

BRAD AVAKIAN
COMMISSIONER



DOUG MCKEAN
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

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

In the Matter of:

KENNETH D. WALLSTROM,

Respondent.

Case No. **58-11**

FINDINGS OF FACT
ULTIMATE FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

The Agency's Formal Charges alleged that Respondent (1) unlawfully denied Complainant, a renter in his duplex, the reasonable accommodation of a service dog; (2) coerced, intimidated, or threatened Complainant when denying her the reasonable accommodation; (3) expelled Complainant because of her disability; and (4) represented to Complainant that the duplex was not available for rental when it was available. The Charges also alleged that Complainant's minor daughter, who occupied the duplex with Complainant, was injured by the alleged practices. The forum held that Respondent unlawfully denied Complainant reasonable accommodation, but did not commit the other alleged unlawful practices. The forum also found that the Commissioner had no jurisdiction over the Charges involving Complainant's daughter because the daughter did not sign a complaint. The forum awarded \$10,000 in damages for mental suffering to Complainant and assessed a civil penalty of \$5,500. ORS 659A.145, ORS 659A.421, ORS 659A.820.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June

1 19, 2012, at the Eugene office of the Bureau of Labor and Industries office located at
2 1400 Executive Parkway, Suite 200, Eugene, Oregon.

3 The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by
4 case presenter Chet Nakada, an employee of the Agency. Complainant Teresa
5 Provenzano was present throughout the hearing and was not represented by counsel.
6 Aggrieved Person Jacelyn Provenzano was only present during her testimony.
7 Respondent Kenneth Wallstrom (“Respondent”) was present throughout the hearing
8 and was represented by James Baldock, attorney at law.

9 The Agency called the following witnesses: Teresa Provenzano (“Complainant”);
10 Jacelyn Provenzano (“J. Provenzano”); Kerry Johnson, senior investigator, BOLI Civil
11 Rights Division (by telephone); Marcia Kennedy, Complainant’s therapist (by
12 telephone); and Kenneth Wallstrom, Respondent.

13 Respondent called the following witnesses: Kenneth Wallstrom, Respondent;
14 Sabrina Dale Coop, Respondent’s daughter; and Donald Ahlquist, Respondent’s
15 brother-in-law.

16 The forum received into evidence:

17 a) Administrative exhibits X-1 through X-10 (submitted or generated prior to
18 hearing) and X-11 and X-12 (submitted at hearing);

19 b) Agency exhibits A-1 through A-18 (submitted prior to hearing) and A-19
20 (submitted at hearing); and

21 c) Respondent exhibits R-2 (submitted prior to hearing) and R-3 (submitted
22 at hearing).

23 Having fully considered the entire record in this matter, I, Brad Avakian,
24 Commissioner of the Bureau of Labor and Industries, hereby make the following
25

1 Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions
2 of Law, Opinion, and Order.

3 **FINDINGS OF FACT – PROCEDURAL**

4 1) On November 2, 2009, Complainant filed a verified complaint with the
5 Agency's Civil Rights Division alleging that she was the victim of the unlawful housing
6 practices of Respondent Kenneth Wallstrom. On November 9, 2009, Complainant
7 amended her complaint. Complainant signed both complaints. On March 30, 2010,
8 Complainant's amended her complaint a second time to add her daughter, J.
9 Provenzano, as an "Aggrieved Person." Complainant signed her second amended
10 complaint, but J. Provenzano did not sign it. After investigation, the Agency found
11 substantial evidence of three unlawful housing practices and issued a Determination on
12 or about April 20, 2010. (Exhibits A-1, A-3, A-13 through A-15)

13 2) On March 22, 2012, the Agency issued Formal Charges alleging
14 Respondent committed unlawful housing practices based on Complainant's disability in
15 that:

16 (a) Complainant, who rented a dwelling ("subject property") from Respondent,
17 had a disability for which she was prescribed "service" cats and a "service" dog.
18 Respondent refused to allow her to have a service dog, thereby violating ORS
19 659A.145(2)(g) with respect to Complainant and Aggrieved Person by refusing to
20 reasonably accommodate Complainant's disability.

21 (b) By denying Complainant's request to have a service dog, Respondent
22 coerced, intimidated and threatened Complainant into not asserting a right to
23 reasonable accommodation, thereby violating ORS 659A.145(8).

24 (c) Respondent told Complainant that she and Aggrieved Person would have to
25 move because Respondent's daughter needed a place to live, but a "for rent"
sign was posted in front of the subject property one week after Complainant and
Aggrieved Person moved out, constituting a violation of ORS 659A.145(2)(e)
based on Respondent's representation that the subject property was not
available for rental or lease when it was in fact available.

(d) Respondent expelled Complaint and Aggrieved Person based on
Complainant's disability "and/or" request for reasonable accommodation, thereby
violating 659A.145(2)(b).

The Formal Charges sought the following damages:

1 (a) Damages, mental, and physical suffering of at least \$20,000 each for
2 Complainant and Aggrieved Person;

3 (b) Out-of-pocket costs at least \$10,000 for being forced to move to
4 Respondent's unlawful practices;

5 (c) Civil penalties at least \$11,000.

6 (Exhibit X-2a)

7 3) On May 14, 2012, Respondent, through counsel, filed an answer to the
8 Formal Charges. (Exhibit X-3)

9 4) On May 16, 2012, the forum ordered the Agency and Respondent each to
10 submit case summaries no later than June 8, 2012, and notified them of the possible
11 sanctions for failure to comply with the case summary order. The Agency and
12 Respondent timely submitted case summaries. (Exhibits X-8 through X-10)

13 5) On May 31, 2012, the Agency filed a motion for a Protective Order
14 regarding medical information and records concerning Complainant were the subject of
15 a discovery request by Respondent. The forum granted the Agency's motion and
16 issued a Protective Order on May 31, 2012. (Exhibits X-5, X-6)

17 6) At the start of the hearing, the ALJ orally advised the Agency and
18 Respondent of the issues to be addressed, the matters to be proved, and the
19 procedures governing the conduct of the hearing. (Statement of ALJ)

20 7) At the outset of the hearing, Respondent and the Agency stipulated to the
21 following:

- 22 • BOLI has jurisdiction over this case
- 23 • Complainant moved out of Respondent's dwelling after receiving notice from
24 Respondent; and
- 25 • Complainant had two service cats during her tenancy with Respondent.

(Statements of Baldock, Nakada)

8) At hearing, the Agency also offered Exhibits A-19 and A-20 as part of its
case in chief. Respondent objected to their admission on the grounds that neither had

1 been submitted with the Agency's case summary. The ALJ reserved ruling on the
2 admissibility of A-19 until issuance of the Proposed Order.

3 A-20 consisted of three letters to Complainant from the Housing and Community
4 Services Agency of Lane County ("HACSA") dated December 3, 2007, April 21, 2010,
5 and October 31, 2011, describing the respective amounts of rent Complainant would pay
6 and HACSA would pay. The ALJ did not receive the exhibit because the Agency failed
7 to offer a satisfactory reason for not providing it with the Agency's case summary and
8 because excluding it would not violate the ALJ's duty to conduct a full and fair inquiry
9 under ORS 183.415(10).

10 A-19 consisted of 10 pages of "Progress Note[s]" notes made by Agency
11 telephone witness Marcia Kennedy, a Licensed Clinical Social Worker who has been
12 Complainant's therapist since January 8, 2009. The chart notes were dated January
13 through March 2009, and January 2010. Statements by Mr. Nakada and testimony by
14 Kennedy established that: (1) The Agency served a subpoena on Kennedy for the
15 records two weeks before the hearing; (2) Kennedy faxed the records in A-19 to Nakada
16 on June 12; (3) Because of a malfunction in Kennedy's fax machine, the records were
17 not transmitted to Nakada; (4) Nakada first acquired the documents late in the afternoon
18 on June 18; and (5) Kennedy had little independent recollection of what was specifically
19 discussed in her therapy sessions with Complainant in 2009. Under these
20 circumstances, the forum finds that the Agency has provided a satisfactory reason for
21 not submitting the records with its case summary and that excluding A-19 would violate
22 the ALJ's duty to conduct a full and fair inquiry. A-19 is admitted into evidence. That
23 ruling is confirmed.

24 9) On July 25, 2012, the ALJ issued a proposed order that notified the
25 participants they were entitled to file exceptions to the proposed order within ten days of

1 its issuance. The Agency filed exceptions on July 31, 2012, and Respondent filed
2 exceptions on August 3, 2012. The exceptions are considered in the Opinion section of
3 this Final Order.

4 **FINDINGS OF FACT – THE MERITS**

5 1) Since 1997, Complainant has suffered from the mental impairments of
6 depression and anxiety. Because of these impairments, she is substantially limited in a
7 number of major life activities, including caring for herself, sleeping, learning,
8 concentrating, and remembering. She also is “obese” and her “knees are shot.”
9 (Testimony of Complainant, Kennedy, J. Provenzano; Exhibits A-17, A-19)

10 2) In 2004, Complainant became eligible for Section 8 Housing, which
11 authorizes the payment of rental housing assistance to private landlords on behalf of
12 approximately 3.1 million low-income households.¹ (Testimony of Complainant; Judicial
13 Notice)

14 3) On March 30, 2004, Patricia P. Buchanan, M.D., wrote a prescription for
15 Complainant that stated: “Teresa should be allowed to have a cat for medical reasons.”
16 (Testimony of Complainant; Exhibit A-17)

17 4) On July 29, 2004, a medical provider² at the Eugene, Oregon Volunteers
18 in Medicine Clinic wrote a prescription for Complainant that stated: “Ms. Provenzano
19 has a mental health diagnosis that would be helped by a pet.” (Testimony of
20 Complainant; Exhibit A-17)

21 5) On March 2, 2006, a medical provider³ at the Eugene, Oregon Options
22 Counseling Services wrote a prescription for Complainant that stated: “To whom it
23

24 ¹ See Section 8 of the Housing Act of 1937 (42 U.S.C. § 1437f), as repeatedly amended.

25 ² The provider’s signature is illegible.

