockout, he did not exhibit any symptoms of anxiety, distress, being overwhelmed, or suffering from inattention to detail. However, Respondents introduced evidence that prior to the lockout, Complainant's subordinates – David Allain and Lisa Carloni – perceived him as being unavailable, sensed that he appeared troubled, distracted, distant and slow in his interactions with co-workers, and believed he did not complete his supervisory responsibilities. On the other hand, Complainant's immediate supervisor, Robert Bucknell, testified credibly that his work performance prior to the lockout was exceptional. In addition, Bucknell claimed that he never received any notice that employees had complained about Complainant's work. I credit Bucknell's testimony

regarding Complainant's work performance prior to the lockout. But I reject Complainant's testimony regarding his not experiencing any symptoms of emotional or psychological distress prior to the lockout.

16. Complainant admitted that prior to the ComGas lockout, he had never been harassed by any Union members. He also acknowledged that he was on good terms with various members of the Union's bargaining unit including, in particular, Kathy Laflash, the Union's Vice-President, and John McNair, a Chief Steward. Although most of the individual Respondents did not know Complainant prior to the lockout, a few had previously met or worked with him. Specifically, St. Pierre testified that he met him when he installed gas service at his home. Bradley claimed that he and Complainant had worked with each other when Complainant was a dispatcher. Bradley also stated that they socialized together at a number of Union outings in the mid-1980's and they remained on good terms until the lockout. I credit Bradley's testimony on this matter.

17. Complainant testified that prior to the ComGas lockout, he had revealed his sexual orientation to only a few friends and confidants at work. Specifically, he claimed that he informed coworkers Sheila Dorian and Jonathon Carey and the Vice-President of ComGas, Stephen Bryant. He also believed that Dorian informed another ComGas employee, Ron O'Brien, that he was gay. In addition, Complainant admitted running into John McNair at a gay night club in the late 1980's.³ However, it is apparent that prior to the lockout a number of other people at ComGas either knew Complainant was gay or heard rumors to that effect. For example, Mike Chizy, who served as a Strike

³ McNair, who is not gay, testified that he was at the club with a gay friend. McNair stated that he told Complainant when he saw him that he did not have a problem with his sexual orientation. I found McNair to be a highly credible witness.

Captain for the Union during the lockout, testified that a female dispatcher had once told him that she had shared an apartment with Complainant and she had observed him engaging in sexual relations with another man. Moreover, Sheila Dorian claimed that two other ComGas employees, Jonathan Carey and Alison Mancusi, had told her that they knew Complainant was gay. Further, Robert Bucknell, Complainant's supervisor, stated that before the lockout he heard rumors that Complainant was gay. Bradley also testified credibly that prior to the lockout, he believed Complainant was bisexual.

Although I credit Complainant's testimony that his sexual orientation was not widely known at ComGas before the lockout, clearly more people knew or suspected that he was gay than he realized. Notwithstanding, I find that within the first month of the lockout, his gay identity became well known as a result the Union members' conduct, and Complainant's incident reports and legal claims related thereto. For example, Dennis Kefallinos, a ComGas supervisor, testified credibly that he did not know Complainant was gay prior to the lockout, but afterwards it was "out in the open."

C. THE LOCKOUT

18. On March 31, 1996, ComGas locked out the Union's members, effectively prohibiting them from coming to work. The lockout was precipitated by the expiration of the collective bargaining agreement between ComGas and the Union and the inability of the parties at the negotiating table to reach a successor agreement.

1. THE UNION'S PREPARATIONS FOR THE LOCKOUT AND CONTROL OF PICKETING ACTIVITIES

19. Prior to the lockout, the Union considered going on strike as a result of the breakdown in negotiations with ComGas, and prepared for a work stoppage. As part of

its preparations, the Union contacted another local, United Steelworkers of America Local 12003, for advice regarding picketing and other strategies. In 1993, members of Local 12003 had been similarly locked out of their employment by their employer, Boston Gas. Walsh testified that Local 12003 provided the Union with strategies with respect to picketing and other matters. Subsequently, Walsh purchased cell phones, picket signs, beepers, and contracted with a news clipping agency on behalf of the Union. At or near the commencement of the lockout, Walsh distributed the beepers to the Union's Chief Stewards and to the picketers at the "stationary" picket lines maintained by the Union at the ComGas facilities located in Worcester, Southboro, Dedham, and Cambridge. Walsh also distributed beepers to Alexander and Laflash, and to the Union's Financial Secretary and Treasurer.

20. As a result of the lockout, members of the Union were essentially thrown out of work and deprived of any wages or benefits. ComGas had hoped to use the lockout as an economic weapon that would compel the Union into agreeing to more favorable terms at the negotiation table. In response, the Union countered with economic weapons of its own by establishing twenty-four hour picket lines at ComGas' four principal facilities and organizing roving picketers or "rovers", who would picket "digs" out in the community. A "dig" is a location out in the field where a street crew was finding and repairing a gas leak. Most of the incidents of harassment alleged by Complainant occurred at dig sites picketed by Union members and supporters.

21. According to the testimony of the Union members, roving picket sites would be established after the Union received notification of a dig. Typically, the Union received notice of the digs at the stationary picket lines situated at ComGas' four principal

facilities. The Union also instructed its members to contact Alexander, Laflash, Walsh and the Chief Stewards regarding any digs discovered during the lockout. After receiving notice of a dig, Union members would then be dispatched to the scene.⁴ Sometimes as many as 50 to 100 picketers responded to a dig. At the dig picket sites, Union members were required to complete incident reports regarding their observations of the ComGas crews' conduct, work performance, and safety record. Union members, at both the stationary picket lines and at the digs, were also instructed by the Union to "sign-in" if they wanted to avail themselves with "Striker Relief Assistance." For example, Lahair, in his capacity as a Chief Steward for the Union, carried a clipboard at some digs for purposes of documenting Union members' attendance at the picket sites.

22. After the commencement of the lockout, Walsh organized picket lines and rallies. The Union also assigned members to serve as Strike Captains and Picket Captains. Lahair picked two strike captains for the Worcester area: Nugent and Michael Chizy. Both Walsh and Lahair testified that they picked individuals who had experience in union matters and respect within the bargaining unit to serve as Strike Captains. The Strike Captains in-turn oversaw the Picket Captains, who were responsible for supervising and scheduling each shift at the stationary picket sites. At the commencement of the lockout, members were scheduled to picket the Worcester office on Quinsigamond Road for four hours every other day. However, on or about April 23, 1996, Lahair and the Picket Captains changed the picket duties to six hours every other day. Throughout the lockout, the Union also attempted to maximize the attendance of its members at the digs. Lahair,

⁴ As discussed in detail below, Buma, Lahair, McNeil and St. Pierre responded to a call of a possible dig site at the Worcester Airport on April 7, 1996. They testified that the Union received the call at the stationary picket site located at the ComGas facility at Quinsigamond Road in Worcester.

Chizy, and Nugent attempted to develop a system based on a color-coded map of the City of Worcester. They hoped that the map would facilitate members attending roving picket sites near their residences. Lahair testified that he did not seek, nor was he required to seek, the formal approval of the Union to develop this system. I find the evidence in the record overwhelmingly established that the Union strategized and organized the picketing at the dig sites throughout the lockout and the Union actively dispatched members to the dig sites with frequency and efficiency.

23. All of the individual Respondents provided moving and credible testimony regarding the anger, stress, and anxiety they endured as a result of the lockout. They all testified credibly that they feared permanently losing their jobs, which they had hoped to hold on to until their retirement.⁵ In addition, they all provided stirring accounts of how the lockout caused severe economic consequences to both themselves and their families. Specifically, most of the individual Respondents testified that they were the primary wage earners for their families. However, as a result of the lockout, they were deprived of essential income and benefits, including medical insurance. For example, St. Pierre testified credibly about his concerns of just having a baby but no longer having any health insurance to protect his family. McNeil claimed that he fell behind on his alimony and child support payments for his four children and began receiving demand letters from the state. Mezzano stated that at approximately the same time that ComGas lockout started, his wife was laid-off from her job and, thus, his family suddenly had no wage earners. Bradley testified credibly that due to the lack of health insurance, he had to stop taking medications for his heart condition, high blood pressure, back pain, and

⁵ All of the individual Respondent's either continue to work for ComGas's successor entity, NSTAR, or have retired.

depression, which significantly heightened his stress and anxiety.

2. THE UNION'S CAMPAIGN OF HARASSMENT

24. Union members and officers all acknowledged that they tried to make the work environment for the supervisors and contractors at the digs as miserable as possible through harassing speech. In addition, the picketers attempted to use their public demonstrations at the picket sites to show the public that ComGas was not operating "business as usual." The Union also used the roving pickets for the broader purpose of convincing the public that ComGas was creating unsafe conditions and dangerous situations by having unskilled supervisors and contractors perform hazardous gas work. In particular, the Union had rovers document their observations of unsafe conditions and violations on "incident reports." Furthermore, Union members, including Charlie Grant, made numerous videotaped recordings of the digs in order to capture ComGas's alleged unsafe practices during the lockout.⁶

25. The videotapes corroborated the testimony from both supervisors and Union members that the picketers at the digs subjected the workers to incredibly hostile and difficult working conditions. Specifically, the picketers engaged in vicious name-calling and hurled numerous profane and demeaning epithets and insults at the workers on an almost continuous basis, oftentimes for many hours. At a few digs, as many as 50 to 100 picketers simultaneously showered the workers with a barrage of vulgar verbal abuse and defamatory statements. Although the picketers shouted profanities like a disorganized angry mob, all of the Union witnesses testified that their actions were part of an

⁶ The parties submitted many videotapes into evidence, many of which showed Complainant working at various digs. Grant, who videotaped most of the tapes viewed at the Public Hearing, estimated that he saw McGrath at approximately 10-20 of the dig sites he picketed during the lockout.

organized Union effort to harass the supervisors and contractors and, thus, put pressure on ComGas to end the lockout and advance the Union's bargaining position.

26. However, all of the Union officials denied specifically directing its members to harass Complainant based on his sexual orientation. The individual Union members likewise testified that they were never expressly directed to harass Complainant based on his gay identity. With the exceptions of Lahair and Bradley, Complainant has not alleged that any other Union official harassed him based on his sexual orientation. In addition, Complainant has failed to introduce any credible evidence that the Union's Executive Board or any of its elected officers expressly directed Union members to harass him based on his sexual orientation. However, I find that the Union members' harassment of Complainant and the other ComGas supervisors and contractors during the lockout was part and parcel of the Union's acknowledged effort to create a severe and pervasive hostile work environment for Complainant and the other supervisors and contractors working at the digs.

27. ComGas supervisors, Union members, and other witnesses present at the dig picket sites all testified that the picketers' profanity frequently included anti-homosexual slurs. For example, Lt. Steve Sergeant, a police officer who was frequently present at the digs during the lockout to keep order, testified that he regularly heard the word "scab faggot" and "faggot" directed at the supervisors. John Dustin, a ComGas supervisor who initially worked with Complainant during the lockout, testified that he was called "fudgey pants." Robert Saster, another supervisor who worked at the digs, claimed that he was called "fudge packer", "gay boy", "cocksucker", "fag", and "queer." Saster also stated he heard other supervisors being called similar anti-homosexual slurs. Robert Bucknell

testified that he was called “dickhead”, “cocksucker”, and “pussy” by the Union picketers. Another ComGas supervisor, David Ward, claimed that he was regularly called “cocksucker.” According to Ed Donovan, he and other supervisors during the lockout were called “fag”, “faggot”, “cocksucking motherfucker”, “fudge packer”, “queer”, and “queer bait.”⁷ In videotapes of the digs, picketers were also heard calling Donovan “pretty boy”, “ho”, “woman”, and “that a girl.” In addition, in the videos, picketers could be heard calling Zuschlag, “pretty boy”, and Faucher being called “sweetheart” and being asked, “Your husband know you’re working tonight?” Moreover, on a videotape of a dig on April 26, 1996, picketers were heard yelling at the workers, “shovel ya sissies.” In addition, in a video of a dig on May 14, 1996, picketers could be heard shouting to the workers, “Get in the hole so you can be alone with each other”, followed by the comment, “Are you holding hands.” In another video of a dig site, picketers commented to a contractor, known as “Timmy”, that “I hear you’re gay anyway, Timmy. I hear you like to take it... You’re a piece of shit, you fucking queer boy.” On the same video, picketers were further heard saying to the supervisors and contractors, “Fucking faggot cowards”, “Nothing but fags”, and “You’re all fucking fags.”

28. Union members readily admitted to using anti-homosexual slurs. For example, Lahair admitted to uttering “cocksuckers”, “fag”, and “faggot” at the supervisors.

⁷ From the testimony of the witnesses and as seen on the videotapes, Donovan appeared to endure the worst of the picketers’ wrath. Based upon my observations of Donovan at the Public Hearing, I found that he was clearly traumatized by the harassment as he tried to avoid at all costs giving detailed answers to questions regarding the work environment at the digs during the lockout.

Nugent testified that he called management workers, “fudge packer.”⁸ McNeil recalled calling supervisors and contractors “cocksuckers” and “fag.” Grant stated that he used the term “cocksucker.” In addition, some Union members admitted that they made statements and threats to sodomize supervisors. Specifically, Mike Chizy testified that he taunted supervisors with the remark: “Do you like getting it shoved up your ass?” Moreover, Walsh recalled yelling to a supervisor, Dennis Keffilanos, “[You’re used] to having a one footer up your ass, you gay boy.” Walsh testified that he did not believe Keffilanos was gay. Laflash stated that she also heard homosexual taunts from the picketers including, “I’m going to fuck you.”

29. Furthermore, supervisors and Union members testified that the picketers regularly made lewd and profane remarks about various supervisors’ physical attributes and personal difficulties. For example, Sheila Dorian, a management employee who worked for ComGas during the lockout, testified that the picketers would make reference to her weight by chanting, “Sheila the whale.” Witnesses testified that picketers told another manager, Ray Plante, that he “wasn’t man enough to create a whole child” because he had a child born with birth defects.⁹ In addition, Union members during the lockout called Vito Zuschlag “gimp” and “flipper” because he had a deformed arm. The picketers also taunted Donovan about his alcoholism problems.

30. In addition, supervisors and Union members testified that picketers taunted

⁸ In addition to the sexual profanity, Nugent acknowledged hurling ethnic slurs, such as “pollock” and “guiney” at the supervisors. Aside from Nugent’s isolated remarks, the record is devoid of picketers making any other ethnic or racial slurs.

⁹ In a complaint filed by Plante in Superior Court against various individual Union members, Plante alleged that a Union member named Robert Stonebreaker, shouted over a bullhorn at a job site, “Don’t ask Ray Plante to fix this. He can’t fix what he did to his daughter.” Plante’s daughter purportedly had Down’s Syndrome.

supervisors and contractors by accusing them of perverse sexual behavior and infidelity. For example, Dave Allain, a supervisor employed with ComGas, recalled picketers taunting him by claiming that he had sex with three female co-workers. Allain also claimed the picketers told him that his wife was having sex with other men while he was working at the digs. McNair testified that the picketers frequently taunted a contractor named “Timmy”, by referring to his wife as the “Plymouth pump” because she allegedly had sexual habits with other men. Walsh further claimed that Union members accused Brian Hawkesworth, another ComGas supervisor, of beating his wife. Laflash also stated that she always heard picketers yelling comments about supervisors and contractors’ sexual activity at the roving picket sites.