³ *Id.*

1 concerns, I highly recommend that Teresa be allowed to have a companion pet for her
2 medical well being.” (Testimony of Complainant; Exhibit A-17)

3 6) On October 26, 2006, a medical provider⁴ in Michigan wrote a prescription
4 for Complainant that stated: “This patient needs to have a companion cat for medical
5 reasons.” (Testimony of Complainant; Exhibit A-17)

6 7) Sometime before August 2007, Complainant and her minor daughter, J.
7 Provenzano, moved into and began renting one unit of a duplex located at 25045
8 Territorial Court, Veneta, Oregon (the “subject property”), entering into a rental
9 agreement with the owner at that time. J. Provenzano lived with Complainant at all
10 times while Complainant resided at the subject property. At the time Complainant
11 moved into the subject property, she was receiving welfare benefits of approximately
12 \$300 per month. (Testimony of Complainant; J. Provenzano)

13 8) In August 2007, Respondent and his wife, Barbara Wallstrom, bought the
14 subject property. At the time of Respondent’s purchase, Complainant and her daughter
15 occupied the subject property and the duplex’s other unit was vacant. The realtor who
16 sold the property to Respondent told Respondent that Complainant and her daughter
17 were Section 8 tenants. On August 7, 2007, Complainant and Respondent executed a
18 “Residential Lease/Rental Agreement,” the term of which extended until August 31,
19 2008. Under the Agreement, Complainant agreed to pay rent of \$655 per month and a
20 \$600 damage deposit. The Agreement also contained the following handwritten
21 provision “Okayed for two cats only @⁵ service animals to Teresa,” based on
22 Complainant having given Respondent at least one of her prescriptions to have a cat as
23 a service animal. (Testimony of Complainant, Wallstrom; Exhibits A-8, A-17)

24 _____
25 ⁴ *Id.*

⁵ Complainant testified that “@” meant “as” in the Agreement.

1 9) Complainant had two “service” cats throughout her tenancy at the subject
2 property. Her cats “cheer her up” and “help her with her depression.” (Testimony of
3 Complainant, J. Provenzano)

4 10) Shortly after he bought the subject property, Respondent leased the other
5 half of the duplex to Donald Ahlquist, his brother-in-law, whose home had just been
6 foreclosed on. Ahlquist, who does not have a disability, already had a dog when he
7 moved in. Respondent allowed Ahlquist to keep his dog as an “outside” dog until the
8 dog died, but required Ahlquist to pay a pet deposit. At the time of the hearing, Ahlquist
9 was still leasing the same property from Respondent. (Testimony of Ahlquist,
10 Complainant, Wallstrom)

11 11) On October 9, 2007, Dr. Dukeminier, Complainant’s primary care
12 physician in Eugene, wrote a prescription for Complainant for “Service cats.”
13 (Testimony of Complainant; Exhibit A-17)

14 12) On November 1, 2007, Complainant submitted a new rental application to
15 Respondent, along with the first page of her existing Lease/Rental Agreement and a
16 letter that read as follows:

17 “Ken,

18 “I have enclosed a copy of the new doctors [sic] note for service cats.

19 “Here is the first page of your rental agreement and a money order for the
20 rent. Please mail me a copy of the other part of the rental agreement I
already signed for you as I would like to read it and have a copy in my file.

21 “Thank you,

22 “Terry”

(Testimony of Complainant; Exhibit A-7)

23 13) Sometime in the first half of 2008, Complainant qualified for and began to
24 receive disability benefits in the amount of \$1,677 based on her disabilities of
25 depression, anxiety, memory problems, “shot” knees, and obesity that she has had

1 since 1997. At of the time of the hearing, she took 20 mg of Prozac, four times a day,
2 for her depression, and Xanax for anxiety and sleep. (Testimony of Complainant)

3 14) On August 29, 2008, Complainant and Respondent executed a
4 "Residential Lease/Rental Agreement," the term of which was "1 yr, beginning (*mo./day*)
5 Sept 1 (*yr.*) 2008 and ending Noon, (*mo./day*) August 31 (*yr.*) 2008."⁶ Under the
6 Agreement, Complainant agreed to pay rent of \$745 per month and a \$600 damage
7 deposit. Complainant's share of the rent was approximately \$400, with Section 8
8 paying the balance. The Agreement also contained the following handwritten provision
9 "Okayed for two cats only @⁷ service animals to Teresa." (Testimony of Complainant;
10 Exhibit A-9)

11 15) Respondent did not require Complainant to pay a pet deposit for either of
12 her cats. (Testimony of Respondent; Exhibits A-8, A-9)

13 16) On October 8, 2008, Dr. Dukeminier wrote a prescription for Complainant
14 stating "Teresa needs a service dog to help with treatment of her depression."
15 (Testimony of Complainant; Exhibit A-17)

16 17) On October 9, 2008, Complainant asked Respondent if she could have a
17 dog as a service animal, saying that her doctor had recommended it. Respondent told
18 her "don't push me on it" and told her she could not have a dog. Complainant took that
19 as a "threat." Respondent did not ask for a doctor's prescription and Complainant did
20 not show Dr. Dukeminier's prescription to Respondent. (Testimony of Complainant, J.
21 Provenzano, Johnson, Wallstrom)

22 18) Complainant was "shaky," "confused" and "upset" after Respondent told
23 her she could not have a dog and didn't sleep that night. (Testimony of J. Provenzano)

24
25 ⁶ Since the term of the lease was for "1 yr.," the forum infers that it was intended to end on August 31,
2009, not August 31, 2008.

1 19) After October 9, 2008, Complainant never again talked to Respondent
2 about getting a dog. (Entire record)

3 20) On January 12, 2009, Respondent gave Complainant a letter that he and
4 his wife had signed. It stated:

5 “Dear Ms. Teresa Provenzano,

6 “This is to inform you that due to the need for an immediate family
7 member, our daughter, needing housing, we must request that you find
8 alternative living arrangements by Feb 28, 2009. We know that this is not
9 easy for you, but our daughter has been in a bad situation. We feel we
10 must do what we can to help her recover and move forward. We are
11 trying to give you as much time as we can so that you can find another
12 place.

13 “God Bless,

14 “Ken & Barbara Wallstrom”

15 (Testimony of Complainant, Wallstrom; Exhibit A-10)

16 21) When Complainant received this letter, she became “really shaky” and
17 upset and “could hardly even stand.” She tried to call her sister and mother. Her
18 daughter had to try to talk to try to Complainant to try to “calm her down and make her
19 feel more comfortable” and became “shaky” herself. She became “very upset and very
20 depressed, scared, didn’t know where I was going to move.” She “cried a lot and didn’t
21 sleep a lot.” She felt like her “world was just ruined.” (Testimony of Complainant, J.
22 Provenzano)

23 22) Complainant never spoke to Respondent after receiving his January 12,
24 2009, letter. (Testimony of Complainant)

25 23) After receiving Respondent’s letter, Complainant got a notice from Section
8 saying she had to move. Complainant drove around Veneta looking for “for rent”
signs, looked on craigslist and the newspaper, and even drove into Eugene to look for

⁷ See fn. 5.

1 apartments.⁸ J. Provenzano helped her mother look for a new place to live, mostly by
2 looking on craigslist and driving around Veneta, looking for apartments. Complainant
3 located new housing sometime between January 22 and January 29, 2009. (Testimony
4 of J. Provenzano, Kennedy; Exhibit A-19)

5 24) At the time of Respondent's January 12, 2009, letter, Respondent's
6 daughter Sabrina had been living in a motor home parked at Respondent's residence.
7 She had moved, with her animals, from central Oregon in July 2008 because of
8 domestic abuse against her over the prior two years from her male partner and his
9 threats to destroy her personal property and kill her animals. She planned to move
10 away from Respondent's residence in Veneta to the subject property so that her ex-
11 partner would have a more difficult time finding her. On January 9, 2009, Sabrina wrote
12 a check in the amount of \$375 to Respondent postdated February 10, 2009, as a
13 deposit for half the rent for March 2009. Before she could move into the subject
14 property, she located and moved to a different rental property in Cottage Grove.
15 (Testimony of Wallstrom, Coop; Exhibit R-2)

16 25) On February 8, 2009, Respondent gave Complainant a second letter that
17 read as follows:

18 "Dear Ms. Teresa Provenzano,

19 "This is in response to the questions you on my phone on 2/2/2009. We
20 have been out of state, and after returning this week, have been very sick
21 in bed.

22 "As stated in the letter from 1/12/2009 was sent to you, we request that
23 you find 'alternative living arrangements by Feb 28, 2009'. The full rent for
24 the month of Feb. is still due and is not allowed to come from the
25 indemnification deposit, as per section 6 of the lease agreement. Please,
be advised that you are 'past due' for the month of February at this time.

"Sincerely

⁸ The forum takes judicial notice that Eugene is approximately 15 miles from Veneta.

1 "Kenneth D. Wallstrom"

2 (Testimony of Complainant, Wallstrom; Exhibit A-11)

3 26) On February 12, 2009, Complainant signed a lease agreement with Four
4 Oaks, LLC, for a rental property on Cottage Court in Veneta, with the lease to run from
5 "3/1/2009 and ending on 2/28/2010" and rent to be \$748 per month. Complainant
6 actually moved into her new residence on or about February 19, 2009. This was a
7 Section 8 duplex located several blocks away from the subject property. Complainant
8 made a down payment on the cleaning deposit of \$300 by check to hold the property
9 and had to pawn some personal property to raise the money to make the \$300 deposit.
10 After she moved in, she had to pay another \$500 for the remainder of the \$800 cleaning
11 deposit. Initially, Complainant's share of the rent was \$510 and Section 8 paid the
12 balance. At some point, her rent was raised to \$800 and her share increased to \$550.

13 (Testimony of Complainant, J. Provenzano, Kennedy; Exhibits A-12, A-19)

14 27) Complainant had to borrow her neighbors' miniature pickup truck to move
15 to her new rental on Cottage Court. It took a couple days to move, and some of her
16 belongings fell out of the truck onto the street during the move. Complainant's knees
17 were in "extreme pain" during the move. J. Provenzano had to miss a week of school to
18 help with the packing and unpacking, and her school principal came to the subject
19 property and asked a neighbor questions about J. Provenzano. Complainant then had
20 to explain the reason for J. Provenzano's absence to the principal. This upset
21 Complainant because of her concerns about "privacy." (Testimony of J. Provenzano)

22 28) After Complainant moved out, Respondent began to clean the subject
23 property. While cleaning, he learned his daughter had found another place to rent and
24 posted a "for rent" sign in front of the subject property. (Testimony of Wallstrom)

25 29) In the summer of 2010, Complainant left her Cottage Court rental and
went to Las Vegas for two months to help the parents of her deceased husband. She

1 paid no rent during that time and her in-laws paid all the costs associated with her
2 move. Complainant moved into her current residence on December 8, 2010. She has
3 three service cats and a service dog. Her initial rent was \$745 per month, with her
4 share being \$498. She had to pay a deposit of \$1,000 that Sec. 8 did not pay.
5 (Testimony of Complainant; Exhibit A-18)

6 30) Complainant noticed a "for rent" sign on the subject property a week or so
7 after she moved out. This made her "highly upset" and made her "feel awful."
8 (Testimony of Complainant)

9 31) On January 8, 2009, Complainant began attending weekly 60 minute
10 therapy sessions with Marcia Kennedy, LCSW, related to her history of depression and
11 anxiety. Kennedy made a "progress note" after each visit that summarized the
12 important points from each visit. In Kennedy's progress notes from January 8 through
13 February 26, 2009, there is no mention of Complainant's request to Respondent for a
14 dog. (Testimony of Kennedy; Exhibit A-19)

15 32) On March 18, 2009, Anne Nama and Chris Wolf completed a rental
16 application for the subject property and moved in the next day. They have an "outside"
17 dog for which they paid a deposit. (Testimony of Wallstrom; Exhibit A-6)

18 33) Complainant has a service dog at her current residence that she acquired
19 in May 2010. The dog makes her feel safe and requires her to go outside more and get
20 more exercise. Her dog is very important to her emotional stability. In her own words,
21 "the dog gets me outside, he gets me exercise, and he makes me feel very safe * * * .
22 The cats just make me feel comfortable when I hug on them and when I'm having a bad
23 day. I pet them and they cuddle up to me. But the dog is very helpful in getting me to
24 go outside * * * ." (Testimony of Complainant, J. Provenzano, Kennedy)

25

1 34) At the time of the hearing, Complainant had a “caregiver” for three times a
2 week, 15 hours per week, whose services were provided through Senior Disabled
3 Services. The caregiver’s role is to help Complainant with housework and grocery
4 shopping and to remind Complainant to take her medications and go to her
5 appointments. Tamara Tucker, Complainant’s caregiver, was present during a portion
6 of the hearing. (Testimony of Complainant)

7 **CREDIBILITY FINDINGS**

8 35) Donald Ahlquist, Kerry Johnson, and Marcia Kennedy were credible
9 witnesses and the forum has credited the entirety of their testimony. (Testimony of
10 Ahlquist, Johnson, Kennedy)

11 36) Sabrina Coop’s recollection of specific dates was poor and she had a
12 natural bias because Respondent is her father. However, the forum has credited her
13 testimony concerning the reasons she moved to Respondent’s property, the reason she
14 planned to move to the subject property, and the reason she changed her mind about
15 moving to the subject property because her explanations made sense and were not
16 contradicted by more credible evidence. (Testimony of Coop)

17 37) Despite her youth and her natural bias as Complainant’s daughter, J.
18 Provenzano was a credible witness who demonstrated a better recollection of the
19 events related to the alleged discrimination than any other witness. The forum has
20 credited her testimony in its entirety. (Testimony of J. Provenzano)

21 38) Respondent’s testimony was inconsistent with prior statements on to two
22 key issues that he made to Johnson, the Agency’s investigator, during a December 7,
23 2009, interview. First, he testified at the hearing that Complainant asked for a puppy for
24 her daughter, and never asked for a “companion” or “service” dog. In contrast, he told
25 Johnson that Complainant made a verbal request to him for a service dog to help her

1 emotional state and said she could provide medical documentation. Second, he
2 testified at hearing that Sabrina, his daughter, never moved into the subject property,
3 whereas in his interview with Johnson he stated that Sabrina lived in the subject
4 property for a month to six weeks before moving to Cottage Grove. The forum also
5 finds his characterization of his January 12, 2009, letter to Complainant as a "request to
6 leave" and not an "expulsion" to be disingenuous, since there is no evidence that
7 Complainant had any choice but to leave. Based on these inconsistencies, the forum
8 has disbelieved Wallstrom's testimony except when it was corroborated or
9 uncontroverted by other credible evidence. Based on Coop's testimony, the forum has
10 credited his testimony that he expelled Complainant so Coop could move in.

11 (Testimony of Wallstrom)

12 39) Complainant testified that one of her disabilities was her "memory." This
13 became apparent during testimony as she struggled to answer almost every question
14 on direct and cross examination that had anything to do with time or dates. Her
15 admission that sometimes she cannot recall details within "a couple minutes" after she
16 becomes aware of them is illustrative and helps explain the ease with which she
17 became confused during her testimony. For example, she testified she could not recall
18 clearly whether she made her request to Respondent for a service dog during a
19 telephone call or while Respondent was at her home. In addition, her daughter also
20 confirmed that Complainant's memory is very poor.

21 In her first complaint and amended complaint, Complainant, under penalty of
22 perjury, signed complaints stating that she "submitted medical certification to
23 Respondent confirming her need for the assistance dog." This allegation was deleted
24 from her second amended complaint. No evidence was offered to explain this change.

1 The forum attributes Complainant's confusing and sometimes inconsistent
2 testimony to her self-acknowledged problems with concentration and memory --
3 problems that were vividly demonstrated at the hearing -- rather than to a willful attempt
4 to deceive. Based on these problems, the forum has only credited Complainant's
5 testimony when it was corroborated by other credible evidence or uncontroverted by
6 other credible evidence. (Testimony of Complainant)

7 **ULTIMATE FINDINGS OF FACT**

8 1) Since 1997, Complainant has suffered from the mental impairments of
9 depression and anxiety. Because of these impairments, she is substantially limited in a
10 number of major life activities, including caring for herself, sleeping, learning,
11 concentrating, and remembering.

12 2) Beginning in 2004, a series of medical providers wrote prescriptions for
13 Complainant for a "companion" or "service" cat related to mental health disabilities. She
14 acquired two cats that cheer her up and help her with her depression.

15 3) Sometime before August 2007, Complainant and her daughter, J.
16 Provenzano, along with Complainant's two cats, moved into and began renting one unit
17 of a duplex that constitutes the subject property. Respondent did not own the subject
18 property at that time.

19 4) In August 2007, Respondent and his wife, Barbara Wallstrom, bought the
20 subject property. Complainant and J. Provenzano occupied the subject property with
21 Complainant's two cats. Complainant and Respondent signed a lease agreement that
22 extended until August 31, 2008. Complainant gave Respondent a copy of a prescription
23 for a "companion" cat, and the lease agreement provided that Complainant was
24 approved for two cats as "service animals." Complainant kept two cats throughout her
25 tenancy at the subject property.

1 5) On August 29, 2008, Complainant and Respondent renewed their lease
2 agreement to extend through August 31, 2009.⁹ This lease agreement also contained
3 a provision approving two cats as “service animals.”

4 6) On October 8, 2008, Dr. Dukeminier, Complainant’s primary care
5 physician, wrote a prescription for Complainant stating “Teresa needs a service dog to
6 help with treatment of her depression.”

7 7) On October 9, 2008, Complainant asked Respondent if she could have a
8 dog as a service animal, saying that her doctor had recommended it. Respondent told
9 her “don’t push me on it” and told her she could not have a dog. Respondent did not
10 ask for a doctor’s prescription and Complainant did not show Dr. Dukeminier’s
11 prescription to Respondent.

12 8) Complainant was “shaky,” “confused” and “upset” after Respondent told
13 her she could not have a dog and didn’t sleep that night. After October 9, 2008,
14 Complainant never again talked to Respondent about getting a dog.

15 9) On January 12, 2009, Respondent gave Complainant a letter he and his
16 wife had signed that asked Complainant to find “alternative living arrangements” by
17 February 28, 2009, because of their daughter’s “bad situation.” At that time,
18 Respondent’s daughter Sabrina had been living in a motor home parked at
19 Respondent’s residence since July 2008 to escape an abusive relationship from her
20 former male partner.

21 10) Complainant signed a lease agreement with Four Oaks, LLC, for a nearby
22 rental property in Veneta, and moved into her new residence on or about February 19,
23 2009. Complainant experienced emotional distress over her expulsion and the troubles
24

25 _____
⁹ See fn. 6.

1 she experienced in finding replacement housing and moving. J. Provanzano had to
2 miss school for a week to help her mother move.

3 11) After Complainant moved out, Respondent began to clean the subject
4 property. While cleaning, he learned his daughter had found another place to rent and
5 posted a "for rent" sign in front of the subject property.

6 12) Complainant moved into her current residence on December 8, 2010.
7 She now has three service cats and a service dog that she acquired in May 2010. Her
8 dog makes her feel safe and requires her to go outside more and get more exercise and
9 is very important to her emotional stability.

10 13) Complainant observed a "for rent" sign on the subject property a week or
11 so after she moved out. This caused her emotional distress.

12 14) On March 18, 2009, Anne Nama and Chris Wolf completed a rental
13 application for the subject property and moved in the next day. They have an "outside"
14 dog for which they paid a deposit.

15 **CONCLUSIONS OF LAW**

16 1) At all times material herein, Complainant was a "purchaser" and the
17 subject property was a "dwelling" as defined in ORS 659A.145(1)(a) & (b) and ORS
18 659A.421(a) & (b). At all times material herein, Complainant was an "aggrieved person"
19 as defined in ORS 659A.820(1) and OAR 839-005-0200(1).

20 2) At all times material herein, Complainant was an individual with a disability
21 as defined in ORS 659A.145 and OAR 839-005-0200(3).

22 3) At all times material herein, J. Provenzano was a "purchaser" and
23 "aggrieved person" as set out in ORS 659A.145(1)(a) & (b), ORS 659A.421(1)(a) & (b),
24 OAR 839-005-0200(1) & (12).