31. Union members and their supporters also harassed ComGas supervisors and officials in other ways. Walsh testified that they setup pickets at the residences of upper-management personnel and then yelled profanities such as “rich fucking bastard”, “corporate whore”, and “fucking asshole.” Walsh also claimed that picketers banged on ComGas vehicles entering and exiting the Southboro facility. Dorian also testified that her car was scratched or “keyed.” In addition, supervisors and Union members testified that “rovers” frequently followed ComGas vehicles. Lahair, Buma, McNeil, Bradley, and Nugent all testified that they followed ComGas vehicles to both harass the supervisors and to discover new dig sites. Bucknell testified that he was frequently followed by Union members as he drove his service van. He also testified that on one occasion Union picketers blocked his ComGas van, which necessitated his calling the police for aid.

32. Supervisors and Union members further claimed that picketers and the workers occasionally threatened each other with physical violence. Bradley claimed that

Zuschlag tried to run over him with a service van, forcing him to grab on to the van's hood ornament "for dear life." Alexander also testified that he was struck by a contractor's vehicle at a picket site.

33. As seen on the videotapes, some supervisors received far more verbal abuse than Complainant. In particular, Union members harassed Donovan and Zuschlag far more than most of the supervisors and contractors. Tom Angelo and Robert Saster also testified that they observed that other supervisors received more harassment than Complainant. In addition, they claimed that Complainant was subjected to the same slurs and profanities shouted at the other ComGas supervisors working at the digs. Furthermore, all of the individual Respondents testified that they harassed Complainant considerably less than other supervisors and contractors. For example, McNeil recalled directing more profanity at Saster and Donovan. Buma testified that he directed more of his profanity at Donovan, Wunschell, Zuschlag, and Faucher. Grant claimed he directed more of his profanity at Faucher, Donovan, Zuschlag, and O'Connor. Mezzano stated that he directed more of his profanity at the backhoe operators because they were performing his job. I credit the testimony of the supervisors and Union members that some supervisors working at the digs were harassed more than Complainant. I further find that Union members called the other supervisors many of the same slurs directed to Complainant.

34. Witnesses also testified that many supervisors and contractors interacted or engaged in "provocative" conduct with the picketers, by smiling, smirking or engaging in conversation with the picketers; and, as a consequence, they were harassed far more than the others. Saster testified that some of the contractors would provoke picketers, which

would increase the tension and escalate the verbal abuse. In addition, Walsh testified the picketers' would become inflamed when some management personnel taunted picketers at the ComGas facility in Southboro, by giving picketers the middle finger, blowing kisses at the picketers, waving money at the picketers, or engaging in gross and disturbing gestures.¹⁰ Chizy testified that he directed more of his harassment at one supervisor, Roger Faucher, because Faucher harassed and made obscene gestures toward Union members. Grant likewise claimed that he hurled more abuse toward Faucher because he would antagonize him by making a reference to Grant's alcohol problem.¹¹

35. Laflash and Walsh testified that on behalf of the Union, they produced and distributed leaflets entitled, "Picket Line Conduct", which instructed bargaining members on how to conduct themselves on the picket line. The instructions to the picketers included: "Do not make any threats", and "No Profanity." In addition, the Union produced and distributed numerous newsletters to its members, entitled "Lockout News", that counseled members to "Keep Calm, Peaceful and Stay Focused, Remember, They Locked Us Out" and to not use profanity at the picket sites. However, Laflash, Walsh, and Alexander all testified that these messages were largely ignored by both Union members and officers. In particular, Laflash admitted that she regularly used profanity and called people names at the picket sites. Walsh also acknowledged that he uttered harsh obscenities including many sexually derogatory insults. Furthermore, both Walsh and Laflash acknowledged that despite being present when Union members shouted profanities and insulting remarks at the supervisors, they made no effort to calm the

¹⁰ Walsh claimed that one supervisor placed a fake mound of dog feces on the dashboard of his car and would point to the feces and then point to the Union members as he drove past them at the picket sites.

¹¹ Grant stated that Faucher would tip his hand at his mouth in a manner suggesting he was drinking.

picketers down or diffuse the harshness of the members' language.

3. COMPLAINANT'S ALLEGATIONS OF HARASSMENT

36. At the commencement of the lockout, ComGas assigned the work previously performed by Union members to supervisors and independent contractors.¹² ComGas initially assigned Complainant to work as a courier with John Dustin, another managerial employee. Both Complainant and Dustin testified that they were not subjected to any harassment from Union members during this assignment. On or around April 5, 1996, Complainant was then reassigned by ComGas to work on a distribution crew with Vito Zuschlag, who worked as a distribution supervisor. Complainant's duties and responsibilities as a member of the distribution crew included assisting in the response and repair of gas leaks in the greater Worcester area. Although Complainant provided specific details of six separate incidents of harassment, he testified that Respondents harassed him frequently throughout the lockout. Moreover, he filed numerous incident reports regarding these incidents with ComGas, but he claimed he did not write down every instance of offensive conduct. I credit Complainant's testimony on this matter.

37. In response to Complainant's incident reports and complaints of harassment, ComGas did offer him an "inside" position during the first month of the lockout, which would have prevented him from being exposed to the wrath of the picketers at the digs. However, Complainant rejected the offer. Specifically, Bucknell testified that he offered to switch positions with Complainant, but Complainant refused because "the Union would then have gotten the better of him." I credit Bucknell's testimony.

¹² The Union members repeatedly referred to the independent contractors as "scabs."

a. **April 7, 1996**

38. Complainant testified that the first incident of harassment he experienced during the lockout occurred on April 7, 1996. On this occasion, Complainant and Zuschlag were eating dinner in a parked ComGas van on an access road leading to the Worcester airport. According to Complainant, a car filled with Union members (subsequently identified as Buma, Lahair, McNeil, and St. Pierre) then arrived at the site, exited the vehicle (which belonged to St. Pierre), and began approaching the van.¹³ Complainant testified that upon seeing the Union members, he exited the van and got into his own ComGas van located approximately fifteen feet away. Complainant stated the Union members then started to shout obscenities at Zuschlag. Complainant then started his van and proceeded to leave the area. The Union members then got back in St. Pierre's vehicle and followed Complainant out of the airport.

39. Complainant testified that he drove his van out of the airport and then made a right-hand turn onto Pleasant Street. He then stayed on Pleasant Street until he reached a set of lights at Chandler Street. He stated that at this intersection, the vehicle with the Union members pulled alongside his van and the occupants began yelling obscenities toward him, including "faggot", and "cocksucker." Complainant claimed he then picked up his cell phone and, in response, someone in St. Pierre's car remarked, "Who are you calling, nobody is going to help you." Complainant did not know and could not identify which of the occupants in St. Pierre's vehicle made any particular comment. He testified that he then proceeded to make a right turn onto Chandler Street and followed Chandler

¹³ At the time of the incident, Complainant did not know the names of Union members and only learned their identities afterwards from Zuschlag. However, all of the individual Respondents named by Complainant admitted to being involved in this incident.

Street to the intersection at Park Avenue. He stated that at this intersection, St. Pierre's vehicle again pulled closely alongside his van, only one to two feet away. Complainant claimed that the Union members then shouted obscenities at him that related to his sexual orientation. Specifically, Complainant alleged that the occupants of St. Pierre's vehicle yelled, "I hear you like to suck cock" and "I'll pull your mustache off, you faggot." He further testified that someone from St. Pierre's car threatened him by stating, "We'll put you in a box" and "we'll be back." Complainant also stated that one of the Union members punched Complainant's vehicle and pushed in the van's side-view mirror. Complainant testified that after he made a right-hand turn onto May Street, the Union members continued to follow him. He stated that he then made a left turn onto Park Avenue, while St. Pierre's vehicle proceeded straight on Chandler Street. Complainant denied smirking or laughing at the Union members. He testified that the Union members' conduct made him feel terrorized and put him in fear of physical harm. He also felt humiliated, embarrassed, and frightened by the incident. Although I decline to credit Complainant's entire version of this incident, I do credit his testimony regarding the fear and distress he suffered as a result of this incident.

40. According to the individual Respondents involved in this incident, the Union had received a call that two ComGas vehicles had been spotted at the airport. In response, Lahair, Buma, McNeil, and St. Pierre drove in St. Pierre's vehicle to the airport to see if a dig was ongoing. Lahair, Buma, McNeil, and St. Pierre all testified credibly that they denied knowing Complainant at this time or knowing anything about his sexual

orientation.¹⁴ They also acknowledged that when they arrived at the location where Complainant and Zuschlag were parked, they exited their vehicle and began yelling at Zuschlag. Similar to Complainant's testimony, the Union members testified that after Complainant started his van and began to leave the area, they got back into St. Pierre's car and followed behind Complainant as he drove down the access road onto Airport Road, and then after he made a right hand turn onto Pleasant Street. The Union members, however, denied that they purposefully followed or chased Complainant. Rather, they all testified that they were merely proceeding back to the ComGas picket site at 25 Quinsigamond Road in Worcester. Respondents submitted an enlarged detailed street map of Worcester that supported the Union members' contention that the route they took after leaving the airport was the shortest and most direct way to the picket site at Quinsigamond Road. The Union members also denied having any interaction with Complainant at the intersection of Pleasant and Chandler Street. However, they admitted to interacting with Complainant at the intersection of May and Park Streets. According to the Union members, at this intersection, Complainant's vehicle was in the left lane on May Street, which was designated for left turns only, when St. Pierre's vehicle pulled alongside Complainant in the right lane because they intended to proceed straight on May Street. The Union members in St. Pierre's car testified that when they pulled alongside Complainant's van, Complainant held up a crucifix attached to a chain around his neck. They further observed Complainant kiss the crucifix, blow a kiss at them, and then point the crucifix in their direction. They claimed that Complainant then

¹⁴ St. Pierre had testified that he previously met Complainant when he installed gas service at Complainant's home. I find this inconsistency immaterial as St. Pierre likely did not recognize him. More importantly, I am convinced that at the time of this incident, which occurred at the beginning of the lockout, all the individual Respondents involved merely regarded Complainant as another ComGas supervisor or contractor.

smiled and smirked at them. In response, St. Pierre testified that he rolled down his window and yelled at Complainant, “What are you looking at? I’ll put you in a box.” St. Pierre also admitted to reaching over and pushing the side mirror on Complainant’s van down on its pivot, but denied otherwise damaging the van. Buma claimed that he raised his middle finger at Complainant and yelled, “Fuck you, you scab bastard.” Lahair testified that upon seeing Complainant kiss his crucifix and smile at him, he yelled, “motherfucker, fucking asshole, what the fuck are you doing.” All of the Union members in St. Pierre’s car denied banging on the side of Complainant’s van. Moreover, they all denied using the terms “cocksucker”, “fag”, “faggot”, or any other anti-homosexual slur. They all further denied hearing anyone else in St. Pierre’s vehicle utter these particular profanities. I credit the Union members’ testimony that they did not purposefully follow or chase Complainant. In addition, I credit their testimony regarding Complainant’s holding up a cross to them and then smirking and smiling. Notwithstanding Complainant’s conduct, I believe that he reacted out of fear and apprehension given the fact that just a few minutes earlier, the Union members verbally abused Zuschlag and then appeared to be following his van as he left the airport. I also credit Complainant’s testimony that one or more of the occupants of St. Pierre’s vehicle called him a “cocksucker”, “fag” or “faggot”, even though they had no knowledge of his sexual orientation.

b. April 25, 1996

41. It is undisputed that on April 25, 1996, Complainant worked at a dig on North Main Street in Millbury, MA. Zuschlag and two independent contractors were working with Complainant at the site. It is also undisputed that Buma and McNeil arrived at the

site and began harassing the Complainant and the other workers. According to Complainant, when he and the two contractors were in the hole, Buma stated, “Look, two scabs and a fag.” Complainant testified that Buma also yelled, “Nice earring faggot, do you have more at home?” and “Do all your boyfriends wear earrings?” Contrary to Complainant’s testimony, Buma testified that he first commented to McGrath, “Why are you doing my job, you have no clue”, whereupon, Complainant stated in a sarcastic voice, “Because I like it.” Buma claimed that Complainant’s response angered him, so he stated, “nice earring”, and then asked Complainant if his “boyfriends liked it.” Buma testified that he made the “boyfriends” comment because Complainant wore an earring and not because he knew Complainant was gay. Buma also denied calling him a “fag” or “faggot.” McNeil corroborated Buma’s testimony regarding this incident and denied hearing Buma use the term “fag” or “faggot.” Although I find that Complainant likely made a sarcastic comment to Buma, I credit Complainant’s testimony with respect to the offensive comments Buma made to him on this occasion. I also believe that Buma made these specific comments because he knew or suspected that Complainant was gay.

c. April 26, 1996

42. On April 26, 1996, McGrath worked at a dig site located at Olean and Mower Streets in Worcester. The videotape of the incident showed that other ComGas managers, including Donovan, Wunschel, Angelo, and Zuschlag, were also present at the site. Numerous Union members, including Edmonds, Bradley, Grant, Lahair, McNair, and Chizy were among the many picketers at the site. Complainant claimed that on this occasion, Edmonds made numerous offense remarks to him, including: “faggot”, “hey sweetie”, “do you want some K-Y up that hole, sweetie”, and “nice ass, are you going to

wear a Speedo when you go to Provincetown this summer? I might like a piece of that ass myself.” Complainant further testified that Bradley called him, “faggot” and “fucking faggot”, and remarked, “who are you looking at faggot”, and “take your eyes off me you fucking faggot.” Complainant also stated that Bradley commented to Donovan in Complainant’s presence, “Hey Eddie, you know you’re working with a fucking faggot.” In addition, Complainant claimed that Grant stated to him, “Don’t look at me, you fucking faggot”, and shouted to Donovan in the presence of Complainant, “Hey Eddie, don’t go in the truck with him, he’s going to try and fuck you.” McNair admitted that at this dig site he heard various Union members call Complainant, “faggot.” Complainant testified that at some point during the dig, the Union members’ harassment of him became so severe, he approached a Police Officer patrolling the site and asked the officer if he could get the picketers to stop. I credit Complainant’s testimony. Moreover, based on the specificity of the comments made to Complainant, I find that at the time of this incident, Edmunds, Bradley, and Grant knew or believed that Complainant was gay.¹⁵

43. As seen in the videotape of this incident, most of the supervisors at the site were subjected to severe and pervasive harassment from the Union picketers. Donovan and Zuschlag, in particular, received the brunt of the picketer’s abuse. Donovan was regularly referred to as “honey” and “pretty boy”, and subjected to the picketers chant, “I don’t know what I’ve been told, we know Eddie is a ho.” Zuschlag was repeatedly called a racist and “super Mario.” With respect to Complainant, in the video the picketers can be heard yelling: “Peter, don’t bend over like that”; whereupon Complainant is then seen smiling and laughing. In the video, picketers can also be heard commenting to

¹⁵ As stated above, Bradley admitted that prior to the lockout he believed Complainant was bisexual.

Complainant, “You’re use to picking up that soap, huh?”, and “he had a bad day, his Gerbil died this morning.”

44. Edmonds testified that when he arrived at the picket site, he noticed Complainant standing alone near a ComGas van. He claimed he then approached Complainant and called him a “scab.” According to Edmonds, Complainant responded by stating “go away nigger.” Complainant adamantly denied calling Edmonds “nigger.” Although I believe that Complainant and Edmonds likely had an exchange of words, I find that Edmonds provoked the confrontation and I credit Complainant’s testimony that he never uttered the word “nigger.”

45. Various Union members and a ComGas supervisor testified that Complainant acted in a provocative manner toward the picketers on this occasion. Edmonds and Bradley stated that Complainant posed for the picketers, smiled, and then flexed his muscles. According to Bradley, after he flexed his muscles, Complainant stated, “I’ve been pumping up.” Edmonds stated that in response to Complainant’s provocative conduct, he and other Union members began calling him “faggot.” McNair, who I found to be a highly credible witness, testified that he observed Complainant laughing and taunting the picketers. In response, McNair approached Complainant and told him to “put his head down” and stop inciting the picketers. According to McNair, Complainant shook his head and complied. Lahair and Grant stated that they likewise observed Complainant provoke the picketers. In addition, Donovan, the lead ComGas supervisor at the site, testified that after he observed Complainant taunting the picketers, he told Complainant to stay in a ComGas van. Complainant initially denied making any provocative gestures toward the picketers, but then admitted to approaching the picketers

at one point and staring at Bradley. Complainant further admitted to being approached by a police officer at the scene and being asked by the officer to move away from the picketers. Although I credit the Union members' testimony regarding Complainant's "provocative" actions and their responses thereto, I also credited Complainant's testimony that he considered the Union's profane and vulgar comments to be highly offensive and unwelcome. Moreover, I believe that Complainant engaged in the provocative conduct only after the Union picketers initiated the confrontation by making harassing remarks to him and the other workers.

d. April 30, 1996

46. On April 30, 1996, Complainant again worked at a dig at Olean and Mower Streets. Numerous Union members picketed the site including Bradley, McNair, Mezzano, Grant, and Lahair. Complainant testified that while sitting in a company vehicle at the location, Mezzano yelled, "Hey gay boy", and then placed his hand on his groin and said, "Fucking faggot, cocksucker." Complainant also claimed that Mezzano screamed to him, "Jump in the hole, fag boy", "watch out, you guys will get AIDS because of him"; and "put the fag boy in the hole."¹⁶ Mezzano denied making any anti-homosexual slurs toward Complainant. In addition, Complainant stated that Grant screamed at him, "You think it's funny, fag boy?" In a video of this dig, a picketer could be heard yelling, "There's the little faggot"; and, another picketer said, "All you guys will get AIDS' cause of him." Notwithstanding the picketers' harassment of Complainant, the videotape of this dig showed that Zuschlag received far more abuse from the picketers than the other supervisors. I credit Complainant's testimony regarding the comments

¹⁶ I credited Complainant's testimony that he did not have AIDS at this time.

made by the Union picketers on this occasion. I also find that Mezzano and Grant, based on their specific comments to Complainant on this occasion, knew he was gay.

47. Several witnesses alleged that Complainant likewise engaged in provocative conduct on this occasion. Lt. Sergeant witnessed Complainant with his back to the picketers and “shaking his behind.” Sergeant then immediately approached Complainant because he feared his actions would incite the picketers. Sergeant stated that he told Complainant he would have to stop engaging in that type of conduct. Furthermore, Grant testified that he recalled Complainant making an “L” (for “loser”) with his fingers on his forehead toward the picketers. Complainant claimed that he did nothing to provoke any of the Union members. However, he did admit that on many occasions he tried to divert the picketers by laughing or talking with a co-worker. He also acknowledged that he took photos of the picketers. I credit the testimony of Lt. Sergeant and Grant regarding Complainant’s provocative conduct on this occasion. However, I likewise believe that Union members initiated the confrontation and Complainant only engaged in the provocative conduct after the members began to verbally harass him.

e. May 8, 1996

48. On or about May 8, 1996, Complainant worked at a ComGas dig site located at Main and Olean Streets. He testified that at this dig, Bradley yelled, “Hey, I had a great time in Maine this weekend. I went to Ogunquit and saw all of Petey’s friends.” Complainant further claimed that Bradley yelled, “I will see you tomorrow”, which Complainant construed as a reference to their scheduled appearance the next day in Superior Court with respect to his complaint for injunctive relief. I credit Complainant’s testimony.

49. Bradley testified that he had returned earlier that day from a trip to Ogunquit, ME and was talking with another picketer on the picket line. He claimed that he never made any reference to Complainant; rather, he stated that he told the other picketer that he had seen friends and relatives of “Peter Lemanski”, a fellow bargaining unit member, who owned a house in Ogunquit. Grant testified that on this occasion he observed Complainant take a notebook and raise it up to the picketers. Grant also claimed that he did not recall anyone using the term “fag” or “faggot” and he recalled that Zuschlag and the independent contractors bore the brunt of the picketers’ harassment. Complainant admitted that at his deposition, he had no memory of being harassed by picketers on May 8, 1996; however, I credit Complainant’s testimony regarding the harassment he endured on this occasion.

f. July 14, 1996

50. Complainant testified that on or about July 14, 1996, he worked at a dig located at Jolma Road in Worcester.¹⁷ Numerous Union members picketed the site, including Bradley, Buma, Edmonds, Grant, Lahair, Mezzano, Nugent, and St. Pierre. Various Union officials were also present, including Alexander, Laflash, Walsh, McNair, and Chizy. Complainant testified that on this occasion, Nugent repeatedly referred to him as “Tinkerbelle.” In addition, he claimed Nugent yelled, “Tinkerbelle, why don’t you call 1-800-spank-me, oh that’s 1-900-spank-me.” Complainant also stated that Nugent made the following comment to Timothy Fox, another ComGas supervisor: “Hey Fox, watch out you better wear an ass protector bending over in front of Tinkerbelle.” Furthermore, Complainant testified that Bradley stated to him, “Come on Tinkerbelle, call someone who

¹⁷ Complainant originally testified that this incident occurred in late-June 1996, but he revised his testimony after seeing his incident report of this event. I find this discrepancy immaterial.

cares, call your lawyers, get them down here so they can hear it first hand.” He also claimed that Grant referred to him as “Tinkerbell.” Lastly, Complainant claimed that unknown picketer(s) shouted, “Petey, you are a piece of shit. You look familiar – I know you’re one of the Village People. Hey, why don’t you requisition a pink hardhat?” I credit Complainant’s testimony regarding the comments made by the Union picketers on this occasion.

51. Bradley recalled yelling at Complainant, “call someone who gives a shit”, after seeing him talk on his cell phone. Bradley denied making any of the other statements alleged by Complainant, but he claimed that he did hear someone call Complainant, “Tinkerbell.” Grant admitted to calling Complainant, “Tinkerbell”; but he claimed that he did not make the remark because Complainant was gay. Rather, Grant testified that he used the term “Tinkerbell” because Complainant worked in an office. Nugent admitted that he made a comment to Complainant about his wearing an earring. Nugent also stated that after he observed Complainant making a telephone call, he shouted, “Who are you calling, 1-800-spank-me”, which he meant as a lewd sexual slur, not as an anti-homosexual remark. I decline to credit the testimony of Bradley, Grant, and Nugent regarding the comments they made at the Jolma Road dig site.

52. Union members testified that Complainant again engaged in provocative conduct at the Jolma Road dig. Specifically, Grant testified that Complainant again made an “L” sign with his fingers on his forehead toward the picketers. Laflash also claimed that she observed Complainant carrying a tape recorder and smiling, which inflamed the picketers. Bradley stated that he observed Complainant roll down the door window of a truck he was sitting in and then stick his head out the window with his hand cupped

around his ear to indicate he was listening. Bradley claimed that Complainant would also point to his pad of paper and write things down on his pad, which further incited the picketers and intensified the harassment. Complainant admitted to making the “L” symbol on his forehead, but denied engaging in any other provocative conduct. I credit the Union members’ testimony regarding Complainant’s provocative conduct; however, similar to the previous incidents, I believe that he engaged in this behavior only after the Union picketers began harassing him.

g. Other Incidents Of Harassment Involving Complainant

53. Although Complainant did not provide any specific testimony regarding being subjected to any harassment at the dig site on April 25, 1996, at Plantation Street in Worcester, Walsh testified that he witnessed Complainant working at this dig. Walsh admitted that he heard one or more members of the Union make anti-homosexual slurs toward Complainant including: “Pete, you fucking fag.” I credit Walsh’s testimony.

54. Michael Hayes, a ComGas employee, testified regarding comments made to him and other workers by Bradley at another dig site on May 8, 1996, located at Lovell Street in Worcester. Complainant was not working at this dig. Hayes claimed that at this site, Bradley made the following derogatory comments: “You bend over that hole pretty good, Hazy. You bend over almost as good as Pete McGrath. You probably take it up the ass like him too. In fact you and Pete probably do it together.” Hayes also testified that Bradley made a similar comment to another ComGas worker: “You’re awfully cute. You must be a homo. We should get Pete down here, because Pete likes homos.” Lastly, Hayes claimed that Bradley made the following statements to several private contractors working at the Lovell Street dig: “Look how small you guys are. You look like little

boys. You and Pete should get together because he likes little boys.” Hayes’ testimony is consistent with an incident report he wrote regarding the events at this dig site.

Bradley denied making these statements. I credit’ Hayes testimony.

4. UNION OFFICIALS’ KNOWLEDGE OF THE HARASSMENT

55. On or about May 3, 1996, Alexander and Walsh, in their official Union capacities, received copies of separate letters sent to, respectively, Mezzano, Bradley, and Edmonds. The letters were sent from Victor DiNardo, ComGas’s Director of Human Resources. Without describing the specific conduct engaged by the Union members, each letter stated, “Please be advised that [ComGas] is currently investigating your alleged misconduct.” The letter to Buma indicated that the incidents involved his actions on April 2, 1996, at Gold Street in Worcester,¹⁸ and April 30 at Mower and Olean Streets in Worcester; the letter to Mezzano referred to his actions on April 30 at Mower and Olean Streets; and, the letter to Edmunds referred to his actions on April 26 at Mower and Olean Streets. The Union officials admitted that they did not investigate the misconduct of its members as vaguely described in DiNardo’s letters. I credit the Union officers’ testimony with respect to the insignificance they attributed to these notices. In addition, given the vagueness of the letters, I do not believe they put the Union on notice with respect to its members’ harassment of Complainant.

56. Many Union officers were present at the various dig sites where Union members purportedly harassed Complainant. Specifically, Lahair was in St. Pierre’s vehicle on April 7; Walsh was at the dig of April 25 at Plantation Street; Lahair, McNair, and Chizy

¹⁸ Complainant claimed he was first harassed on April 7, 1996, and, therefore, an incident on April 2 at Gold Street would not likely have pertained to him.

were present at the dig of April 26 at Olean and Mower Streets; Lahair was present at the dig of April 30 at Olean and Mower Streets; and, Alexander, Laflash, Walsh, McNair, Chizy, and Lahair were at the dig of July 14 at Jolma Road.

57. Moreover, on May 5, 1996, Complainant filed a complaint in Worcester Superior Court seeking an injunction against all of the individual Respondents except for Nugent. In his complaint, Complainant asserted claims for defamation, invasion of privacy, violation of Massachusetts Civil Rights Act, G.L. c. 12 § 11I, assault and battery, and conspiracy. The complaint identified many of the incidents of harassment described above. Although the Union was not a party to this action, the Union received a copy of his complaint on or before May 8, 1996 and provided legal counsel to the named defendants. Given the Union's participation in the Superior Court proceeding, I find that the Union clearly had notice of the specific allegations of harassment by May 8, 1996.

5. COMGAS' SUPPORT OF COMPLAINANT'S ACTIONS

58. Complainant admitted that ComGas funded his Superior Court action against individual Union members filed in May 1996. In addition, ComGas' counsel, Palmer & Dodge, filed the Superior Court complaint on Complainant's behalf and initially represented him in the proceeding. ComGas also paid for all of Complainant's legal bills associated with the lawsuit. Complainant further testified that ComGas' legal counsel initially represented him with respect to his claims filed at the Commission. Specifically, ComGas' legal counsel during the lockout, Palmer & Dodge, drafted his initial charge of discrimination (No. 96-SEM-0839). After the lockout ended, in October 1996, ComGas engaged Complainant's present counsel to represent him in the proceedings at the Commission. ComGas then continued to pay for all expenses and legal fees associated

with Complainant's claim until sometime in 1999. I find that ComGas supported and sponsored Complainant in his legal actions against the Union and its individual members, including his complaints presently before the Commission, in furtherance of its bitter battle with the Union. However, I decline to draw the inference that ComGas provoked Complainant into filing his complaints, or that Complainant filed these actions in bad faith or to merely support ComGas in its struggle with the Union.

D. DAMAGES

1. COMPLAINANT'S PSYCHOLOGICAL HISTORY PRIOR TO THE LOCKOUT

59. As evident from Complainant's testimony, his medical records, and the opinions of the various medical experts who testified in this proceeding, Complainant had a significant history of childhood trauma that caused him lasting psychological problems. Specifically, Complainant admitted to having a traumatic childhood, which included being abandoned by his father, having a severely alcoholic mother, and being terrorized and sexually molested by his brother.

60. Notwithstanding his medical and psychological history, Complainant testified that in the two years immediately preceding the lockout, he did not exhibit any symptoms of anxiety, distress, or of being overwhelmed. I decline to credit Complainant's testimony on this matter since it is completely contradicted by the records of Dr. Sidney Smith, a psychologist, who treated Complainant from December 1994 through June 1996. Dr. Smith's notes indicated that Complainant regularly expressed feelings of depression and

isolation prior to the lockout.¹⁹ For example, Dr. Smith's note of January 2, 1995, stated:

I feel [Complainant] is clinically depressed, little tasks become gargantuan, low self-esteem, terrible fears or rejection, feeling isolated, generally unhappy and alone. His depression affects much of his work life. Small tasks become overwhelming; he often has episodes of crying. Last week he left work to go home and found himself in tears for 2-3 hours and went back to work again.

61. Furthermore, in the weeks preceding the lockout, Dr. Smith's notes indicated that Complainant continued to complain of severe emotional difficulties. Specifically, on January 11, 1996, Complainant "came in after a 2 week vacation with a sense of despair, shame and isolation." On February 5, 1996, the notes state that Complainant entered the session "feeling isolated and depressed." On February 7, 1996, Complainant indicated that he was having random sex and Dr. Smith "cautioned him strongly against the damages that were implicit in this conduct." On March 27, 1996, just a few days prior to the beginning of the lockout, Dr. Smith noted, "Peter came into the session today stating that he was very depressed. The process seems to be wearing and exhausting."