25 4) At all times material herein, Respondent was a "person" as defined in
ORS 659A.001(9).

1 damages for emotional, mental, and physical suffering, "at least" \$10,000 for out-of-
2 pocket costs related to Complainant's move from the subject property, and an \$11,000
3 civil penalty. The forum addresses these issues separately.

4 **RESPONDENT VIOLATED ORS 659A.145(2)(G) BY DENYING COMPLAINANT'S**
5 **OCTOBER 9, 2008, REQUEST TO HAVE A SERVICE DOG**

6 The Agency alleges that Complainant asked Respondent if she could have a
7 "service dog" based on her doctor's recommendation that it would help her with her
8 mental health issues, and that Respondent unlawfully denied her request. In pertinent
9 part, ORS 659A.145(2)(g) provides:

10 "(2) A person may not discriminate because of a disability of a purchaser * * *
11 by doing any of the following:

11 " * * * * "

12 "(g) Refusing to make reasonable accommodation in rules, policies, practices or
13 services when the accommodations may be necessary to afford the individual
14 with a disability equal opportunity to use and enjoy a dwelling."

14 A service dog, when it "mitigates one or more of the person's disability-related needs,"
15 may be such a "reasonable accommodation." OAR 839-005-0220(2)(c)(C).

16 **A. Respondent is a "person."**

17 ORS 659A.001(9)(a) and OAR 839-005-0200(9) define "person" as "one or more
18 individuals." Respondent, as an individual, is therefore a "person" who may not
19 discriminate because of the disability of a purchaser under ORS 659A.145(2).

20 **B. Complainant was a "purchaser" with "disability."**

21 The Formal Charges allege that Complainant was a "purchaser" who "had mental
22 impairments, specifically depression and anxiety, that substantially limited her in major
23 life activities, including but not limited to concentrating, communicating, sleeping and
24 interacting with others."
25

1 ORS 659A.145, read together with ORS 659A.421(1)(b), defines “purchaser” as
2 “an occupant, prospective occupant, renter, prospective lessee, buyer or prospective
3 buyer.” Complainant, as an “occupant” of the subject property, was a “purchaser.”

4 As relevant to this proceeding, “disability” is defined as “[a] * * * mental
5 impairment that substantially limits one or more major life activities of the individual.”
6 OAR 839-005-0200(3)(1). “Mental impairment” is defined as “any mental or
7 psychological disorder, * * * emotional or mental illness, and specific learning
8 disabilities.” Testimony by Complainant and Kennedy established that Complainant has
9 had anxiety and depression for 15 years and that those conditions substantially limit her
10 sleeping, learning, concentrating, remembering, and ability to self-care. This evidence
11 establishes that Complainant had a “disability” as set out in OAR 659A.145 at the time
12 of the alleged discrimination.

13 **C. The subject property is a “dwelling.”**

14 Under ORS 659A.145, a “dwelling” has the meaning given it in ORS 659A.421.
15 As relevant to this proceeding, ORS 659A.421(1)(a)(A) defines “dwelling” as “[a]
16 building or structure, or portion of a building or structure, that is occupied, or designed
17 or intended for occupancy, as a residence by one or more families[.]” OAR 839-005-
18 0195-0200(4) parrots that definition. The subject property is a duplex designed and
19 intended for residential occupancy and its respective units were occupied by
20 Complainant and Respondent’s brother-in-law during the time of the alleged
21 discrimination. As such, it qualifies as a “dwelling” under ORS 659A.145.

22 **D. Complainant requested reasonable accommodation.**

23 At the time Complainant became Respondent’s tenant, she already had two
24 “service” cats prescribed by her former and current physicians. Her cats and their
25 function as “service animals” was memorialized in the original and renewed lease

1 agreements between Complainant and Respondent.¹⁰ On October 8, 2008, Dr.
2 Dukeminier, her primary care physician, wrote a prescription for Complainant stating
3 "Teresa needs a service dog to help with treatment of her depression." The Agency
4 alleges that Complainant asked Respondent the next day if she could get a dog as a
5 service animal, saying that her doctor had recommended it. Respondent admits telling
6 Complainant she could not have a dog but contends this was in response to
7 Complainant's request for a puppy for her daughter, not for a "companion" or "service"
8 dog for herself. Under Respondent's version of the facts, Complainant would not be
9 entitled to reasonable accommodation under the law, as the purpose of the request
10 would not be to mitigate one or more of the Complainant's disability-related needs, but
11 as company for J. Provenzano, her non-disabled daughter.

12 The forum accepts Complainant's version of the facts for several reasons. First,
13 Complainant had received a prescription from her primary care physician the very day
14 before making her request for a service dog. Second, although Complainant's memory
15 was definitely an issue and she did not recall whether she made an in-person or a
16 telephone request to Respondent for a service dog, her testimony as to the contents
17 and time of her request was consistent with having received a prescription the day
18 before making her request. Third, no testimony was elicited from Complainant, J.
19 Provenzano, or any other witness that had any tendency to show that J. Provenzano
20 wanted a puppy or that Complainant wanted a puppy for her. Fourth, the statement
21 Respondent made to Johnson that Sabrina Coop moved into the subject property for a
22 least a month and Respondent's testimony at hearing that Coop never moved into the
23 subject property are at extreme odds and can only be reconciled by the conclusion that

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¹⁰ See Findings of Fact ##8 & 14 –The Merits.

1 Respondent did not tell Johnson the truth. These four reasons, taken together, lead the
2 forum to disbelieve Respondent's story that Complainant asked for a "puppy."

3 **E. Respondent denied Complainant's request for reasonable accommodation.**

4 Under cross examination, Respondent admitted that he told Complainant she
5 could not have a dog. In his testimony, Respondent put his denial in the context of
6 refusing to allow Complainant to have a puppy for her daughter, but he told Johnson he
7 would prefer she "not have a dog." It was unnecessary for Complainant to show Dr.
8 Dukeminier's prescription to Respondent for her to be entitled to reasonable
9 accommodation. In any event, Respondent did not ask Complainant to see it and no
10 evidence was adduced to establish that Respondent would have been legally entitled to
11 ask Complainant to provide a prescription.¹¹

12 **F. Conclusion.**

13 OAR 839-005-0220(2)(c)(C) provides that it is unlawful "for a housing provider
14 refused to permit a disabled person to live in a covered dwelling with an animal that
15 mitigates one or more of the person's disability-related needs, except when a specific
16 animal poses a direct threat to the health or safety of other individuals and the threat
17 cannot be eliminated significantly reduced[.]" The forum does not consider the rule's
18 "direct threat" exception because it is an affirmative defense that was waived by
19 Respondent's failure to raise it in the answer. By denying Complainant's request to
20 have a service dog, Respondent violated ORS 659A.145(2)(g) and OAR 839-005-
21 0220(2)(c)(C) with respect to Complainant.

22
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25 ¹¹ See OAR 839-005-0220(2)(c)(A), which provides that "[a] housing provider may not require verification of disability-related need for a requested accommodation if that need is readily apparent or otherwise known[.]

1 **RESPONDENT DID NOT VIOLATE ORS 659A.145(8) BY TELLING COMPLAINANT**
2 **NOT “TO PUSH” HER REQUEST FOR A SERVICE DOG.**

3 ORS 659A.145(8) provides that “[a] person may not coerce, intimidate, threaten
4 or interfere with any individual in the exercise or enjoyment of * * * any right granted or
5 protected by this section.” See also OAR 839-005-0205(1)(g)(the Agency’s
6 administrative rule containing similar language). The Agency specifically alleges, in
7 section 5, paragraph 25 of the Formal Charges, that Respondent “coerced, intimidated
8 and threatened” Complainant, in violation of ORS 659A.145(8), by his five-word spoken
9 response -- “don’t push me on it” -- when Complainant asked if she could have a
10 service dog.¹² The Formal Charges do not allege that Respondent “interfered” with
11 exercise or enjoyment or her rights under ORS 659A.145(8).

12 As a person with disabilities who had been prescribed a service dog,
13 Complainant had the legal right to a service dog while she lived in Respondent’s
14 covered dwelling. OAR 839-005-0220(2)(c)(C). That right necessarily includes the right
15 to request a service dog. Under ORS 659A.145(8), a person may not be subject to
16 coercion, threats, or intimidation related to such a request. Based on the credible
17 testimony of Complainant and her daughter, the forum concludes that Respondent
18 made the alleged statement, leaving the forum with the question of whether or not
19 Respondent’s statement violated ORS 659A.145(8). To determine that, the forum must
20 ascertain the meaning of the terms “coerce, intimidate, threaten.” In its exceptions, the
21 Agency points out that the Proposed Order does not consider whether or not
22 Respondent’s statement constituted “interference” under ORS 659A.145(8). Whether or
23 not Respondent’s statement constituted “interference” under ORS 659A.145(8) is not a
24 question before the forum because, as noted earlier, the Formal Charges do not allege

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¹² See Finding of Fact #17 – The Merits.

1 that Respondent “interfered” with Complainant’s exercise or enjoyment or her rights
2 under ORS 659A.145(8). The forum lacks the authority to draw a legal conclusion on
3 an allegation that is not set out in the Formal Charges.

4 In interpreting a statute, the forum follows the analytical framework set out by the
5 Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d
6 1143 (1993) and modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). See
7 *In the Matter of Petition for Declaratory Ruling, International Association of Fire*
8 *Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor*, 31 BOLI 267, 281-
9 82 (2012), *appeal pending*. Within that framework, the forum first examines the text
10 and context of the statutes and also considers any pertinent legislative history proffered
11 by the participants. In this case no legislative history was proffered, and the forum is
12 not required to independently research that history unless the meaning of “coerce,
13 intimidate, threaten,” as used in 659A.145(8), cannot be determined from a text and
14 context analysis. The text of the statutory provision itself is the starting point for
15 interpretation and the best evidence of the legislature’s intent. Also relevant is the
16 context of the statutory provision, which includes other provisions of the same statute
17 and other related statutes. If the legislature’s intent is clear from the text and context of
18 the statutory provision, further inquiry is unnecessary. *In the Matter of Captain Hooks,*
19 *LLP*, 27 BOLI 211, 229 (2006). In this case, the words “coerce, intimidate, threaten” are
20 not defined in ORS 659A.145 or in OAR 839-005-0205, the Agency’s administrative rule
21 interpreting ORS 659A.145, and the forum has found no Oregon case law on point. In
22 the past, the forum has found similar federal law to be instructive, though not binding.
23 In this case, the Federal Fair Housing Act (“FHA”), at 42 U.S.C. §3617, contains
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25

1 language almost identical to ORS 659A.145(8).¹³ However, the FHA does not define
2 “coerce,” “intimidate,” and “threaten” and the forum has not found any FHA cases that
3 define those words other than by application.