2. EMOTIONAL DISTRESS ATTRIBUTABLE TO THE HARASSMENT

62. Complainant claimed that during the course of the lockout and continuing thereafter, he began to suffer severe anxiety and depression as a result of Respondents' conduct. But Dr. Smith's records, from the beginning of the lockout through June 20, 1996, do not indicate that Complainant ever mentioned being subjected to harassment while at work. Rather, Dr. Smith's records of Complainant's therapy sessions during the lockout merely reflected that Complainant continued to deal with the same emotional

¹⁹ I allowed Respondent to introduce both Dr. Smith's original hand-written notes (Ex. 21) and, due to the illegibility of Dr. Smith's handwriting, and the vagueness and brevity of his comments, a typed transcription prepared by Dr. Smith (Ex. 22). In the typed version, Dr. Smith provided more detail with respect to the counseling sessions than in the hand-written version. I find the discrepancies between the two versions, as outlined in detail in Respondent's Proposed Findings of Fact, to be de minimus.

issues he dealt with prior to the lockout, namely, his gay identity and his family. In particular, in the therapy sessions that occurred during the lockout, Complainant expressed his acceptance of his homosexuality and his willingness to confront discrimination. Specifically, Dr. Smith's notes of April 25, 1996, state in part that Complainant is "coming out with energy, values wanting to declare the equality of the homosexual in our culture. Wanting to stand up to people who are against gay men." On May 2, 1996, Dr. Smith noted that "Peter came in this hour and expressed his fearfulness and intimidation at what he called scathing bigotry, which he believed, was in our culture around the issues of gay [men]. It frightened him and yet he was determined to stand up to it with a sense of righteousness."

63. Although Complainant either could not recollect or only vaguely remembered the topics and matters addressed during his sessions with Dr. Smith, he testified at length about a telephone conversation he had with Dr. Smith in June 1996.²⁰ According to Complainant, during this phone call he allegedly told Dr. Smith about the terrible harassment he suffered at work and expressed feeling suicidal as a result thereof. He further stated that Dr. Smith suggested he seek hospitalization. However, neither Dr. Smith's original hand-written notes, nor his amplified transcribed version mentioned or referred to the alleged telephone conversation. I decline to credit Complainant's testimony regarding his alleged emotional telephone conversation with Dr. Smith in June 1996.

64. Complainant last treated with Dr. Smith on June 20, 1996. In a note dated July

²⁰ Complainant believed the telephone conversation occurred after June 20, 1996, the last time he saw Dr. Smith, and prior to seeing Dr. Kassel.

18, 1996, Dr. Smith stated, “Abrupt ending – no response to calls or letters – no confirmation of.... Left message last eve that I would respect....No idea why all good will ended w/out explanation.” Strangely, Complainant told his subsequent therapist, Dr. Peter Kassel, not to contact Dr. Smith for information about his treatment. Complainant testified that he made this request because he felt badly that he had not spoken to Dr. Smith regarding the discontinuance of his treatment. In May 1998, approximately two years after he last saw Dr. Smith, Complainant called Dr. Smith apparently out-of-the-blue. Dr. Smith’s transcribed note of May 6, 1998 states:

Peter called and asked if we could meet. Two years have past. He shared at that time that he needed [to] find a gay therapist which he did and expressed apology and regret for the abrupt closure. He came to say good bye. He also shared that he has been going through a terrible time in the strike with ComGas. He gave me many details how he felt he was discriminated against, how he was mocked and punished for being a homosexual. He did not wish to schedule another hour and this constituted the end [of] our work together.

I find Complainant’s testimony with respect to the reasons he refused to allow Dr. Kassel to contact Dr. Smith, lacked credibility.

65. From July through December 1996, Complainant treated with Dr. Kassel in a group therapy session for anxiety and depression. Dr. Kassel is a psychologist and at this time served as the Associate Director of Psychology at Beth-Israel Hospital. None of Dr. Kassel’s notes from the group sessions with Complainant mention anything about Complainant being harassed at work. In January 1997, Complainant began seeing Dr. Kassel on an individual basis. In addition to seeing Dr. Kassel, Complainant saw Dr. Alexandra Beckett for psychopharmacology. According to Dr. Kassel’s records, the first reference Complainant made to the harassment during the lockout occurred during their individual session on January 7, 1997. Dr. Kassel continued to treat Complainant until

August 1998. Dr. Kassel testified that he had no knowledge of Complainant's emotional health prior to the lockout. In addition, he had no recollection of Complainant ever divulging to him that he experienced feelings of depression, deep isolation, withdrawal, or anxiousness prior to the lockout. Lastly, Dr. Kassel admitted that it would have been helpful in treating Complainant to have seen Dr. Smith's records.

66. During his individual counseling sessions with Dr. Kassel, Complainant reported having nightmares and flashbacks to the harassment he suffered during the lockout. He also indicated to Dr. Kassel that he had started to engage in unsafe sex.²¹ He further complained of being increasingly irritable, depressed, agitated, fearful, and having trouble sleeping. Dr. Kassel initially diagnosed Complainant as suffering from anxiety and then determined that he suffered from Post-Traumatic Stress Disorder ("PTSD"). Dr. Kassel subsequently consulted with Dr. Terence Keane, the Director of the National Center for PTSD, who confirmed the diagnosis of PTSD. Beginning in or around January 1997 and continuing through May 1997, Dr. Kassel encouraged and advised Complainant to terminate his employment at ComGas because he believed the working conditions there impacted his emotional well-being. In February 1997, Dr. Kassel advised Complainant to seek inpatient hospitalization for his symptoms of depression, anxiety, and PTSD.

67. After the lockout ended in September 1996, Complainant returned to his old position as Manager of Commercial and Industrial Sales. However, Complainant believed that his work had greatly deteriorated and he assessed his performance after the

²¹ As stated above, Complainant apparently made the same statements to Dr. Smith just prior to the lockout.

lockout as “poor.” He also claimed that after the lockout he could not concentrate, appeared non-attentive, and became easily distracted. Moreover, Complainant testified that he withdrew from many of his responsibilities at ComGas and no longer socialized with his colleagues from work. Bucknell testified credibly that Complainant’s work performance did deteriorate after the lockout, but in April 1997, he still gave Complainant an exceptional performance appraisal for the 1996 calendar year. Bucknell claimed that when he evaluated Complainant’s work in 1996, he did not give much weight to Complainant’s performance during the short period following the lockout (September – December 1996), given his history of exceptional work.

68. In May 1997, ComGas granted Complainant’s request for a leave of absence. In June 1997, Dr. Kassel and Dr. Beckett wrote to ComGas regarding Complainant’s medical status. In the letter, Dr. Kassel indicated:

Mr. McGrath has been under my care for individual therapy since January of this year. He is being treated by myself and Dr. Alexandra Beckett (for psychopharmacology) for Post-Traumatic Stress Disorder stemming from work-related incidents he experienced last summer. These symptoms have been worsening considerably since February [1997]... While it is my hope that he will be able to return to gainful employment before too long, I do not foresee it being beneficial to his recovery to return to work in the same environment alongside with some of the same people who harassed him.

In August 1997, Dr. Kassel and Dr. Beckett again wrote to ComGas and indicated that Complainant’s “symptoms have remained worsened since February [1997], and we have recommended that he continue to take a leave of absence for an indefinite period of time.”

69. Complainant testified that in April 1997, just prior to taking a leave of absence from ComGas, he began an intimate relationship with another man, James Barney.

Complainant admitted that he and Barney grew very close during the spring and summer of 1997. He further acknowledged that he had unprotected oral sex with Barney, even though he knew Barney was “HIV+.” In the late summer of 1997, Barney became seriously ill. Complainant then spent “every waking hour” with Barney during his hospitalization at Beth Israel Hospital. On September 11, 1997, Barney died.

Complainant testified that he was devastated by his partner’s death and shortly thereafter, in October 1997, he resigned from ComGas and admitted himself into the psychiatric ward at Beth Israel Hospital.

70. Complainant testified that he resigned from ComGas in October 1997 at the urging of Dr. Kassel. However, it is also undisputed that Complainant left ComGas as part of a “buyout” severance package offered to many ComGas management-level employees. Com Gas offered the severance package after it merged with another utility, Commonwealth Electric, resulting in an overlap of management positions.

Complainant’s supervisor, Robert Bucknell, similarly accepted the severance package and left ComGas. As part of the severance buyout, Complainant received \$58,889.57. The severance package also included Complainant’s release of all claims against ComGas arising out of his employment. I credit Complainant’s testimony that he took the severance package upon the recommendation of Dr. Kassel. While it remains unclear whether the amount of the severance buyout influenced his decision to accept the package, I find that his mental condition clearly played a significant factor in his decision to leave ComGas.

71. In October 1997, after leaving ComGas and following the death of his partner, Complainant voluntarily admitted himself into Beth Israel Hospital where he received

psychiatric treatment for PTSD, anxiety, and depression. He stayed in the hospital for seven days. Upon his discharge from the hospital, he remained unemployed and continued to live in the Worcester area for several months. Thereafter, he moved between Massachusetts, California, and Maine.

72. On May 15, 1998, Complainant filed a workers' compensation claim against ComGas, alleging that he was totally incapacitated from working as a result of the harassment he suffered during the lockout. On October 22, 1998, Complainant entered into a "Lump Sum Agreement" for \$80,000, which after deductions, netted him \$6,800. The Agreement expressly stated that, "Liability has not been established by acceptance or by standing decision of the [Board of Industrial Accidents]." In addition to the monetary settlement, the Lump Sum Agreement provided that the insurer agreed to pay all outstanding "outpatient psychiatric bills to date."

73. In May 1998, Complainant sold his home in Worcester and moved temporarily to Ogunquit, ME, where he worked as a housekeeper at The Inn at Two Squires Village Square, and lived in a basement room. Complainant testified that while living in Maine during the summer of 1998, he suffered a relapse and began drinking. In September 1998, The Inn closed and Complainant then moved temporarily to California to live with friends. He remained in California until the spring of 1999, when he returned to the Worcester area for a brief period of time. Later the same spring, he moved permanently to California and began renting an apartment in West Los Angeles. Complainant claimed that from spring 1999 to October 1999, he lived off his savings. He also claimed that during this period he remained isolated, did not socialize with others, and could not work due to his psychological condition. I credit Complainant's testimony regarding these

matters.

74. In October 1999, Complainant accepted a full-time managerial position with Mahler Enterprises, Inc., in Milwaukee, Wisconsin. Complainant testified that during his tenure at Mahler, his work performance was initially satisfactory but soon deteriorated. He claimed that he eventually could not organize his thoughts or follow through on tasks, and became extremely distressed and suicidal. After only working at Mahler for approximately four months, Complainant left the company in February 2000 and returned to California. He remained unemployed from February to May 2000.

75. In May 2000, Complainant took a position as General Manager of CelebFrame, Inc. Complainant testified that similar to his experience at Mahler, his initial work performance was satisfactory but then declined. He claimed that his anxiety and stress level became unmanageable and inhibited his ability to organize his work or complete assigned tasks. He left CelebFrame after working there for only three months. After leaving CelebFrame in August 2000, Complainant remained unemployed.

76. In August 2000, Complainant sought treatment for his emotional distress with his primary care physician, Dr. Clifton Cole, and then with a psychiatrist, Dr. Timothy Peters-Strickland. Based on the advice of Dr. Peters-Strickland, Complainant subsequently applied for and received disability benefits from the State of California, and then Social Security disability benefits from the Federal Government, which he continues to receive. In addition, from August 2000 to July 2001, he began treating with a psychologist, Dr. James Kennedy, for symptoms related to anxiety, depression, and PTSD.

77. In a report dated August 28, 2002, Dr. Peters-Strickland, stated in pertinent part:

At the time of the initial evaluation, Mr. McGrath appeared distant, reserved, anxious, but able to relate his distress in a reasonable manner... The patient's mood was dysphoric with an anxious effect... The patient's current mental status reveals a depressed, anxious man who feels extremely overwhelmed. He reports feeling very hopeless, helpless, isolative and indecisive. He continues to experience suicide ideation but denies having a current plan or intent. The patient's attitude is generally distant and passive... Attention and concentration are still clinically impaired... The patient's prognosis is fair with ongoing psychiatric and psychological treatment but poor with sustained, consistent treatment. Mr. McGrath in his current state would be unable to adapt to the normal stressors encountered in the work environment. Attendance would likely be erratic. Secondary to the patient's impaired attention and concentration, the implementation of assigned tasks would be questionable.

78. From September 11, 2002 to the date of the Public Hearing, Complainant has treated with a psychologist, Dr. Mark Bilkey. In addition, in January 2003, while in Massachusetts to attend a deposition in this matter, Complainant treated with Dr. Kassel.

79. Dr. Keane testified on behalf of Complainant regarding his emotional distress. Dr. Keane is the Chief of Psychiatry at the Veterans Affairs Hospital in Boston and a specialist in the area of PTSD. Dr. Keane initially consulted with Dr. Kassel regarding Complainant's case in August 1997, and then examined Complainant in March 2003. He reported that Complainant presented him with a complicated psychological history at the time of the lockout in 1996 and this history made him vulnerable to being harmed by harassment based upon his gay sexual orientation. Dr. Keane further noted that Complainant responded to these traumatic events with intense fear and helplessness and, as a result, he experienced the full range of symptoms of anxiety, PTSD, and major depression. Dr. Keane opined that Complainant's reaction to the traumatic events during

the lockout were consistent with the diagnosis of PTSD.²² In particular, Dr. Keane testified that PTSD is associated with the symptoms of considerable comorbidity and disability experienced by Complainant, including depression and alcoholism,²³ as well as his inability to sleep soundly, inability to maintain steady employment, lack of concentration, inability to lead a structured life, and participation in high-risk sex activity. Moreover, Dr. Keane claimed that Complainant's anxiety and PTSD were caused by the harassment he endured during the lockout. Dr. Keane testified that Complainant has made significant progress toward resuming an active and productive life and that as of March 2003, he exhibited only residual symptoms of PTSD. Considering Dr. Keane's particular expertise in the area of PTSD, I credit his general testimony with respect to the symptoms and causes of PTSD. I further credit Dr. Keane's testimony regarding Complainant's symptoms of anxiety, major depression, and PTSD. However, Dr. Keane did not have the benefit of reviewing Dr. Smith's medical records. As discussed above, Complainant treated with Dr. Smith both prior to and during the lockout.²⁴ Dr. Smith's records also referenced Complainant's significant family history and further indicated that he experienced severe emotional problems just prior to the lockout. Therefore, I decline to credit Dr. Keane's testimony with respect to both to his opinion that the alleged harassment during the lockout precipitated Complainant's alleged PTSD, and his belief

²² Dr. Keane and Dr. Dodes both agreed that there is considerable debate in the academic field as to what constitutes a traumatic event and no consensus existed as to whether sexual harassment can be a traumatic event.

²³ Complainant testified that he had a drinking problem earlier in his adult life, but had been sober for a long-time prior to the lockout. He further claimed that the distress he suffered as a result of the Respondents' harassment during the lockout caused him to return to drinking. However, Dr. Smith's transcribed notes from "session 53", which I believe occurred on October 30, 1995, despite being incorrectly dated "10/30/02", stated, "[Complainant] uses alcohol only in moderation." Thus, I find Complainant's testimony regarding his consumption of alcohol prior to the lockout lacked credibility.