4 Since the words “coerce, intimidate, threaten” are words of common usage, the
5 forum ascribes to them their plain, natural and ordinary meaning contained in *Webster’s*
6 *Third New Int’l Dictionary* (unabridged edition), the dictionary in use at the time ORS
7 659A.145(8) was enacted.¹⁴ Those meanings, as relevant to this case, are as follows:

8 “**Coerce: 1:** to restrain, control, or dominate, nullifying individual will or desire (as
9 by force, power, violence, or intimidation) <religion has in the past tried to ~ the
10 irreligious, by garish promises and terrifying threats —W.R.Inge> **2:** to compel to
11 an act or choice by force, threat, or other pressure <a person might no longer be
12 coerced into an agreement not to join a union — *American Guide Series:*
13 *Massachusetts*> **3:** to effect, bring about, establish, or enforce by force, threat, or
14 other pressure <struggles to ~ uniformity of sentiment — Felix Frankfurter> **syn**
15 see FORCE” *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY*, at
16 439

17 “**Intimidate:** to make timid or fearful : inspire or affect with fear : FRIGHTEN
18 <despite his imposing presence and all the grandeur surrounding him, I was not
19 *intimidated* — Polly Adler>; *esp* : to compel to action or inaction (as by threats)
20 <charged with *intimidating* public officials to get the government to buy machine
21 guns he was selling — *Time*> **syn** INTIMIDATE, COW, BULLDOZE, BULLY,
22 BROWBEAT agree in meaning to frighten or coerce by frightening means into
23 submission or obedience. INTIMIDATE suggests a display or application (as of
24 force or learning) so as to cause fear or a sense of inferiority and a consequent
25 submission <most of these officials have been badly *intimidated* by the specter of
a summons to appear before a Congressional committee — *New Republic*>
<many authors and publishers are not merely *intimidated* by the thought of
footnotes; they are positively terrified — G.W.Sherburn>” *Webster’s*, at 1184.

21
22 ¹³ 42 U.S.C. §3617 provides “It shall be unlawful to coerce, intimidate, threaten, or interfere with any
23 person in the exercise or enjoyment of, or on act of his having exercised or enjoyed, or on account of his
having aided or encouraged any other person in the exercise or enjoyment of, any right granted or
protected by section 803, 804, 805, or 806 of this title.”

24 ¹⁴ ORS 659A.145(8) was originally enacted in 1989 as ORS 659.430(7), with the original language
25 beginning with the words “[a] person shall not coerce * * *.” In 2001, it was renumbered as ORS
659A.145(7). In 2007, it was renumbered as ORS 659A.145(8) and the word “may” substituted for “shall.”
In 2009, it was amended once more to substitute the word “individual” for the word “person” where it
refers to someone who is the victim of discrimination.

1 **“Threaten:** 1: to utter threats against : promise punishment, reprisal, or other
2 distress to <~trespassers with arrest> * * * 3: to promise as a threat : hold out by
3 way of menace or warning <~punishment to all trespassers> 4a: to give signs of
4 4 a : to give signs of the approach of (something evil or unpleasant) : indicate as
5 impending : PORTEND <the sky ~s a storm> b: to hang over as a threat :
6 MENACE <famine ~s the city> 5: to announce as intended or possible <threaten
7 to buy a car> ~ vi 1: to utter or use threats or menaces 2: to have a menacing
8 appearance : portend evil <though the seas ~ they are merciful — Shak.> syn.
9 MENACE: THREATEN applies to the probable visitation of some evil or affliction;
10 it may be used of attempts to dissuade by promising punishment or retribution
11 <most of them lived on the margin of survival, constantly *threatened* by famine
12 and disease — Arthur Geddes> <another form of lying, which is extremely bad
13 for the young, is to *threaten* punishments you do not mean to inflict — Bertrand
14 Russell> <discredit completely all other forms of Christianity, denying any
15 efficacy to their rites, and *threatening* all their members with eternal damnation —
16 W.R.Inge>” Webster’s, at 2382.

17 All three definitions involve (a) an intentional act (b) designed to compel someone to act
18 or refrain from acting in a certain way (c) that is premised on a potential negative
19 consequence that the actor has the power to influence or bring about and (d) the
20 apprehension of that negative consequence by the person sought to be compelled.
21 Based on these definitions, the forum examines Respondent’s intent in making his
22 statement and Complainant’s reaction to that statement to determine if it was an attempt
23 to “coerce,” “intimidate,” or threaten” Complainant based on the exercise of her rights
24 related to her disability and Oregon’s housing laws.

25 Respondent’s intent, based on his testimony that he told Complainant she could
26 not have a dog, is clear – he did not want to let Complainant have a dog. Complainant
27 reacted by becoming upset and having trouble sleeping for a night. Complainant
28 testified that she took Respondent’s statement “as a threat,” but did not testify as to why
29 she took it as a threat, as opposed to a mere denial of her request to have a dog, and
30 there was no evidence concerning Respondent’s body language or manner of speech
31 when he uttered the words “don’t push me on it” that could indicate the words were
32 intended to coerce, intimidate, or threaten Complainant. There was no testimony that

1 Respondent took any action related to his statement,¹⁵ or that Complainant refrained
2 from getting a dog because she feared repercussions from Respondent.¹⁶ Although the
3 fact that Complainant did not get a dog while she continued to live in the subject
4 property leads to a possible inference that she did not do so because of Respondent's
5 statement and her resultant fear, the forum declines to draw that inference because of
6 the lack of other supporting evidence. In conclusion, the evidence is insufficient to show
7 that Respondent's statement violated ORS 659A.145(8) and the Agency has failed to
8 carry its burden of proof.¹⁷

9 **COMPLAINANT WAS NOT EXPELLED FROM THE SUBJECT PROPERTY BECAUSE**
10 **OF HER DISABILITY**

11 The Agency alleges that, on January 12, 2009, Respondent gave Complainant a
12 written request to vacate the subject property by February 28, 2009, because of her
13

14 ¹⁵ See Conclusion of Law #7, in which the forum concludes that Complainant's expulsion was unrelated to
15 her request for a service dog, and the discussion in the Opinion explaining the reasons for that
16 conclusion.

17 ¹⁶ Although J. Provenzano testified "My mom just left it alone after that," there was no evidence that
18 Complainant ever talked with her daughter or therapists, whom she saw on a regular basis, concerning
19 any fear of retaliation if she asked again for a service dog, and she did not testify that she waited until
20 after she vacated the subject property to get a dog because she feared expulsion or other retaliation from
21 Respondent.

22 ¹⁷ Compare *Secretary of HUD v. Astralis Condominium Association*, HUDALJ 08-071-FH (issued
23 September 10, 2009) (Respondent violated 42 U.S.C. §3617 when, in response to Complainants' request
24 for exclusive use of handicapped accessible parking spaces: (a) Respondent placed and/or caused to be
25 placed parking stickers for alleged misuse of the handicapped parking spaces on Complainants' cars,
even on the driver's side window, when they parked in the handicapped parking spaces. The parking
stickers covered large portions of the glass and prevented people inside the car from effectively seeing
out; (b) Respondents filed a law suit against Complainants for the sole purpose of preventing them from
using the handicap parking spaces on an exclusive basis; (c) Respondents withdrew its lawsuit against
and modified the handicap parking spaces by identifying them with a "big sign" which read "Visitors"; (d)
Respondents' Board ignored advice to provide Complainants with the requested spaces in exchange for
Complainants' Assigned Spaces, and Complainants were forced to appear before an hostile Assembly;
and (e) Respondents' Board members made a series of public, disparaging remarks about
Complainants); *Secretary of HUD v. Willie L. Williams*, HUDALJ 02-89-0459-1 (issued March 22, 1991)
(Respondent telephoned Complainant, an AIDS victim, at 6 a.m., and awakened him to tell him he had
heard Complainant had AIDS, thereby violating 42 U.S.C. §3617 for the reason that the "timing,
circumstances and content of Respondent's phone call [had] the effect of threatening and intimidating
Complainant and interfering with the quiet enjoyment of his home.")

1 disabilities and request for a service dog, thereby violating of ORS 659A.145(2)(b).¹⁸

2 The Agency's prima facie case on this issue consists of the following elements:

- 3 (1) Complainant has a "disability" as defined in ORS 659A.421;
- 4 (2) Respondent is a "person" as defined in ORS 659A.001(9);
- 5 (3) Complainant was a "purchaser" as defined in ORS 659A.421(1)(b) who
6 leased and occupied a "dwelling" as defined in ORS 659A.421(1)(a) that
7 was owned by Respondent;
- 8 (4) Respondent expelled Complainant from her dwelling;
- 9 (5) Respondent expelled Complainant because of her disability.

10 The first three elements are undisputed. Respondent testified that his "request" that
11 Complainant find "alternative living arrangements" was just that – a "request" – and not
12 an expulsion. The forum disagrees and finds that Respondent's "request" satisfies the
13 fourth element of the Agency's prima facie case.