²⁴ As previously discussed, Complainant expressly prohibited Dr. Kassel from contacting Dr. Smith. The record does not provide any explanation as to why Dr. Smith's medical records were not provided to Dr. Keane.

that the anxiety and other mental ailments Complainant suffered from were the direct and probable cause of the harassment he experienced during the lockout.

80. With respect to Complainant's apparent failure to mention anything to Dr. Smith about the harassment he allegedly suffered during the lockout, Dr. Keane stated that there are many reasons why a patient would not report ongoing harassment to his or her therapist. With respect to Complainant, Dr. Smith opined that it may have been difficult for Complainant to express, as a gay man, that he was being harassed. Dr. Keane further stated that Complainant may have experienced "avoidance" of the issue, because he did not want to convey to his therapist that he was ashamed or humiliated. I refuse to credit Dr. Keane's testimony on this particular matter. As indicated in Dr. Smith's notes, Complainant apparently showed no inhibition in expressing his inner most feelings with respect to his gay identity. In particular, he expressed to Dr. Smith his desire to "stand up to people who are against gay men" and respond to the "scathing bigotry, which he believed, was in our culture around the issues of gay [men]", and "he was determined to stand up to it with a sense of righteousness."

81. In addition, Dr. Keane claimed that persons can experience "delayed onset" of PTSD, which could explain why Complainant did not become symptomatic until after the lockout. According to Dr. Keane, delayed onset is characterized by two phenomena: first, people do their best to cope with traumatic event; and, second, as people acquire information or realization of trauma, symptoms develop. Consequently, Dr. Keane claimed that people are not able to articulate the traumatic events underlying PTSD, either because they cannot or they are ashamed to put it into words, or they simply don't understand it. Although I accept Dr. Keane's general testimony regarding delayed onset

of PTSD, I cannot accept his specific opinion with respect to Complainant having experienced delayed onset of PTSD, since he did not have the benefit of reviewing Dr. Smith's notes. In addition, as highlighted above, Complainant experienced many of the symptoms related to the PTSD prior to the lockout, including anxiety, depression, and participation in unsafe sexual activity.

82. Dr. Lance Dodes testified as an expert witness on behalf of Respondents with respect to Complainant's emotional distress. Dr. Dodes testified that Complainant's early childhood trauma led him to have a lifelong and lengthy history of emotional difficulties. He also noted that the psychological testing performed on Complainant at Beth Israel Hospital in 1997 indicated that his "depression appears to stem from an experienced emotional deprivation and has resulted in a high degree of unmet dependency needs" and "his limited coping skills and dependent style appear to be longstanding in nature." Unlike Drs. Kassel and Keane, Dr. Dodes had the benefit of reviewing the Dr. Smith's records. Dr. Dodes testified that Dr. Smith's records were important because they reflected Complainant's emotional conflict prior to and during the lockout. In particular, Dr. Dodes noted that Dr. Smith's records indicated that the isolation, desperation, depression, and unhappiness he experienced being a gay male prior to the lockout was attributable to Complainant's childhood trauma. I credit Dr. Dodes' testimony regarding the importance of Dr. Smith's records and the effect of Complainant's childhood trauma on his emotional well-being prior to and during the lockout.

83. Contrary to Drs. Kassel and Keane, Dr. Dodes opined that Complainant did not suffer from PTSD. Rather, he believed Complainant suffered from Severe Mixed Personality Disorder (DSM-IV), which is characterized by a tendency to a loss of reality-

testing.²⁵ According to Dr. Dodes, this disorder predisposed Complainant to depression, anxiety, paranoid ideation, and excessive reactions to stressful life events. Although Dr. Dodes believed that Complainant had many of the symptoms of PTSD, he stated that Complainant did not meet the first and most fundamental requirement, namely, a person must be exposed to a traumatic event “that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.” According to Dr. Dodes, PTSD is restricted to cases in which the precipitants are so realistically severe that they could have created the described symptom complex in anyone; therefore, the diagnosis excludes “people who have an idiosyncratically severe reaction to non-life-threatening conditions.” Thus, Dr. Dodes concluded that Complainant may have had a strong reaction to a number of different events, but only the death of his partner in September 1997 could meet the DSM-IV severity criterion for PTSD. Dr. Dodes, therefore, believed that the death of his partner brought up earlier childhood traumas. I decline to credit Dr. Dodes testimony with respect to the necessity of a person having to experience a life-threatening event in order to be diagnosed with PTSD and instead accept the broader definition espoused by Dr. Keane. However, I do credit Dr. Dodes’ testimony with respect to the significance of the death of Complainant’s partner as an event that likely brought up the underlying trauma from his childhood.

84. Dr. Dodes also found it significant that during the lockout, Complainant never spoke about the harassment to this therapist, Dr. Smith. Dr. Dodes opined that the absence of any discussion regarding harassment during the lockout is inconsistent with Respondents’ conduct being a major factor in his emotional distress at the time. In

²⁵ Dr. Keane testified that “Mixed Personality Disorder” is typically used as a “diagnosis of last resort” when you “don’t reach criteria of any of the known personality disorders.”

addition, Dr. Dodes noted that many of the symptoms allegedly caused by the harassment – seeking unsafe sex and suffering from serious depression, loneliness, and self-loathing – predated the lockout. Dr. Dodes also did not give credence to the notion that Complainant could have a delayed onset of PTSD or repressed the events of the lockout during his therapy sessions with Dr. Smith. Dr. Dodes believed that Complainant’s filing of his lawsuit in Superior Court in May 1996, rather than after the lockout, indicated that Complainant did not repress the harassment he suffered during the lockout. I credit Dr. Dodes’ testimony on this particular matter.

3. LOST WAGES AND MEDICAL EXPENSES

85. Complainant’s income declined significantly after he left ComGas in 1997. Specifically, for the years 1998 to 2002, Complainant earned the following income:

1998	\$13,957
1999	\$18,861
2000	\$42,815
2001	\$13,600
2002	\$19,740

86. Complainant also alleged that he incurred the following reasonable medical expenses with respect to the treatment he received for his psychological ailments attributable to the Respondents’ conduct during the lockout:

Beth Israel-Deaconess Hospital	\$8,037.96
Peter Kassel, Ph.D.	\$9,825.00
Timothy Peters-Strickland, MD	\$1,910.00
James M. Kennedy, Psy.D.	\$ 535.00
Mark Bilkey, Psy.D.	\$1,140.00

III. CONCLUSIONS OF LAW

A. JURISDICTION - PREMPTION

As an initial matter, Respondents have argued that even if Complainant's allegations of harassment are accepted as true, the conduct engaged in by the Union and its members is protected by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA") and, therefore, the Commission lacks jurisdiction to adjudicate Complainant's claims. Accordingly, Respondent requested that the Commission dismiss Complainant's claims because they are preempted by the NLRA. *See, San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959) (when state action threatens interference with the NLRA, the state must yield its jurisdiction).

The Full Commission has previously addressed this issue. *McGrath*, 23 MDLR at 327-328. As mentioned above, prior to the Public Hearing, Respondents filed a Motion to Dismiss asserting the same argument. The Full Commission denied Respondents' Motion and held that Complainant's claims were not preempted by the NLRA. Specifically, the Full Commission held that "the issues presented in this matter implicate a compelling state interest in the maintenance of domestic peace, which is not overridden by a clearly expressed congressional direction to regulate the alleged conduct." *Id.* With respect to the NLRA's exclusive jurisdiction in matters of national labor policy, the Full Commission noted that "when the conduct at issue is of only 'peripheral concern' to federal labor policy, the states are not precluded from regulating the activity." *Id.*, 23 MDLR at 327, *citing, Garmon*, 359 U.S. at 243. The Full Commission further held that "discrimination in employment is generally considered to be a 'peripheral concern' of the [NLRA]" and, therefore, Massachusetts is not precluded from regulating employment

discrimination. *Id.*

In addition, the Full Commission recognized that state action is not preempted when the regulated conduct touches interests “so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the states of the power to act.” *Id.*, quoting, Garmon, 359 U.S. at 243.²⁶ In applying the “local interests” exception, the Full Commission first found that Massachusetts has a significant state interest “deeply rooted in local feeling and responsibility” to protect its citizens from the discrimination in employment on the basis of sexual orientation. *Id.*, at 328. The Full Commission then held that the exercise of state jurisdiction in this case would not interfere with the National Labor Relations Board’s “primary jurisdiction” to enforce the statutory prohibition against unfair labor practices. *Id.*, citing, Sears, Roebuck & Co. v. San Diego Cty. Council of Carpenters, 436 U.S. 180, 198 (1978); Chaulk Services v. MDAD, 70 F.3d 1361, 1366 (1st Cir. 1995) (the critical inquiry is whether the controversy presented is identical or different from that which could have been presented to the NLRB). In particular, the Full Commission found that the controversies presented by Complainant in this proceeding pertain to allegations of harassing speech – including personal attacks, intimidation, and threats of violence – that are not protected by the NLRA and, thus, there is no risk of interference with the NLRB’s primary jurisdiction. *Id.*

I find that Respondents have failed to introduce any credible evidence at the Public Hearing that would compel a different conclusion than previously reached by the

²⁶ Under the “local interests” exception, two factors are considered. First, “the existence of a significant state interest in protecting its citizens from the challenged conduct”; and, second, “the controversy which could be presented to the state court must be different from that which could have been presented to the NLRB.” Chaulk Services v. MCAD, 70 F.3d 1361, 1366 (1st Cir. 1995).

Full Commission with respect to the preemption of the issues raised herein.

Consequently, Complainant's claims are not *per se* preempted by the NLRA.²⁷

However, as discussed in detail below, the NLRA's "license" to a union in a labor dispute "to use intemperate, abusive or insulting language without fear of restraint or penalty", necessitates that Complainant establish that the specific conduct engaged in by Respondents exceeded the protections afforded to a union and its members by the NLRA. Old Dominion Branch No. 495, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283-84 (1974).

B. HARASSMENT

Complainant has claimed that Respondents subjected him to unlawful hostile work environment harassment based on his sexual orientation. The Commission has recognized that harassment based on one's sexual orientation constitutes unlawful discrimination. Berardi v. Medical Weight Loss Center, Inc., 23 MDLR 5, 9-10 (2001). Although Complainant does not have an employment relationship with the Union, M.G.L. c. 151B, § 4(2) provides that it shall be unlawful for a "labor organization" to discriminate in any way on the basis of sexual orientation "against any of its members or against any employer or any individual employed by an employer unless based upon a bona fide qualification." In addition, G.L. c. 151B, § 4(4A) provides that it shall be unlawful "for any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged

²⁷ Analogously, Title VII claims are not preempted by the NLRA. See, Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974) (complainants have separate statutory right to be free from discrimination); Britt v. Grocers Supply Co., Inc., 978 F.2d 1441, 1447 (5th Cir. 1992), *reh'g. denied*, 986 F.2d 97 (5th Cir. 1993) (claims under Title VII are not preempted by the NLRA).

any other person in the exercise or enjoyment of any such right granted or protected by this chapter.” It is well-settled that G.L. c. 151B protects and grants individuals the right to work in an environment free of unlawful harassment based on sexual orientation. *See, Fluet v. Harvard University*, 23 MDLR 145, 165-166 (2001); *Berardi*, 23 MDLR at 11-12. Moreover, G.L. c. 151B, § 4(5) provides that it is unlawful for “any person, whether an employer or employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [G.L. c. 151B] or to attempt to do so.”

The standard for analyzing a hostile work environment claim based on sexual orientation is analogous to a hostile work environment sexual harassment claim. *Dukes v. NWI Investigative Group, Inc.*, 25 MDLR 484, 474 (2003); *Klekota V. Carlin Combustion Technology, Inc.*, 21 MDLR 72, 74 (1999); *Curry & Hayes v. Alessio*, 21 MDLR 247, 248 (1999). Pursuant to G.L. c. 151B, § 1(18), sexual harassment is defined as:

sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating, or sexually offensive work environment."²⁸

This definition encompasses a claim for sexual harassment brought by an individual claiming harassment by a member of the same gender. *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 290 (1997).

The determination of whether a particular work environment is hostile requires a factual inquiry by the hearing officer into all of the circumstances, including the

²⁸ Complainant has not alleged that he was subjected to *quid pro quo* harassment as defined in G.L. c. 151B, § 4(18)(a).

frequency of the unwelcome conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with a complainant's job performance. College-Town, Division of Interco v. MCAD, 400 Mass. 156, 162 (1987). Therefore, in order to establish a claim of hostile work environment based on sexual orientation, Complainant must show that he is a member of a protected group based on his sexual orientation; Respondents' subjected him to unwelcome verbal or physical conduct based on his sexual orientation; and, the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment. Berardi, 23 MDLR at 9.

1. Complainant A Member of A Protected Group

It was undisputed that Complainant was a gay male during the period that Respondents allegedly subjected him to a hostile work environment. Therefore, Complainant has established that he was a member of a protected group based on his sexual orientation.

2. Respondents' Conduct Based On Complainant's Protected Status

With respect to the second element, Complainant must establish that Respondents subjected him to unwelcome conduct based on his status as a gay male. As noted below, on some occasions (e.g., April 7, 1996), I found that Union members harassed Complainant merely because he was a ComGas supervisor who performed bargaining unit work. Complainant also admitted that Respondents never harassed him prior to the lockout and almost all of the alleged incidents of harassment occurred at roving picket sites. Furthermore, many of the anti-homosexual slurs and insults directed at

Complainant, such as “faggot” and “cocksucker”, were directed at most of the supervisors, regardless of their sexual orientation.

As discussed above, Complainant claimed he only revealed his sexual orientation to a few colleagues and friends at ComGas prior to the lockout. Moreover, the record reflects that only one of the individual Respondents (Bradley) and two Union officials (McNair and Chizy) knew or believed that Complainant was gay prior to the lockout. In fact, most of the individual Respondents had never met and had no knowledge of Complainant prior to the lockout. However, from the specific comments made by Union members to Complainant during the lockout, I infer that most if not all of the individual Respondents knew about his sexual orientation on or about April 25, 1996. Moreover, all of the individual Respondents with the possible exception of Nugent clearly became aware of Complainant’s gay identity shortly after he filed his Superior Court complaint in May 1996.

3. Respondents’ Engaged in Unwelcome Conduct

Complainant must also establish that the alleged conduct was unwelcome, meaning conduct that he subjectively found Respondents’ conduct to be hostile and abusive. College-Town, 400 Mass. at 162; Ramsdell v. Western Mass. Bus Lines, 415 Mass. 672, 677 (1993); *see* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (if the victim did not subjectively perceive the environment to be abusive, the conduct had not actually altered the conditions of the victim’s employment). Respondents argued that Complainant’s provocative conduct precludes a finding that he found the Union members’ conduct offensive. In many instances, I credited the testimony from witnesses regarding Complainant’s verbal and physical conduct directed to the picketers. I also

believe that Complainant's conduct in some instances further incited the picketers. Clearly, had Complainant consistently adhered to the advice given to him by McNair to "keep his head down", the harassment inflicted upon him by the picketers would have been less severe. Respondents also contend that Complainant's refusal to accept a reassignment to a safer "inside" position illustrates that Complainant did not feel subjectively harassed.