14 The remaining element of the Agency's prima facie case is the causal link --
15 proof that Respondent expelled Complainant from her dwelling because of her disability.
16 The Agency has the burden of proof to establish this link¹⁹ and the standard of proof is a
17 preponderance of the evidence.²⁰

18 The Agency's administrative rules set out three legal theories that can be used to
19 prove unlawful discrimination in housing: specific intent, different or unequal treatment,
20 and mixed motive. OAR 839-005-0206(2)(d). The rules instruct the forum to use

21 ¹⁸ ORS 659A.145(2)(b) prohibits the expulsion of a person from a dwelling based on their disability,
22 whereas ORS 659A.145(8) prohibits a person from "interfer[ing]" with an individual's "enjoyment of * * *
23 any right granted or protected by this section." In the forum's view, retaliation by expulsion against
24 Complainant because she requested a dog, a right granted and protected by ORS 659A.145, would
25 constitute "interfere[nce]" prohibited by ORS 659A.145(8). See *In the Matter of Petworks LLC*, 30 BOLI
35, 46 (2008) (citing *Drayton v. Department of Transportation*, 186 Or App 1, 62 P3d 430 (2003) for the
proposition that the Agency could not award overtime pay to a wage claimant because the Agency's
charging document lacked a citation to the statute and rule allegedly violated). Since the Agency did not
plead Complainant's expulsion as a violation of ORS 659A.145(8), the forum does not consider the
Agency's allegation that Complainant was expelled because she requested a service dog.

¹⁹ See OAR 839-005-0206(2)(d)(B)(ii).

²⁰ See, e.g., *In the Matter of Sunnyside Inn*, 11 BOLI 151, 165 (1993).

1 “whichever of the following theories applies.” Because the Formal Charges do not
2 specify which of the three theories supports the Agency’s allegation of discriminatory
3 expulsion, the forum refers to the facts alleged in the Charges in support of the
4 Agency’s allegation to determine which theory should be applied. That section of the
5 Formal Charges contains the following allegations:

6 “VII. DISCRIMINATION: EXPELLING A PURCHASER BASED ON DISABILITY

7 “The Agency re-alleges paragraphs 1-30 and further alleges:

8 “31. At all material times, Complainant was an occupant, renter and/or lessee
9 of the subject property and was therefore a ‘purchaser’ as defined by ORS
10 659A.421 and Aggrieved Person was an occupant and therefore a ‘purchaser’ as
11 defined by ORS 659A.421.

12 “32. On or about October 9, 2008, Complainant asked Respondent that she be
13 allowed to have a companion²¹ dog. Respondent denied the request.

14 “33. On or about January 12, 2009, Respondent advised Complainant that she
15 and Aggrieved Person would have to move by February 28, 2009, because
16 Respondent’s daughter needed a place to live.

17 “34. Complainant and Aggrieved Person vacated the subject property on or
18 about February 28, 2009.

19 “35. Complainant observed a ‘for rent’ sign in the yard at the subject property
20 about one week after she moved out.

21 “36. By his actions, Respondent expelled Complainant and Aggrieved Person
22 based on Complainant’s disability and/or request for reasonable accommodation,
23 in violation of ORS 659A.145(2)(b).”

24 The different or unequal treatment theory of discrimination requires
25 comparators,²² and the mixed motive theory of discrimination requires dual motives.²³

21 Although the Formal Charges use the term “companion dog” in two places, the forum uses the term
22 “service dog” in its analysis because it is the term Dr. Dukeminier used when prescribing a dog for
23 Complainant and because Complainant testified she asked Respondent if she could have a “service” dog.

24 ²² OAR 839-005-0206(1)(d)(B) provides: “Different or Unequal Treatment Theory: The respondent treats
25 members of a protected class differently than others who are not members of that protected class. When
the respondent makes this differentiation because of the individual’s protected class and not because of
legitimate, non-discriminatory reasons, unlawful discrimination exists.”

²³ OAR 839-005-0206(1)(d)(B)(i)(II) provides: “Mixed Motive: If the respondent presents substantial
evidence that a legitimate, non-discriminatory reason contributed to the respondent’s action, but the
division finds the individual’s protected class membership was also a substantial factor in the
respondent’s action, the division will determine there is substantial evidence of unlawful discrimination.”

1 The pleadings allege neither. Consequently, the forum applies the specific intent
2 theory, which provides that unlawful discrimination occurs when a respondent
3 “knowingly and purposefully discriminates against an individual because of that
4 individual’s membership in a protected class.” OAR 839-005-0206(1)(d)(A).

5 Specific intent can be shown by direct or circumstantial evidence. *In the Matter*
6 *of WINCO Foods, Inc.*, 28 BOLI 259, 300 (2007). Direct evidence is evidence that
7 proves a fact in dispute directly, without any inferences or presumptions, and which in
8 itself, if true, conclusively establishes the fact.²⁴ There is no direct evidence that
9 Respondent expelled Complainant because of her disabilities. The Agency can also
10 prove unlawful discrimination by showing that Respondent’s reason for expelling
11 Complainant – so that Coop, his daughter, could move in -- was a pretext for
12 discrimination because it was untrue. The Agency argues that has proved pretext by
13 showing that Coop did not move into the subject property and Respondent posted a “for
14 rent” sign after Complainant moved out. In evaluating this argument, the forum is
15 mindful that the burden of proof on this issue rests with the Agency.

16 The Agency relies on three primary pieces of evidence to show that Coop’s
17 failure to move into the subject property and the “for rent” sign establish pretext. First,
18 Respondent’s prior inconsistent statement to Johnson that Coop moved into the subject
19 property. Second, Respondent’s failure to produce any records except for Coop’s
20 check register to show that Coop in fact paid a rental deposit to show her intent to move
21 into the subject property. Third, Respondent’s failure to produce any records to show
22 the date that Coop moved out of Respondent’s motor home to her Cottage Grove rental
23

24 ²⁴ See, e.g., *In the Matter of Alpine Meadows Landscape, LLC*, 19 BOLI 191, 209, 211 (2000) (A note that
25 respondents sent to complainant a note stating they did not hire him because they "were looking for
someone younger, to possibly take over the business" was direct evidence that established respondent’s
specific intent to discriminate against complainant based on his age).

1 or the date that new tenants moved into the subject property. The forum addresses
2 each separately.

3 **A. Respondent's prior inconsistent statement.**

4 Johnson credibly testified that Respondent told him that Coop had moved into
5 the subject property for a short time. At hearing, Respondent testified that Coop did not
6 move into the subject property after Complainant vacated it because she located
7 alternative lodging in Cottage Grove between January 12 and February 28, 2009, and
8 moved there instead. However, this prior inconsistent statement only reflects on
9 Respondent's credibility, as there is no dispute that Coop never moved into the subject
10 property.

11 **B. Did Respondent and Coop ever intend for Coop to move into the subject**
12 **property?**

13 The question then becomes whether Respondent and Coop ever intended that
14 Coop would move into the subject property. Coop testified that she planned to move
15 into the property to make it more difficult for her abusive partner to find her, as he knew
16 where Respondent lived. She also testified that she wrote out check #136 to
17 Respondent for \$375 on January 9, 2009, as a deposit on the rent and Respondent
18 provided a copy of Coop's check register as corroboration. Respondent did not provide
19 a copy of the check and testified that he tore it up when Coop moved elsewhere.
20 Respondent produced no records except for Coop's check register to show that Coop in
21 fact paid a rental deposit to show her intent to move into the subject property. The
22 Agency contends that Respondent's failure to produce a copy of the check and Coop's
23 failure to note the payee of the check in her check register should lead the forum to
24 conclude that no check was ever written, or if it was, it was not written to Respondent.
25 The forum disagrees for several reasons. First, Respondent brought the original check
register to the hearing and the Agency and the ALJ both inspected the two pages

1 containing the handwritten entry for check #136 that constitute Exhibit R-2. The ALJ
2 observed no anomalies and the Agency's case presenter, after inspecting the original
3 check register, did not argue that the original document had been altered in any way.
4 Second, check #136 is one of 14 entries on the same page in Coop's register. For
5 check 136, the register reads "136 1/9/09 Half of March Rent Post Dated 2/10/09
6 375.00." Two other entries in Exhibit R-2 are also unaccompanied by a note as to their
7 purpose. Check 133 has no notation at all after the check number, and the entry after
8 "134," written on 12/10/08, only states "VOID." Third, because Coop is respondent's
9 daughter and not a merely a tenant with whom he had only a fiduciary relationship, the
10 forum believed Respondent's testimony that he did not cash check 136 and instead tore
11 it up. Finally, as to check 136, Respondent cannot produce what no longer exists.

12 **C. Significance of Respondent's failure to produce any records showing**
13 **Coop's "move-out" date and the new tenants' "move-in" date.**

14 Respondent produced no records at hearing to show the date that Coop moved
15 out of Respondent's motor home to her Cottage Grove rental and the date that Anne
16 Nama & Chris Wolf, Respondent's new tenants, moved into the subject property. Since
17 those records were arguably within the power of Respondent to produce and would
18 support Respondent's defense, the Agency argues that Respondent's failure to produce
19 them creates an inference that Coop never intended to move. The forum disagrees for
20 two reasons. First, because there was no evidence that Respondent "willfully
21 suppressed" the records, no presumption exists under OEC 311(1)(a) that the records
22 would have been adverse to Respondent.²⁵ Second, it was the Agency's burden to
23 prove that Respondent's defense was pretextual. If the Agency believed that

24 _____
25 ²⁵ See, e.g., *In the Matter of Storm King Construction, Inc.*, 27 BOLI 46, 53 (2005) (forum took guidance from presumption in Oregon Evidence Code to resolve the issue of whether a respondent had received a letter sent to it by the Employment Department).

1 Respondent's defense was a pretext, it could have sought these records through
2 discovery and offered them as impeachment or rebuttal evidence or called Wolf or
3 Nama, the new tenants, as witnesses. Nothing in the record suggests that the Agency
4 made any attempt to obtain the records and the Agency did not call Wolf or Nama as a
5 witness.

6 In conclusion, the forum finds that the Agency has not shown, by a
7 preponderance of the evidence, that Respondent expelled Complainant because of her
8 disability.

9 **RESPONDENT DID NOT REPRESENT THAT THE SUBJECT PROPERTY WAS NOT**
10 **AVAILABLE FOR RENT WHEN IT WAS IN FACT AVAILABLE**

11 The Agency alleges that Respondent violated ORS 659A.145(2)(e) by sending a
12 letter to Complainant, dated January 12, 2009, that stated she needed to move because
13 the subject property was no longer available due to his daughter's imminent move when
14 the subject property was still available for Complainant's occupancy. In pertinent part,
15 ORS 659A.145(2)(e) provides:

16 "(2) A person may not discriminate because of a disability of a purchaser * * *
17 by doing any of the following:

18 * * * * *

19 "(e) Representing that a dwelling is not available for * * * rental or lease when the
20 dwelling is in fact available for * * * rental or lease."