A complainant who is a willing and active participant in creating a sexually charged atmosphere typically cannot establish that he found the conduct unwelcome or that the workplace atmosphere was subjectively hostile. Thomas v. King Arthur's Motel and Lounge, Inc., 24 MDLR 66, 73 (2002); Ellie v. Taste of Italy, Inc., 19 MDLR 150, 153 (1997); Molloy v. Cook & Co., 24 MDRL 325, 330 (2002) (complainant instigated conflict by bringing vulgarity and hostility into the workplace). However, the mere fact that a complainant participated in the offensive conduct does not, by itself, prove that the conduct is welcome and that he did not perceive the environment to be hostile. Beaupre v. Smith, 50 Mass. App. Ct. 480, 489, n.15 (2000); Lawless v. Northeast Battery & Alternator, 23 MDLR 322, 323 (2001) (Full Commission); *see also*, Ramsdell, 415 Mass. 678, n.4 (complainant engaged in sexual banter because she needed to fit into the environment and minimize workplace friction); Rosati v. Town of Warren Board of Health, 19 MDLR 34, 38 (1997) (employee's infrequent joking with the alleged harasser does not demonstrate that entire course of conduct was welcome).

In the case at bar, I found that the Union members initiated the confrontations by hurling abusive and insulting remarks at Complainant and the other ComGas supervisors and contractors. The Union picketers admittedly tried to make the work environment for

Complainant and the other workers as miserable as possible. With respect to Complainant, the Union members clearly succeeded. By directing profane and offensive comments toward Complainant regarding his sexual orientation, the picketers successfully got under his skin and struck a nerve. In response, Complainant in some instances engaged in conduct that only made the situation worse. Notwithstanding, I find that Complainant would not have engaged in the provocative conduct but for the Union members' having initiated the harassment. Furthermore, on each occasion Complainant's provocative conduct paled in comparison to the severe and abusive comments hurled at him by the Union members. I also find Complainant's refusal to accept a reassignment after he reported the harassment did not undermine his assertions that he found Respondents' conduct unwelcome. Rather, I believe he rejected the offer because he wanted to fit in with the other supervisors working on the crews and did not want to admit that the Union had gotten the better of him.

The absence of any discussion in Dr. Smith's notes regarding the allegedly abusive work environment likewise might suggest that Complainant did not consider Respondents' conduct to be sufficiently hostile or abusive. However, I still believe that Complainant clearly did consider some of the Union members' comments to be subjectively offensive. As discussed above, he filed numerous reports with ComGas regarding the incidents and he filed suit in Superior Court against the individual Union members seeking an injunction to halt their harassment. Furthermore, on one occasion, he attempted to solicit the assistance of a police officer at a dig site when the Union members' taunts and remarks became overwhelming. More importantly, I credited Complainant's testimony that at the time of these incidents, the Union members' conduct

made him feel threatened, scared, embarrassed, and humiliated. I believe the absence of any apparent discussion between Complainant and Dr. Smith regarding the harassment is relevant for purposes of determining the severity of Complainant's emotional distress, but does not undermine his credible testimony that he found Respondents' conduct offensive.

4. Respondents Engaged in Severe and Pervasive Conduct

In order to establish a claim of hostile work environment harassment, Complainant must also prove that the Respondents' conduct was sufficiently severe or pervasive so as to interfere with a reasonable person's work performance. Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 411 (2001); *see*, College-Town, Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987) (a hostile work environment is one that is "pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, [and that] poses a formidable barrier to the full participation of an individual in the workplace").

This "objective" reasonable person standard has been interpreted to mean that the evidence of harassment must be considered from the "view of a reasonable person in the [Complainant's] position." Muzzy, 434 Mass. at 411-412, *citing*, Ramsdell, 415 Mass. at 677-678 n.3; Gnerre v. MCAD, 402 Mass. 502, 507 (1988); *see*, Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541, 1547 (1995) (in determining whether speech or conduct creates such an environment, the standard is whether a reasonable person in the complainant's position would interpret the behavior "as offensive and an interference with full participation in the workplace"). In hostile work environment cases, the Commission has consistently held that the alleged conduct is objectively offensive if a reasonable person from the protected group of which Complainant is a

member would have considered it to be so. Andrade v. Stop & Shop Supermarket, Inc., 23 MDLR 213, 218 (2001); Torres v. Union Market, 20 MDLR 215, 219 (1998); Godino v. International Food Services, 13 MDLR 1697, 1720 (1991); Couture v. Central Oil Company, 12 MDLR 1401 (1990).

In determining whether a work environment is sufficiently hostile or abusive, “all of the circumstances [must be looked at], including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating (or a mere offensive utterance), and whether it unreasonably interferes with an employee’s work performance.” Faragher v. City of Boca Raton, 524 U.S. 775, 787-788 (1998); Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 412-413 (2001). As Respondents have correctly pointed out, G.L. c. 151B is not a clean language statute. Praeder v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 619-620 (1996), *citing*, Scott v. Sears, Roebuck & Co., 798 F. 2d 210, 213, n. 2 (7th Cir. 1986), *quoting*, Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (“Title VII is not a clean language act...”). The Commission has also held that “casual comments or accidental or sporadic conversations are insufficient to constitute a pervasive, hostile environment.” Horzesky v. R&M Construction Co., 15 MDLR 1171, 1176 (1993). Consequently, “crass garden variety expletives” that are not “sexual commands or lurid innuendos” would not constitute offensive conduct if the particular workplace had a general culture of profanity. Praeder, 39 Mass. App. Ct. at 619. In addition, I note that the U.S. District Court recently held that a statement merely implying that an individual is a homosexual is not capable of a defamatory meaning. Albright v. Morton (C.A. No. 02-11458-NG) (Memorandum and Order, May 28, 2004).²⁹

²⁹ The District Court in Albright found that in light of recent court decisions in Massachusetts giving

Consequently, “as a matter of settled law and common sense, a hostile environment claim requires consideration of the environment in which a plaintiff works.” Ruffino v. State Street Bank & Trust Co., 908 F. Supp. 1019, 1038-1039 n.34 (D. Mass. 1995).

More importantly, in the context of a labor dispute, the NLRA “gives a union license to use intemperate, abusive or insulting language without fear of restraint or penalty.” Austin, 418 U.S. at 283-284. However, as the U.S. District Court correctly pointed out, “this license is not without limits.” Local Union No. 12204, United Steel Workers of American v. MCAD, (Civ. No. 03-10379-NG) (Memorandum and Order, August 5, 2003) (Ex. 29, at 19-20).³⁰ For example, “Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute.” Farmer, 430 U.S. at 299, *quoting*, Int’l Union, United Auto, Aircraft and Agricultural Implement Workers of Am. v. Russell, 356 U.S. 634, 640 (1958).

The District Court, in providing guidance to the parties and the Commission in this proceeding on the issue of preemption, noted that a union’s federal protections under the NLRA end when its conduct borders on the tortious. Local Union No. 12004, (Ex. 27, at 20). The District Court noted that the United States Supreme Court has recognized

legal force to homosexuals' ongoing quest for equal rights, if it determined that “calling someone a homosexual is defamatory per se -- it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status. *See*, Goodrich v. Department of Public Health, 440 Mass. 309 (November 18, 2003) (finding limitations on same sex couples' ability to marry unconstitutional); *see also*, In Re Opinions of the Justices to the Senate, 802 N.E.2d 565 (February 3, 2004) (recognizing that “[m]any people hold deep-seated religious, moral, and ethical convictions that . . . homosexual conduct is immoral.”) The District Court noted that “while the [Supreme Judicial Court's] language in these decisions acknowledges that a segment of the community views homosexuals as immoral, it also concludes that courts should not, directly or indirectly, give effect to these prejudices.”

³⁰ Respondents filed suit in the U.S. District Court against the Commission seeking to prevent the Commission from adjudicating Complainant’s claims. In response to cross motions filed by the parties, Judge Gertner held that the District Court lacked jurisdiction to decide the substantive preemption jurisdictional questions raised by Respondents. However, the court provided well-heeded direction to the parties and the Commission on the issue of preemption.

that state tort claims may be brought against a union on such theories as malicious libel,³¹ intentional infliction of emotional distress,³² and malicious interference with a lawful occupation,³³ notwithstanding that the origins of these claims arose in the context of a labor dispute. *Id.* (Ex. 29, at 20-21). As stated by the District Court,

The Supreme Court's cases upholding state court jurisdiction over tort claims give the general impression that the NLRA's protections end where tortious acts begin. That is, to the extent that under the NLRA some allowance must be given to the rough-and-tumble of labor disputes, the wisdom of the common law has built into the legal standard the very allowance for context the federal law would require. *See, Farmer*, 430 U.S. at 306 (suggesting that state courts adjudicating tort actions should excuse "the type of robust language and clash of strong personalities that may be commonplace in various labor contexts").

Id. (Ex. 29, at 21).

The Supreme Court has identified specific salient features in tort claims that fall within the limited exception to the preemption rule. First, in claims for defamation, in order to avoid preemption, a complainant must establish that a union engaged in "malicious" conduct as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964),³⁴ meaning it made a statement with knowledge that it was false or with reckless disregard of its truth or falsity. *Linn*, 383 U.S. at 65. The plaintiff, in *Linn*, filed a libel action against a union and its officers alleging that statements contained in leaflets circulated by the union in connection with its organization campaign were "false, defamatory and untrue." The Court held that claims involving speech in the context of a

³¹ *Linn v. United Plant Guard Workers of Am. Local 114*, 282 U.S. 53, 62-63 (1966) (the NLRA does not afford "either party license to injure the other intentionally by circulating defamatory or insulting material known to be false").

³² *Farmer*, 430 U.S. at 302.

³³ *Russell*, 356 U.S. at 641-646; *see also*, *Tosti v. Ayik*, 386 Mass. 721, 726 (1982) (*Tosti I*) (Federal labor law does not preempt the cause of action for tortious interference with an employment relationship if the jury finds that a libel made with actual malice was the basis of such interference).

³⁴ In *New York Times*, the court held that first amendment constitutional rights prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct absent proof that the statement was made with "actual malice." 376 U.S. at 279-280.

labor dispute must be considered "against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." 383 U.S. at 62, *quoting*, New York Times Co., 376 U.S. at 270. The Court further noted that even the most repulsive speech enjoys immunity "provided it falls short of a deliberate or reckless untruth." *Id.*, 383 U.S. at 63. The Court in Linn, therefore, incorporated the standards enunciated in New York Times Co., and held that state remedies for libel arising out of a labor dispute will be limited to those instances in which the complainant can show that the defamatory statements were circulated with malice. 383 U.S. at 65. Specifically, the court held,

We apply the malice test to effectuate the statutory design with respect to preemption. Construing the Act to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act.

Id.

Subsequently, in Austin, the Court reaffirmed the necessity of a showing of malice in a libel claim in order to avoid preemption and emphasized the importance of applying the "reckless-or-knowing-falsehood" standard enunciated in New York Times. 418 U.S. at 282. In Austin, the plaintiffs brought libel actions against the union when it published a "List of Scabs" in its newsletter, including the names of the plaintiffs, together with a pejorative definition of "scab" written by Jack London.³⁵ The Supreme

³⁵ The Union literature included London's often-quoted comments that, "After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab." London further likened a scab to "a two-legged animal with a corkscrew soul, a water brain, a combination of jelly and glue," and associated a scab with Judas Iscariot, Easau, and Benedict Arnold, "a traitor to his God, his country, his family, and his class." Austin, 418 U.S. at 268.

Court found that the lower state courts in Austin correctly recognized the applicability of Linn with respect to the limited exception of preemption of tort claims arising out of labor disputes; however, the Court held that the state courts erroneously relied on the common-law definition of “malice”, meaning "hatred, personal spite, ill will, or desire to injure." *Id.*, 418 U.S. at 281. The Court in Austin held that "[I]ll will toward the plaintiff, or bad motives, are not elements of the New York Times standard." *Id.* Rather, the Court reaffirmed that Linn specifically required that the "knowledge of falsity or reckless disregard of the truth" standard must be used to determine whether the union’s conduct was malicious. *Id.*, 418 U.S. at 282. Applying the New York Times standard to the libel claims at issue, the Court in Austin held that publication of Jack London's “Definition of a Scab” was entitled to the protection of the federal labor laws since it was “merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.” *Id.*, 418 U.S. at 286. ³⁶

In Massachusetts, the Supreme Judicial Court similarly recognized the necessity of showing malice in order to avoid preemption of a state tort claim for tortious interference with an employment relationship. Tosti v. Ayik, 386 Mass. 721, 726 (1982) (Tosti I). The court held that federal labor law did not preempt the cause of action for tortious interference with an employment relationship provided that the jury specifically finds that a libel made with actual malice was the basis of such interference. *Id.*

Second, the Supreme Court has recognized that a tort claim involving union conduct “which is so outrageous that ‘no reasonable [person] in a civilized society should

³⁶ The court emphasized that before the test of reckless or knowing falsity can be met, there must be a false statement of fact, and in the case of the union literature in question, “the only factual statement in the disputed publication is the claim that appellees were scabs, that is, that they had refused to join the union.” Austin, 418 U.S. at 283.

be expected to endure it’”, is not preempted under the NLRA. Farmer, 430 U.S. at 302. In Farmer, the plaintiff brought a state claim for intentional infliction of emotional distress in a California state court, specifically alleging that defendants had intentionally engaged in "outrageous conduct, threats, intimidation, and words", which caused him to suffer "grievous mental and emotional distress as well as great physical damage." The Supreme Court, relying on its prior decisions in Linn and Russell, held that NLRA did not protect the Union’s "outrageous conduct." *Id.* In particular, the Court recognized,

The State...has a substantial interest in protecting its citizens from the kind of abuse of which [the plaintiff] complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury, as in Russell, or damage to reputation, as in Linn. Although recognition of the tort of intentional infliction of emotional distress is a comparatively recent development in state law, *see*, W. Prosser, Law of Torts, 12, pp. 49-50, 56 (4th ed. 1971), our decisions permitting the exercise of state jurisdiction in tort actions based on violence or defamation have not rested on the history of the tort at issue, but rather on the nature of the State's interest in protecting the health and well-being of its citizens.

Id., 420 U.S. at 302-303. However, the Court also emphasized, “Our decision rests in part on our understanding that California law permits recovery only for emotional distress sustained as a result of ‘outrageous’ conduct. The potential for undue interference, with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts.” *Id.*, 420 U.S. at 305-306.

Although the preemption standards discussed above have pertained to state tort claims, I find that these principles are equally applicable to claims under M.G.L. c. 151B. As stated by the District Court, “Although the gravamen of the complaint before MCAD cites a statutory wrong – sexual orientation discrimination forbidden by Chapter 151B of the [Mass. G. Laws.] – and not a common tort, the above analysis applies with no less

force.” Local 12004 (Ex. 27 at 24). In addition, in the recent case of Stonehill College v. MCAD, 441 Mass. 549, 560 (2004), the Supreme Judicial Court held:

Although a violation of G. L. c. 151B is not a tort, we have, on many occasions, identified tort-like aspects of a G. L. c. 151B discrimination claim brought in the Superior Court. Thomas v. EDI Specialists, Inc., 437 Mass. 536, 539 (2002); Conway v. Electro Switch Corp., 402 Mass. 385, 387 (1988). The Supreme Court of the United States has recognized that “[a]n action to redress racial (or gender) discrimination may . . . be likened to an action for defamation or intentional infliction of mental distress.” Dalis, *supra* at 224, quoting, Curtis v. Loether, 415 U.S. 189, 195-196 n.10 (1974).

As stated above, in determining whether Respondents’ conduct is sufficiently severe and pervasive so as to alter the conditions of Complainant’s employment and create an abusive working environment, “all of the circumstances” of the workplace must be looked at. In the case at bar, clearly a “culture of profanity” existed at the dig sites where Complainant worked during the lockout. Union members subjected the ComGas supervisors and contractors at the digs to abusive insults and anti-homosexual slurs, regardless of their sexual orientation.³⁷ Thus, Complainant must show that a reasonable gay man working under these unique circumstances of this labor dispute would be offended by Respondents’ conduct. Moreover, in recognition of the limited exception to the NLRA’s preemption of labor disputes, I believe Complainant must also show that Respondents engaged in conduct so outrageous that no reasonable person in a civilized society should be expected to endure it.³⁸ Consistent with the Supreme Court’s opinion

³⁷ The record reflects that Donovan was called “fag,” “faggot,” “fudgepacker,” “queer,” “queer bait,” “pretty boy,” a “woman” and a “girl.” Saster was called “fudgepacker,” “gay boy,” cocksucker,” “fag,” and “queer.” Bucknell, McGrath’s supervisor, was called “dickhead,” “cocksucker,” and a “pussy.” Supervisors and contractors are regularly called “motherfuckers,” “assholes,” “bastards,” “fucking scabs,” “worthless piece of shit,” “scab motherfucker,” and “fucking maggot.”

³⁸ I find no recognizable difference between this standard and the one articulated by the Complainant, which is applicable to claims of intentional infliction of emotional distress, namely, that a plaintiff must show that a defendant’s conduct was extreme and outrageous, beyond all possible bounds of decency and utterly intolerable in a civilized community. See, Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466 (1997) (elements of intentional infliction of emotional distress).

in Farmer, “outrageous” conduct may include highly defamatory statements made by the individual Union members, meaning they made the remarks with knowledge of their falsity or in reckless disregard of their truth of falsity.³⁹ The imposition of this additional burden upon Complainant ensures that the Commission can further its compelling state interest to eradicate discrimination based on sexual orientation, while avoiding the adjudication of claims arising out of labor disputes that are preempted by federal law.

5. Complainant’s Specific Allegations of Harassment

Applying the above standards to specific facts of this case, I conclude that Complainant has established that Respondents subjected him to unlawful hostile work environment harassment based on his sexual orientation. Specifically, I find that on April 26, 1996, Edmunds and Grant made numerous outrageous and highly offensive statements. Specifically, I credited Complainant’s testimony that Edmunds called Complainant “faggot”, and yelled to him “hey sweetie”, “do you want some K-Y up that hole, sweetie”, and “nice ass, are you going to wear a Speedo when you go to Provincetown this summer? I might like a piece of that ass myself.” In addition, Complainant testified credibly that Grant stated to him, “Don’t look at me, you fucking faggot”, and also stated to Donovan in the presence of Complainant, “Hey Eddie, don’t go in the truck with him, he’s going to try and fuck you.” In addition to Edmunds and Grant’s outrageous conduct, I credited Complainant’s testimony that at this same dig, numerous Union members, including Edmunds and Bradley, called him “faggot”, and Bradley further commented to Donovan in Complainant’s presence, “Hey Eddie, you

³⁹ “In defamation cases governed by the New York Times standard, a plaintiff must establish malice by clear and convincing evidence.” Tosti II, 394 Mass. at 491, *quoting*, Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 870 (1975). “Clear and convincing proof involves a degree of belief greater than usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases.” Stone, 367 Mass at 871.

know you're working with a fucking faggot."

Moreover, on April 30, 1996, Mezzano likewise engaged in outrageous and severely offensive conduct. I credited Complainant's testimony that on this occasion, Mezzano yelled at him, "Hey gay boy", and then placed his hand on his groin and said, "Fucking faggot, cocksucker." I also credited his testimony that Mezzano screamed, "Jump in the hole, fag boy", and "put the fag boy in the hole." In addition, Mezzano made the highly defamatory comment, "watch out, you guys will get AIDS because of him." As noted above, I credited Complainant's testimony that he did not have AIDS at this time. In addition to Mezzano's outrageous conduct, Complainant testified credibly that at the same dig, Grant screamed at him, "You think it's funny, fag boy?" Furthermore, on the video of this dig site, picketers could be heard yelling to Complainant, "There's the little faggot", and "All you guys will get AIDS' cause of him."

Lastly, at the dig of July 14, 1996, Nugent similarly engaged in highly offensive and outrageous conduct. In particular, I credited Complainant's testimony that Nugent repeatedly referred to him as "Tinkerbell" and yelled, "Tinkerbell, why don't you call 1-800-spank-me, oh that's 1-900-spank-me." Complainant also testified credibly that Nugent made the following comment to Timothy Fox, another ComGas supervisor in Complainant's presence: "Hey Fox, watch out you better wear an ass protector bending over in front of Tinkerbell." In addition to Nugent's outrageous conduct, I credited Complainant's testimony that at this dig both Grant and Bradley referred to him as "Tinkerbell" and Bradley made the comment, "Come on Tinkerbell, call someone who cares, call your lawyers, get them down here so they can hear it first hand." Moreover,

Complainant testified credibly that at this dig unknown picketer(s) shouted, “Petey, you are a piece of shit. You look familiar, I know you are one of the Village People. Hey, why don’t you requisition a pink hardhat?”

On each of these occasions, I find that Complainant considered the Union’s profane and vulgar comments to be highly offensive and unwelcome. Moreover, although I credited most of the Union members’ testimony that Complainant engaged in provocative behavior at some of these digs, I believe that Complainant engaged in such conduct only after the Union picketers initiated the confrontation by making highly offensive remarks to him and the other workers. I further find that Complainant’s provocative behavior paled in comparison with the defamatory and offensive language used by the Union members. Moreover, from the specific insults and expletives uttered to Complainant on these occasions, I believe that the Union members subjected Complainant to this verbal abuse based on his sexual orientation. Although Union members regularly uttered many anti-homosexual slurs (such as “faggot” and “cocksucker”) to other supervisors and contractors notwithstanding their sexual orientation, the specific language used by the Union members’ on each of these particular occasions would lead a reasonable person to unmistakably conclude that they made these remarks precisely because Complainant was a gay man.

In addition, I find that Complainant has established that Edmunds, Grant, Mezzano, and Nugent, on these specific occasions, engaged in outrageously severe and pervasive conduct that altered the conditions of Complainant's employment and created an abusive work environment. Unlike the typical insults hurled at the ComGas workers, or the general profanities commonly shouted to Complainant (such as “faggot”), on these

occasions, Edmunds, Grant, Mezzano, and Nugent made highly defamatory statements that contained appalling stereotypical insults and innuendo aimed directly at Complainant's gay identity, including references to his having AIDS, engaging in anal sex, and being sexually promiscuous with other men. Contrary to Respondents' assertions, I believe these specific remarks constituted far more than "garden variety expletives"; rather, they constituted viciously hateful, harmful, and malicious remarks based on Complainant's sexual orientation. I, therefore, conclude that a reasonable person in Complainant's position would find these outrageous remarks extremely embarrassing and humiliating, and highly offensive.

With respect to the other incidents of harassment alleged by Complainant, I find that Complainant failed to establish that on April 7, 1996, Buma, Lahair, McNeil, and St. Pierre verbally abused him based on his sexual orientation. Although I found that these Union members shouted profanities at Complainant and likely called him "cocksucker", "fag" or "faggot", Complainant has not proven that these individuals knew or believed he was gay on this occasion, which occurred at the beginning of the lockout. Moreover, Union members regularly shouted these same profanities at the other supervisor regardless of their sexual orientation. With respect to the incident at on April 25, 1996, I find that Complainant has failed to establish that Buma's remarks were outrageously severe. Although Buma's comments pertained directly to Complainant's identity as a gay man, these remarks were neither particularly threatening nor highly defamatory.⁴⁰ Moreover, I do not believe Buma's statements, which merely implied that Complainant is gay, could be construed as defamatory. Lastly, I credited Complainant's testimony that

⁴⁰ I credited Complainant's testimony that when he and two contractors were in a hole, Buma stated, "Look, two scabs and a fag." Complainant also testified credibly that Buma yelled, "Nice earring faggot, do you have more at home?", and "Do all your boyfriends wear earrings?"

on May 8, 1996, Bradley made various remarks to him based on his sexual orientation.⁴¹

I further found that he considered Bradley's comments on this occasion to be subjectively offensive. However, Complainant has not established that Bradley's comments on this occasion were outrageous or sufficiently severe and pervasive so as to alter the conditions of his work environment.

6. The Union's Liability

Complainant has established that individual members of the Union engaged in outrageous, offensive behavior and unlawfully harassed him based on his sexual orientation. But in order to hold the Union liable for its members' actions, Complainant must meet the special proof requirements of M.G.L. c 149, § 20B. The statute, which is analogous to the Federal Norris-LaGuardia Act, 29 U.S.C. § 106, states in relevant part:

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, as defined in § 20C, shall be held responsible or liable in any court for the unlawful acts of individual officers, members or agents except upon clear proof of actual participation in, or actual operation of such acts or of ratification of such acts after actual knowledge.⁴²

Thus, Complainant must establish "clear proof" of the Union's participation in, or authorization or ratification of the unlawful acts committed by its members. As to what constitutes "clear proof", the Full Commission cited to the definition provided by the Supreme Court in Mine Workers v. Gibbs, 383 U.S. 715, 737 (1966), with respect to

⁴¹ I credited Complainant's testimony that Bradley yelled, "Hey, I had a great time in Maine this weekend. I went to Ogunquit and saw all of Petey's friends." Complainant further claimed that Bradley yelled that he would see him tomorrow, which Complainant construed as a reference to their scheduled appearance the next day in Superior Court.

⁴² Section 6 of the Norris-LaGuardia Act states in relevant part: "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of such acts, or of ratification of such acts after actual knowledge thereof." See, McGrath, 23 MDLR at 329.

analogous provisions contained in the Norris-LaGuardia Act:

Although the statute does not define “clear proof”, its history and rationale suggest that Congress meant at least to signify a meaning like that commonly accorded such similar phrases as “clear, unequivocal, and convincing proof.” Under this standard, the plaintiff in a civil case is not required to satisfy the criminal standard of reasonable doubt on the issue of participation, authorization or ratification, neither may he prevail by meeting the ordinary civil burden of persuasion. He is required to persuade by a substantial margin, to come forward with “more than a preponderance of the evidence to prevail.” Schneiderman v. U.S., 320 U.S. 18 (1943)

McGrath, 23 MDLR at 329. ⁴³

Under section 6 of the Norris-LaGuardia Act, the issue is less that of the union’s intent, rather, the inquiry is whether the union “objectively manifested its approval or disapproval of the violent acts, and thus either involved itself in them or ratified them.” Curreri v. Int’l Brotherhood of Teamsters, 722 F.2d 6, 11 (1st Cir. 1983); *see also*, Mine Workers, 383 U.S. at 739. (“What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law....”). However, no rigid requirement exists that a union affirmatively disavow any unlawful acts that may have

⁴³ The Full Commission has imposed the more stringent “clear and convincing” evidence standard despite judicial authority in Massachusetts supporting the applicability of a lesser burden of proof. For example, in Tosti II, the Supreme Judicial Court found no error with a trial court’s instruction to a jury that, in order to hold a union liable for its members’ defamatory conduct, “the plaintiff must prove by the greater weight of the believable evidence that [the union members] were acting on behalf of the local and within the scope of their responsibilities for the local when the material in question was published.” 394 Mass. 482, 486 (1985), *cert. denied sub nom.*, UAW Local 442 v. Tosti, 484 U.S. 964 (1987). The court specifically rejected the union’s contention that c. 149, § 20B, required proof of a union’s vicarious tort liability by clear and convincing evidence. *Id.* The court held that its interpretation of the scope of the statute was bolstered by the U.S. Supreme Court’s discussion of the purpose of the Norris-LaGuardia Act:

[T]he simple concern of Congress was that unions had been found liable for violence and other illegal acts occurring in labor disputes which they had never authorized or ratified and for which they should not be held responsible. . . . The straightforward answer was Section 6, with its requirement that when illegal acts of any individual are charged against one of the major antagonists in a labor dispute -- whether employer or union -- the evidence must clearly prove that the individual's acts were authorized or ratified." Ramsey v. UMW, 401 U.S. 302, 310 (1971). *See United Bhd. of Carpenters v. United States*, 330 U.S. 395, 403 (1947).

Id., 394 Mass. at 487-488.

occurred. ILGWU v. Labor Board, 237 F.2d 545 (1956), *quoted in*, McGrath, 23 MDLR at 329, n. 9.

Although Complainant has not introduced any credible evidence that the Union ever formally ratified (e.g., voted to approve) any harassment against him based on his sexual orientation, or expressly directed its members to harass him based on his sexual orientation, I believe he has established “clear proof” of the Union’s approval of its members’ harassment. As discussed above, I found that Complainant has proved that the Union strategized and organized the picketing at the dig sites throughout the lockout and actively dispatched members to the dig sites with frequency and efficiency. Moreover, officers of the Union acknowledged that the picketers deliberately tried to make the work environment for the supervisors and contractors at the digs as miserable as possible through harassing speech. It is also undisputed that many Union officers were present at and participated in the picketing where individual Union members subjected Complainant to outrageous and highly offensive conduct. Specifically, Lahair, McNair, Bradley and Chizy were present at the dig of April 26 at Olean and Mower Streets; Lahair, Bradley, and McNair was present at the dig of April 30 at Olean and Mower Streets; and, Alexander, Laflash, Walsh, McNair, Chizy, and Lahair were at the dig of July 14 at Jolma Road. With respect to these particular officers’ knowledge of the Union members’ harassment of Complainant, Chizy claimed that at the dig on April 26, he heard Edmunds and Bradley’s offensive statements. Moreover, McNair stated that at the dig on April 30, he heard Union members utter slurs and profanities at Complainant, including Mezzano’s comment that Complainant had AIDS. Additionally, Union officers admitted that they did not take any steps to cease the outrageous conduct. The Union also clearly had

knowledge of Complainant's Superior Court complaint by May 8, 1996, which outlined the on-going harassment by its members in detail. Yet, at the dig of July 14, 1996, many senior Union officials, including Alexander, Laflash, and Walsh, joined the other Union members on the picket line, participated in the general harassment of all of the supervisors and contractors at the site, and likely witnessed the highly offensive conduct aimed at Complainant.