21 OAR 839-005-0205(1)(i), the Agency's administrative rule on this subject, merely
22 duplicates the statutory language. Since neither the statute, rule, or Oregon case law
23 define "representing" in the context of ORS 659A.145(2)(e) and it is a word of common
24 usage, the forum again relies on *Webster's* for the meaning of "representing."

25 *Webster's* defines "representing" as the "*present part of REPRESENT.*"
Webster's at 1926. "Represent" has a number of meanings, but the meanings that most
closely fit the context of the statute are:

1 1: to bring clearly before the mind : cause to be known, felt, or apprehended :
2 present especially by description * * * 10: "to set forth or place before someone
3 (as by statement, account, or discourse) : exhibit (a fact) to another mind in
4 language : give one's own impressions and judgment of : state with advocacy or
5 with the design of affecting action or judgment." *Id.*

6 There is no dispute that Respondent sent the letter or as to its contents or that it
7 was correctly dated, and the letter itself was admitted as Exhibit A-10. The relevant
8 sentence in the letter reads as follows: "This is to inform you that due to the need for an
9 immediate family member, our daughter, needing housing, we must request that you
10 find alternative living arrangements by Feb 28, 2009." Based on the *Webster's*
11 definitions quoted above, the forum concludes that Respondent's statement
12 "represent[ed]" that, as of February 28, 2009, the subject property was not available for
13 * * * rental or lease."

14 The forum has determined that the subject property became available for rent
15 after Complainant moved out in February 2009 due to Coop's failure to move in, and
16 that Respondent did not obtain new tenants until March 18, 2009. However, because
17 "representing" is the present part of "represent," the forum's focus must be on the
18 prospective post-February 28, 2009, availability of the subject property on January 12,
19 2009, the date of Respondent's letter. The forum does this by examining Respondent's
20 and Coop's intentions on January 12 related to Coop's prospective tenancy. This issue
21 was already discussed at some length in the section of this opinion discussing
22 Complainant's expulsion and resolved with the conclusion that both Respondent and
23 Coop believed and intended that Coop would move to the subject property after
24 Complainant moved out. Since Respondent believed on January 12, 2009, that the
25 subject would not be available for "rental or lease" after February 28, 2009, his
representation to Complainant did not violate ORS 659A.145(2)(e).

1 **THE COMMISSIONER LACKS JURISDICTION OVER THE AGENCY'S ALLEGATIONS**
2 **REGARDING J. PROVENZANO**

3 The Agency alleges that J. Provenzano, as well as Complainant, was "injured by
4 the actions and inaction of Respondent" and is thereby entitled to damages as a
5 "purchaser" and "aggrieved person." J. Provenzano, as an "occupant" of the subject
6 property, is a "purchaser" as defined by ORS 659A.421. As plead in the Formal
7 Charges, she is also an "aggrieved person" because she was expelled from the subject
8 property, allegedly due to Complainant's disability. ORS 659A.820(1). However, based
9 on ORS 659A.820(2) and OAR 839-003-0200(5)(e), the Commissioner lacks jurisdiction
10 to pursue the allegations in the Formal Charges because J. Provenzano never signed a
11 complaint.

12 ORS 659A.820 defines "aggrieved person" in cases involving alleged unlawful
13 discrimination in real property transactions and sets out the procedure by which an
14 "aggrieved person" can have the Commissioner conduct an investigation or other
15 proceeding to resolve the complaint. In pertinent part, ORS 659A.820 reads:

16 "(1) As used in this section, for purposes of a complaint alleging an unlawful
17 practice under ORS 659A.145 or 659A.421 or discrimination under federal
housing law, 'aggrieved person' includes a person who believes that the person:

18 "(a) Has been injured by an unlawful practice or discriminatory housing
practice; or

19 "(b) Will be injured by an unlawful practice or discriminatory housing practice
that is about to occur.

20 "(2) Any person claiming to be aggrieved by an alleged unlawful practice may
21 file with the Commissioner of the Bureau of Labor and Industries a verified
22 written complaint that states the name and address of the person alleged to have
committed the unlawful practice. The complaint must be signed by the
23 complainant. The complaint must set forth the acts or omissions alleged to be an
24 unlawful practice. The complainant may be required to set forth in the complaint
such other information as the commissioner may require. Except as provided in
25 ORS 654.062, a complaint under this section must be filed no later than one year
after the alleged unlawful practice." (Underlined emphasis added)

1 OAR 839-003-0200 is an administrative rule adopted by the Agency that sets out the
2 process for an aggrieved person to file a complaint of housing discrimination. In
3 pertinent part, it provides:

4 “(2) A person claiming to be aggrieved by an alleged unlawful practice under
5 ORS 659A.145 or 659A.421 or discrimination under federal housing law or the
6 person's attorney, or the commissioner may file a complaint, in person or by mail,
with the division at any bureau office in the state of Oregon. Complaint means a
written statement signed by the complainant that:

7 “(a) Gives the name and address of the complainant and the respondent;

8 “(b) Describes the acts or omissions alleged to be an unlawful practice, including
those acts or omissions the person believes are about to occur and;

9 “(c) Describes how the person was harmed or will be harmed by such actions.

10 * * * * *

11 “(5) The procedures for filing a complaint are as follows:

12 “(a) A person or the person's attorney makes an inquiry to the division;

13 “(b) The division may provide the person or the person's attorney with a letter of
information and/or questionnaire;

14 “(c) If the division determines the person has a basis for filing a complaint, the
15 division will draft a complaint based upon the information provided by the person
and send or give the complaint to the person or the person's attorney for
16 verification. The person or the person's attorney will request any necessary
changes to the complaint.

17 “(d) The person will verify and sign the complaint. The complaint will then be
submitted to the division.

18 “(e) If the person is an unemancipated minor the complaint must be signed by the
minor and the parent or legal guardian of the minor.

19 (Underlined emphasis added)

20 To summarize, ORS 659A.820(1) provides that any person meeting the definition of an
21 “aggrieved person” may file a verified written complaint with the Commissioner by (1)
22 meeting the same requirements of ORS 659A.820(2) that any person alleging any other
23 “unlawful practice” under the Commissioner’s jurisdiction must meet, and (2) following
24 the procedures set up by the Agency in OAR 839-003-0200(2) & (5). By doing so, that
25 person becomes a “complainant.” All aggrieved person, including an unemancipated
minor in a complaint alleging unlawful discrimination in a real property transaction, must

1 sign the complaint before the Commissioner can pursue it. Although the Formal
2 Charges allege standing to pursue the Agency's allegations because J. Provenzano is
3 an "aggrieved person," there is no statutory language or Agency administrative rule that
4 exempts an "aggrieved person" in a housing discrimination case from signing their
5 complaint. There is also no evidence that J. Provenzano, who was at most 10 years old
6 when Complainant filed her second amended complaint naming J. Provenzano as an
7 "aggrieved person," was an emancipated minor at that time. The Agency, having
8 adopted its rule requiring unemancipated minors to sign complaints, is bound to follow
9 that rule.²⁶ Based on the plain language of ORS 659A.820(2) and the Agency's own
10 rule, J. Provenzano's failure to sign her complaint foreclosed the Agency from
11 proceeding on her behalf. Accordingly, the forum enters no findings regarding whether
12 or not Respondent's denial of reasonable accommodation to Complainant "injured" J.
13 Provenzano and awards her no damages.

14 **DAMAGES**

15 The Agency seeks out-of-pocket moving expenses of "at least \$10,000" for
16 Complainant and "at least \$20,000" in emotional, mental, and physical suffering for
17 Complainant. The forum awards no damages for Complainant's moving expenses
18 based on its conclusion that Complainant's expulsion was not an unlawful practice. The
19 award that is discussed below is predicated solely on Respondent's failure to
20 reasonably accommodate Complainant's disabilities by allowing her to have a service
21 dog in violation of ORS 659A.145(2)(g).

22 In determining an award for emotional, mental, and physical suffering, the forum
23 considers the type of discriminatory conduct, and the duration, frequency, and severity
24

25 ²⁶ See *Harsh Investment Corp. v. State Housing Division*, 88 Or App 151, 157, 744 P2d 588 (1987), citing
Bronson v. Moonen, 270 Or 469, 476-477, 528 P2d 82 (1974).

1 of the conduct. It also considers the type and duration of the mental distress and the
2 vulnerability of the complainant. The actual amount depends on the facts presented by
3 each complainant. A complainant's testimony, if believed, is sufficient to support a
4 claim for damages. *In the Matter of From the Wilderness*, 30 BOLI 227, 291-92 (2009).

5 This forum has only issued four Final Orders that involved discrimination in real
6 property transactions, most recently in 1990.²⁷ Because of their age, the forum does
7 not consider them in evaluating the monetary value of Complainant's mental suffering.

8 There is considerable evidence in the record related to Complainant's emotional,
9 mental, and physical suffering due to her expulsion, but scant evidence of her suffering
10 related to Respondent's denial of her request to have a service dog. Her daughter
11 testified that Complainant was "shaky," "confused" and "upset" after Respondent told
12 her she could not have a dog and didn't sleep that night. Complainant, her daughter,
13 and Kennedy, her therapist, testified that Complainant has had a service dog since May
14 2010, that the dog makes her feel safe, requires her to go outside more and get more
15 exercise, and is very important to her emotional stability. From this testimony, the forum
16 infers that Complainant would have had the same benefits during her tenancy with
17 Respondent, had she been allowed a service dog. The forum recognizes that it is
18 impossible to determine the exact date Complainant would have acquired a service dog,
19 had Respondent granted her request, but infers that it would have happened at some
20 time during her remaining tenancy with Respondent.²⁸ Correspondingly, the forum also

21
22 ²⁷ *In the Matter of Strategic Investments of Oregon, Inc.*, 8 BOLI 227 (1990); *In the Matter of Dan Stoller*,
23 7 BOLI 116 (1988); *In the Matter of Harold Schipporeit*, 6 BOLI 113 (1987), *aff'd*, *Schipporeit v. Roberts*,
93 Or App 12, 760 P2d 1339 (1988), *aff'd*, 308 Or 199, 778 P2d 953 (1989); *In the Matter of Harold*
Carlson, 24 BOLI 168 (1975).