Most importantly, I find that the Union members' unlawful harassment of Complainant was part and parcel of the Union's acknowledged campaign to harass the ComGas workers and create a hostile work environment. Although the Union did not specifically direct its members to harass Complainant based on his sexual orientation, its officers did authorize and participate in the campaign of harassment against all of the ComGas supervisors and contractors and deliberately attempted to create a hostile work environment. As illustrated in the numerous videos submitted into evidence by the parties, Union members engaged in vicious name-calling and hurled numerous abusive and demeaning profanities and insults at the workers, including Complainant, on an almost continuous basis, oftentimes for many hours. Under these circumstances, I conclude that Complainant has established clear and convincing evidence that the Union did approve of the unlawful harassment of Complainant and is liable for the damages he sustained therefrom.

7. **Individual Liability**

M.G.L., c. 151B, § 4(4A) makes it unlawful "for any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter or to coerce, intimidate, threaten or interfere with

such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.” It is well-settled that G.L. c. 151B protects and grants individuals the right to work in an environment free of unlawful harassment based on sexual orientation. *See, Fluet v. Harvard University*, 23 MDLR 145, 165-166 (2001); *Berardi v. Medical Weight Loss Center, Inc.* 23 MDLR 5, 11-12 (2001).

The Commission has repeatedly imposed liability against individual respondents under the provisions of § 4(4A). *See, Fluet*, 23 MDLR at 165-166, and cases cited therein. Moreover, the Commission has imposed liability under § 4(4A) when the person charged with employment discrimination is not the complainant’s employer or an agent of the employer. As stated by the Commission in *Erewa*, “The words ‘any person’ [in § 4(4A)] could not be interpreted, standing alone, to require any relationship to an employer.” 20 MDLR at 40. In addition, G.L. c. 151B, § 4(5) provides that it is unlawful for “any person, whether an employer or employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [G.L. c. 151B] or to attempt to do so.”

Applying these principals to the case at hand, I find that Complainant has established cases of individual liability against Edmunds, Grant, Mezzano, and Nugent. As discussed above, each of these individuals engaged in outrageous conduct. Specifically, on April 26, 1996, Edmunds called Complainant “faggot”, and yelled to him “hey sweetie”, “do you want some K-Y up that hole, sweetie”, and “nice ass, are you going to wear a Speedo when you go to Provincetown this summer? I might like a piece of that ass myself.” On that same date, I found that Grant yelled to Complainant, “Don’t

look at me, you fucking faggot”, and then stated to Donovan in Complainant’s presence, “Hey Eddie, don’t go in the truck with him, he’s going to try and fuck you.” On April 30, 1996, Mezzano yelled at him, “Hey gay boy”, and then placed his hand on his groin and said, “Fucking faggot, cocksucker.” Mezzano also screamed, “Jump in the hole, fag boy”, “watch out, you guys will get AIDS because of him”; and “put the fag boy in the hole.” Lastly, on July 14, 1996, Nugent repeatedly referred to Complainant as “Tinkerbell”; yelled, “Tinkerbell, why don’t you call 1-800-spank-me, oh that’s 1-900-spank-me”; and, then made the following comment to Timothy Fox, another ComGas supervisor: “Hey Fox, watch out you better wear an ass protector bending over in front of Tinkerbell.”

By engaging in outrageous and highly offensive conduct, these individuals clearly “interfered” with the exercise and enjoyment of Complainant’s right to be free of harassment in the workplace and, therefore, I conclude that they violated G.L. c. 151B, §4(4A). Accordingly, Paul Edmunds, Charles H. Grant, Jr., Ronald Mezzano, and Thomas Nugent, are individually and jointly liable with the Union for the unlawful discrimination established under the facts of this case.

IV. REMEDY

M.G.L. c. 151B, paragraph 5 authorizes the Commission to grant remedies to make a Complainant whole, including back pay and emotional distress damages. Stonehill College, 441 Mass. at 575-576; College-Town, 400 Mass. 156, 68-169 (1987); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 181-182 (1985). Complainant seeks an award of monetary damages in compensation for the emotional distress he suffered as a direct and probable result of Respondents’ unlawful harassment.

In addition, Complainant seeks reimbursement for wages he lost due to his inability to work or keep a job, which he attributed to the emotional distress caused by Respondents. Lastly, he seeks reimbursement of medical expenses for treatment related to his alleged emotional distress.

Both parties introduced a significant amount of evidence regarding Complainant's emotional distress and the casual connection, or the lack thereof, between the harm and the hostile work environment he experienced during the lockout. In the recent decision of Stonehill College, the Supreme Judicial Court reaffirmed the standards the Commission should follow in considering emotional distress awards. 441 Mass. at 576. Specifically, the court held:

Emotional distress damage awards, when made, should be fair and reasonable, and proportionate to the distress suffered. Each award should be case specific and should not be determined by formula or by precise reference points. While evidence in the form of some physical manifestation of the emotional distress, or evidence in the form of expert testimony, is not necessary to obtain an award, such evidence certainly would be beneficial. An award must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)... In addition, complainants must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress... Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.

Id.

With respect to Complainant's allegations that he suffered severe and long-lasting emotional distress as a result of Respondents' unlawful conduct, I note that he initially testified on direct examination that prior to the lockout, he did not exhibit any symptoms of anxiety, distress, or of being overwhelmed. He also had only a vague recollection of the matters he discussed with his therapist Dr. Smith both prior to and during the lockout.

However, Dr. Smith's records for the period preceding the lockout indicate that Complainant regularly expressed feelings of depression and isolation prior to the lockout. In particular, in the weeks just prior to the lockout, Dr. Smith's notes repeatedly indicated that Complainant continued to complain of severe emotional difficulties. According to Dr. Smith's records, Complainant's emotional difficulties were centered on his identity as a gay man, his difficult childhood, and his relationship with his family. When Complainant was questioned on cross-examination about the notations in Dr. Smith's records, he admitted that he did suffer from depression prior to the lockout, but he claimed he was not as depressed as he felt after the lockout. Based on Complainant's inconsistent testimony, and the contradictions between his testimony and Dr. Smith's records, I cannot credit his testimony with respect to the insignificance he attributed to his emotional problems prior to the lockout.

With respect to the emotional distress Complainant suffered during the lockout, I credited his testimony that he felt humiliated, embarrassed, and degraded as a direct result of Respondents' conduct. However, I rejected Complainant's testimony regarding the severity and intensity of the emotional distress he attributed to Respondents' conduct during the lockout. Specifically, he testified that he discussed the harassment and the emotional distress he suffered as a result thereof with Dr. Smith. Complainant also claimed that he felt suicidal after one particular incident with the Union members in June 1996, and he discussed the harassment and his distress with Dr. Smith over the telephone. But Dr. Smith's records of Complainant's therapy sessions during the lockout never indicated that Complainant mentioned being subjected to harassment while at work. Nor do Dr. Smith's records reference the "suicidal" telephone conversation. Dr. Smith's

notes during the lockout merely reflect that Complainant continued to deal with the same emotional issues he addressed prior to the lockout, namely, issues surrounding his gay identity and his family relationships. According to Dr. Smith's notes, Complainant only remotely alluded to the possibility of being harassed on two occasions. First, on April 25, 1996, Dr. Smith wrote that Complainant is "coming out with energy, values wanting to declare the equality of the homosexual in our culture. Wanting to stand up to people who are against gay men." Second, on May 2, 1996, Dr. Smith wrote, "Peter came in the hour and expressed his fearfulness and intimidation at what he called scathing bigotry, which he believed, was in our culture around the issues of gay [men]. It frightened him and yet he was determined to stand up to it with a sense of righteousness." However, in absence of any expressed indication in Dr. Smith's notes that the "scathing bigotry" and "fear" related to the harassment he endured during the lockout, I decline to infer that the vague feelings he expressed on April 25 or May 2, 1996, were the direct and probable result of Respondents' unlawful harassment.

In July 1996, Complainant abruptly ended his relationship with Dr. Smith, and began treating with Dr. Kassel as part of a group therapy session.⁴⁴ Although Complainant testified that the distress he suffered during the lockout was severe, none of Dr. Kassel's notes from the group sessions indicated that Complainant mentioned anything about the harassment he allegedly experienced during the lockout. In January 1997, Complainant began seeing Dr. Kassel on an individual basis. According to Dr. Kassel's records, the first reference Complainant made to the harassment during the lockout occurred during their session on January 7, 1997, approximately four months

⁴⁴ As stated above, I found Complainant's testimony with respect to the reasons for leaving Dr. Smith and then prohibiting Dr. Kassel from contacting Dr. Smith or obtaining his records, lacked credibility.

after the lockout had ended. Dr. Kassel testified that he had no knowledge of Complainant's emotional health prior to the lockout. As stated above, Complainant specifically told Dr. Kassel not to contact Dr. Smith and, therefore, Dr. Kassel did not have the benefit of reviewing Dr. Smith's records. In addition, Dr. Kassel testified that he had no recollection of Complainant ever divulging to him that he experienced feelings of depression, deep isolation, withdrawal, or anxiousness prior to the lockout.

During his individual counseling sessions with Dr. Kassel, Complainant reported having nightmares and flashbacks to the harassment he suffered during the lockout. He also indicated to Dr. Kassel that he had started to engage in unsafe sex. He further complained of being increasingly irritable, depressed, agitated, fearful, and having trouble sleeping. Dr. Kassel initially diagnosed Complainant as suffering from anxiety and then determined that he suffered from Post-Traumatic Stress Disorder ("PTSD"). Dr. Kassel subsequently consulted with Dr. Terence Keane, the Director of the National Center for PTSD, who confirmed the diagnosis of PTSD. Beginning in or around January 1997 and continuing through May 1997, Dr. Kassel encouraged and advised Complainant to terminate his employment at ComGas because the working conditions were impacting his emotional well-being. In February 1997, Dr. Kassel advised Complainant to seek inpatient hospitalization for his symptoms of depression, anxiety, and PTSD.

I credited Dr. Kassel's testimony, as his treating psychologist, with respect to Complainant having experienced symptoms of depression, anxiety, and PTSD. However, I credited the testimony of Respondents' expert witness, Dr. Lance Dodes with respect to the lack of causal connection between Complainant's emotional distress and the

harassment he endured during the lockout. Unlike Dr. Kassel or Dr. Keane (Complainant's expert witness), Dr. Dodes had the benefit of reviewing Dr. Smith's records. I credited Dr. Dodes testimony that Dr. Smith's records were important because they reflected Complainant's emotional conflict prior to and during the lockout. In particular, Dr. Dodes noted that Dr. Smith's records indicated that Complainant's childhood trauma affected his emotional state prior to the lockout, including the isolation, desperation, depression, and unhappiness he experienced being a gay male. As previously discussed, Complainant had a very traumatic childhood. I also credited Dr. Dodes' testimony that Complainant's early childhood trauma led him to have a lifelong and lengthy history of emotional difficulties. In addition, he noted that the psychological testing performed on Complainant at Beth Israel Hospital in 1997 indicated that his "depression appears to stem from an experienced emotional deprivation and has resulted in a high degree of unmet dependency needs" and "his limited coping skills and dependent style appear to be longstanding in nature." Dr. Dodes also testified credibly regarding the significance of Complainant having never spoken about the harassment with Dr. Smith. Dr. Dodes opined that the absence of any discussion regarding harassment during the lockout is inconsistent with his claim that the harassment was a major factor in his emotional distress at the time. Furthermore, Dr. Dodes noted that many of the symptoms Complainant allegedly attributed to the harassment – seeking unsafe sex and suffering from serious depression, loneliness, and self-loathing – predated the lockout. I also credited Dr. Dodes' testimony regarding the unlikelihood that Complainant could have a delayed onset of PTSD or repressed the events of the lockout during his therapy sessions with Dr. Smith.⁴⁵ Dr. Dodes believed that Complainant's

⁴⁵ Evidence suggesting that Complainant repressed the harassment during his treatment with Dr. Smith

filing of his lawsuit in Superior Court during the midst of the lockout in May 1996, rather than after the lockout, indicated that Complainant was not repressing the harassment. Lastly, I credited Dr. Dodes testimony regarding the significance of the death of Complainant's partner in September 1997, as an event that likely brought up the underlying trauma from his childhood. Complainant admitted that he was devastated by his partner's death and shortly thereafter, in October 1997, he resigned from ComGas and admitted himself to the psychiatric ward at Beth Israel Hospital.

Consequently, Complainant has failed to establish that Respondents' unlawful conduct caused all of the emotional distress he experienced during and after the lockout. Rather, I am persuaded that other factors overwhelmingly contributed to Complainant's emotional problems. As stated above, "emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Stonehill College, 441 Mass. at 576. Notwithstanding, I credited Complainant's testimony that he felt deeply humiliated, degraded and embarrassed as a result of Respondents' on-going harassment during the lockout. I also believe that Respondents' unlawful conduct exacerbated his preexisting emotional problems, although to a significantly lesser degree than argued by Complainant. In particular, Complainant testified credibly that as a result of the unlawful harassment, his work performance greatly deteriorated. Bucknell likewise testified credibly that Complainant's work performance declined after the lockout, but Bucknell still assessed his performance as "exceptional." Complainant also reported, during his individual

would be more believable had Complainant admitted that he never or barely mentioned the harassment to Dr. Smith. To the contrary, Complainant adamantly claimed that he did discuss these details with Dr. Smith. As stated above, I found Complainant's testimony with respect to his treatment with Dr. Smith lacked credibility.

counseling sessions with Dr. Kassel, having nightmares and flashbacks to the harassment he suffered during the lockout. Under these circumstances, I conclude that Complainant is entitled to an award of \$35,000 in damages in compensation for the emotional distress he incurred as a direct and probable consequence of Respondents' unlawful conduct.

With respect to his lost wages after he left ComGas, I credited his testimony that he decided to accept the ComGas' severance package in October 1997 as a result of his on-going emotional difficulties and upon the advice of Dr. Kassel. However, Complainant has failed to establish that most of the severe emotional problems he experienced after the lockout were the direct and probable result of Respondents' unlawful conduct. In particular, just prior to his decision to leave ComGas, he had just experienced the devastating loss of his loving partner. Thus, Complainant has not established that he was compelled to leave ComGas as a result of Respondents' unlawful conduct. Similarly, I cannot find that Complainant's inability to work or keep a job, or his subsequent treatment with a variety of medical professionals for his severe emotional problems, were the direct and probable consequence of the harassment he experienced during the lockout. Complainant is, therefore, not entitled to any damages for lost wages or reimbursement of medical expenses.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby issue the following order:

1. Respondents, Local Union No. 12004, Paul P. Edmunds, Charles H. Grant, Jr., Ronald F. Mezzano, and Thomas Nugent, shall pay Complainant, Peter D. McGrath, within sixty (60) days of receipt of this decision, the sum of

\$35,000.00 in damages for emotional distress plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

2. The parties shall notify the Clerk of the Commission as soon as the above-described ordered payments have been made. If Respondents fail to comply with the terms of this Order within the time periods allotted, Complainant is instructed to immediately notify the Clerk of the Commission.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 28th day of July, 2004.

EDWARD R. MITNICK
Hearing Officer