24 ²⁸ Complainant testified that she did not obtain a dog until May 2010 because of financial problems
25 caused by the cash deposit she had to make to obtain replacement lodging after her expulsion, but there
was no evidence that she was financially unable to obtain a dog in October 2008 or that there were any
other circumstances that would have made it difficult for her to obtain a dog during her remaining tenancy
with Respondent.

1 infers that Respondent's denial of her request caused her to be denied those benefits
2 for some period of time.

3 Respondent contends that any mental suffering award to Complainant should be
4 diluted by the concurrent mental suffering she experienced due to related to family
5 problems. The forum disagrees, having consistently held in prior Final Orders when
6 calculating mental suffering damage awards that respondents must take complainants
7 "as they find them." The forum follows that precedent in making an award in this case.²⁹

8 Based on the suffering Complainant experienced in the immediate aftermath of
9 Respondent's denial of her service dog request and the corresponding benefit she was
10 denied during at least part of her remaining tenancy, the forum finds that \$10,000 is an
11 appropriate award to compensate Complainant for her emotional and mental suffering.

12 **CIVIL PENALTY**

13 This is the first case to come before the Commissioner since the civil penalty
14 provisions of ORS 659A.855 were enacted by the legislature. Under that statute, the
15 Formal Charges ask the forum to assess an \$11,000 civil penalty. In pertinent part, that
16 statute provides:

17 "(1)(a) If the Commissioner of the Bureau of Labor and Industries files a
18 complaint under ORS 659A.825 alleging an unlawful practice other than an
19 unlawful employment practice, and the commissioner finds that the respondent
20 engaged in the unlawful practice, the commissioner may, in addition to other
steps taken to eliminate the unlawful practice, impose a civil penalty upon each
respondent found to have committed the unlawful practice.

21 ** * * *

22 "(2)(a) Notwithstanding subsection (1)(b) of this section, if a complaint is filed
23 under ORS 659A.820 or 659A.825 alleging an unlawful practice under ORS
659A.145 or 659A.421 or discrimination under federal housing law and the

24 ²⁹ See, e.g., *In the Matter of Charles Edward Minor*, 31 BOLI 88, 104 (2010); *In the Matter of Robb*
25 *Wochnick*, 25 BOLI 265, 290 (2004); *In the Matter of Entrada Lodge, Inc., amended final order on*
remand, 24 BOLI 126, 154 (2003); *In the Matter of Kenneth Williams*, 14 BOLI 16, 26 (1995); *In the*
Matter of Motel 6, 13 BOLI 175, 186-87 (1995); *In the Matter of Loyal Order of Moose*, 13 BOLI 1, 12-13
(1994).

1 commissioner finds that a respondent has engaged in an unlawful practice under
2 ORS 659A.145 or 659A.421 or discrimination under federal housing law, the
3 commissioner may assess against the respondent, in addition to any other relief
4 available, a civil penalty:

“(A) In an amount not exceeding \$11,000[.]”

“* * * * *

“(3) Civil penalties under this section shall be imposed in the manner provided by
ORS 183.745.”

6 Here, the forum has found that Respondent committed an unlawful practice under ORS
7 659A.145. ORS 659A.855(2)(a)(A) provides for a maximum civil penalty of \$11,000 in
8 these circumstances.³⁰ However, there are no provisions in ORS 659A.855 or any
9 other statute in ORS chapter 659A that offer guidance as to factors the forum should
10 consider in deciding whether to assess the maximum civil penalty or a lesser amount.
11 OAR 839-005-0195 *et seq*, the Agency’s administrative rules interpreting the housing
12 discrimination provisions of ORS chapter 659A, similarly lend no guidance.³¹
13 Incongruously, ORS 183.745(7) provides “(7) This section does not apply to penalties: *
14 * * (c) Imposed under the provisions of ORS chapter * * * 659A[.]”

15 The FHA, at 42 U.S.C. §3612(g)(3)(A), similarly provides for a civil penalty
16 against a respondent “(A) in an amount not exceeding \$11,000³² if the respondent has
17 not been adjudged to have committed any prior discriminatory housing practice.” Unlike
18 ORS 659A.855, the Code of Federal Regulations sets out specific guidelines for an ALJ

20 ³⁰ Subsequent paragraphs in ORS 659A.855(2) provide for a greater maximum civil penalty for repeat
21 offenders.

22 ³¹ This contrasts with civil penalties assessed by the Commissioner in wage and hour cases alleging
23 violations of working conditions, farm labor contractor cases, and prevailing wage rate cases, in which the
24 Agency has promulgated rules requiring, allowing, or requiring and allowing the forum to consider
25 “mitigating” and “aggravating” circumstances in determining an appropriate civil penalty. See OAR 839-
015-0510 (farm labor contractor); OAR 839-020-1020 (wage and hour working conditions); OAR 839-025-
0540 (prevailing wage rate).

³² This amount has been amended in the Code of Federal Regulations to \$17,000 based on 28 U.S.C.
2461 (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by 31 U.S.C. 3701 (Debt
Collection Improvement Act), which requires each federal agency to make inflation adjustments to its
maximum civil money penalties.

1 to use when evaluating the appropriate amount of civil penalty. 24 CFR §180.671. In
2 pertinent part, it states:

3 “(c) *Factors for consideration by ALJ.* (1) In determining the amount of the civil
4 penalty to be assessed against any respondent for each separate and distinct
5 discriminatory housing practice the respondent committed, the ALJ shall consider
6 the following six (6) factors:

7 “(i) Whether that respondent has previously been adjudged to have committed
8 unlawful housing discrimination;

9 “(ii) That respondent’s financial resources;

10 “(iii) The nature and circumstances of the violation;

11 “(iv) The degree of that respondent’s culpability;

12 “(v) The goal of deterrence; and

13 “(vi) Other matters as justice may require.”

14 In the absence of any direction from the Oregon legislature or the Agency through
15 promulgation of an administrative rule, the forum takes guidance from the criteria above
16 to determine the appropriate civil penalty, if any, to be assessed against Respondent for
17 its violation of ORS 659A.145(2)(g).³³

18 There is no evidence that Respondent has engaged in any previous housing
19 discrimination and no evidence of Respondent’s financial resources, other than that he
20 owned only one rental property, the duplex Complainant lived in. The nature of the
21 violation was an indirect, but effective oral denial of a service dog for a maximum period
22 of four and one-half months to a complainant who was prescribed a dog for her

23 ³³ The forum has previously taken guidance from analogous federal law in civil rights cases. See, e.g., *In*
24 *the Matter of Barrett Business Services, Inc.*, 22 BOLI 77, 90-91 (2001) (forum relied on EEOC Guidelines
25 interpreting provisions of the ADA that were similar to ORS 659.447 and 659.448); *In the Matter of*
Murrayhill Thriftway, Inc., 20 BOLI 130, 149 (2000), *affirmed without opinion*, *Burks v. Murrayhill*
Thriftway, Inc. and Bureau of Labor and Industries, 174 Or App 405 (2001), *rev den* 333 Or 400 (2002)
(although federal case law interpreting federal statutes and regulations similar to Oregon laws are not
binding on this forum, federal decisions are instructive in construing and applying similar state law); *In the*
Matter of Kenneth Williams, 14 BOLI 16, 25 (1995) (While federal case law interpreting federal statutes
and regulations that are similar to Oregon laws is not binding on this forum, it is instructive and may be
adopted as precedent in Oregon cases); *In the Matter of WS, Inc.*, 13 BOLI 64, 86 (1994) (because some
of Oregon’s civil rights laws are modeled after federal civil rights laws, the commissioner has often looked
to federal case law for guidance in interpreting and administering Oregon’s laws).

1 depression issues. Respondent is the only culpable person. The maximum penalty
2 may have a substantial deterrence effect on other landlords. However, based on (1)
3 Respondent's limited property holdings; (2) the fact that he let Complainant keep two
4 "service" cats that were prescribed for her "medical well being"; (3) the fact that he
5 allowed Ahlquist and the renters who replaced Complainant to keep a dog; and (4) the
6 absence of any evidence of a bias on his part toward disabled persons, the forum
7 concludes that the maximum penalty is not likely to have a significant deterrent effect on
8 Respondent. The forum considers the fact that Respondent obeyed the law in allowing
9 Complainant to have two "service" cats as mitigating evidence.

10 Based on the above, the forum concludes that \$5,500 is an appropriate civil
11 penalty for Respondent's violation of ORS 659A.145(2)(g).

12 **RESPONDENT'S EXCEPTIONS**

13 Respondent's exceptions focus on two issues – the ALJ's credibility findings, and
14 the amount of damages in the proposed award to Complainant. Respondent's
15 exceptions to the ALJ's credibility findings are denied because those findings are
16 supported by substantial evidence in the record. Likewise, the proposed award of
17 \$10,000 in damages for emotional suffering is supported by the facts found by the ALJ
18 and is within the Commissioner's authority. Related to Complainant's emotional
19 suffering, the forum notes that the evidence is not clear as to when Complainant
20 received her lump sum Social Security disability award, and that Complainant credibly
21 testified that it cost her \$130, plus food and flea medicine, to obtain her service dog
22 from the pound.

23 //

24 //

25 //

1 b) Create a written policy designed to prevent unlawful housing practices
2 related to granting reasonable accommodation to any “purchaser” with a disability, as
3 those terms are respectively defined in ORS 659A.421(1)(b) and OAR 839-005-0200,
4 who requests a service or companion animal related to the purchaser’s disability, with
5 such policy to be approved by the Oregon Bureau of Labor and Industries, Civil Rights
6 Division.

8
9 DATED this 30th day of August, 2012.

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13 _____
14 Brad Avakian, Commissioner
15 Bureau of Labor and Industries
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