

BRAD AVAKIAN
COMMISSIONER



CHRISTIE HAMMOND
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:

Case No. **30-14**

**KARA JOHNSON dba Duck Stop
Market,**

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

Respondent.

SYNOPSIS

Complainant, an individual with multiple disabilities who has been prescribed a service dog and uses service dogs to mitigate her disabilities, was not allowed to shop in Respondent's convenience store in April 2013 while accompanied by her service dogs. Respondent violated ORS 659A.142(4). The forum awarded Complainant \$60,000 in damages for physical, emotional, and mental suffering.

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 July 22-25, 2014, at the office of the Workers Compensation Board, Delta Triad Building, 1140 Willagillespie Road, Suite 38, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Cristin Casey, an employee of the Agency. Michel A. Hilt-Hayden ("Complainant") and Kara Johnson ("Respondent") were present throughout the

1 hearing. Also present throughout the hearing were Mark Jordan, Complainant's
2 attorney, and Meng Ouyang and Jill Featherstonhaugh, Respondent's attorneys.

3 The Agency called the following witnesses: Complainant; Moayyad Khoshnaw,
4 senior Civil Rights Division investigator; Heather Murlin, president, Sunstone Service
5 Dogs; Elizabeth Fuell, Complainant's daughter; and Kevin Lugene-Hayden,
6 Complainant's husband.

7 Respondent called the following witnesses: Respondent; Charlotte Gordon,
8 Respondent's employee; Patricia Wiest; Gordon Gill; Moayyad Khoshnaw; Heather
9 Murlin; Complainant; and Joy St. Peter and Bill Spiry (expert witnesses).

10 The forum received into evidence:

- 11 a) Administrative exhibits X1 through X29;
- 12 b) Agency exhibits A1 through A30;
- 13 c) Respondents' exhibits R1 through R19 and R22.¹

14 Having fully considered the entire record in this matter, I, Brad Avakian,
15 Commissioner of the Bureau of Labor and Industries, hereby make the following
16 Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,² Conclusions
17 of Law, Opinion, and Order.

18 **FINDINGS OF FACT – PROCEDURAL**

19 1) On May 10, 2013, Complainant filed a verified complaint with the Agency's
20 Civil Rights Division ("CRD") in which she alleged that Respondent unlawfully
21 discriminated against her because of her disability by not allowing Complainant to enter
22

23 _____
24 ¹ Exhibit R21, a video purporting to show Complainant, unaccompanied by a dog, pushing a stroller near
25 a Dari-Mart store, was shown to Complainant, but not authenticated or offered into evidence.

² The Ultimate Findings of Fact required by ORS 183.470 are subsumed within the Findings of Fact –
The Merits.

1 Duck Stop Market with her service dogs in April 2013. (Testimony of Complainant; Ex.
2 A1)

3 2) On October 7, 2013, after investigation, the CRD issued a Notice of
4 Substantial Evidence Determination in which it found substantial evidence of unlawful
5 discrimination in public accommodation against Respondent based on Complainant's
6 disability. The CRD issued an amended Notice of Substantial Evidence Determination
7 on March 5, 2014. (Testimony of Khoshnaw; Exs. A16, A17)

8 3) On March 14, 2014, the Agency issued Formal Charges and served them
9 on Respondent, accompanied by a Notice of Hearing setting a hearing date of June 10,
10 2014. The Charges alleged that Respondent had unlawfully discriminated against
11 Complainant in a place of public accommodation, based on her disability, by denying
12 her entry with her service dogs in April 2013. The Charges requested that Complainant
13 be awarded "at least \$30,000" in damages for physical, mental and emotional distress.
14 (Ex. X2)

15 4) On April 2, 2014, Respondent filed an answer to the Formal Charges in
16 which Respondent denied that she had unlawfully discriminated against Complainant.
17 (Ex. X8)

18 5) On May 8, 2014, Respondent filed a motion for summary judgment in
19 which Respondent argued that Complainant's dogs were not "assistance animals" as
20 defined by Oregon law and that, as a matter of law, Respondent was not required to
21 accommodate Complainant by allowing her to bring her dogs into Duck Stop Market.
22 On May 15, 2014, the Agency filed a response to Respondent's motion for summary
23 judgment. (Exs. X10 through X12)

1 6) On May 12, 2014, Respondent filed an unopposed motion to postpone the
2 hearing. On May 15, 2014, the ALJ rescheduled the hearing to begin on July 22, 2014.
3 (Exs. X13, X15b)

4 7) On May 16, 2014, the Agency filed a motion for a protective order
5 regarding certain of Complainant's medical records. On May 20, 2014, the ALJ issued a
6 protective order regarding those records. (Exs. X15, X16)

7 8) On May 21, 2014, the ALJ issued an interim order denying Respondent's
8 motion for summary judgment. That order is reprinted below:

9 **"INTRODUCTION**

10 "On May 8, 2014, Respondent filed a motion for summary judgment,
11 accompanied by a Memorandum of Law, in which Respondent contended there are
12 no material issues of fact in this case and that, based on the undisputed facts,
13 Respondent should prevail as a matter of law. The Agency timely filed written
14 objections to Respondent's motion.

15 **"SUMMARY JUDGMENT STANDARD**

16 "A motion for summary judgment may be granted where no genuine issue as to
17 any material fact exists and a participant is entitled to a judgment as a matter of law,
18 as to all or any part of the proceedings. *OAR 839-050-0150(4)(B)*. The standard
19 for determining if a genuine issue of material fact exists and the evidentiary burden
20 on the participants is as follows:

21 ‘ * * * No genuine issue as to a material fact exists if, based upon the record
22 before the court viewed in a manner most favorable to the adverse party, no
23 objectively reasonable juror could return a verdict for the adverse party on
24 the matter that is the subject of the motion for summary judgment. The
25 adverse party has the burden of producing evidence on any issue raised in
the motion as to which the adverse party would have the burden of
persuasion at [hearing].’ ORCP 47C.

The 'record' considered by the forum consists of: (1) the Formal Charges and
Respondent's answer; (2) Respondent's motion, with attached exhibits; and (3) the
Agency's response to Respondent's motion, with attached exhibits.

1 **“THE AGENCY’S CHARGES AND RESPONDENT’S ANSWER**

2 **“The Agency’s Formal Charges.**

3 “Summarized, the Agency's Formal Charges allege the following:

- 4 • ‘Complainant has visual impairment and a mental disability that substantially
- 5 limit one or more major life activities and benefits from the use of a service
- 6 animal to assist her mobility.
- 7 • ‘In April 2013, Complainant had two service animals -- a 12-year-old dog
- 8 (Panda) that was in the process of retiring as a service animal and an 18-
- 9 month-old dog Contessa) that was enrolled in service dog training. Both
- 10 dogs are trained to assist with psychological and visual impairment and have
- 11 service identification cards.
- 12 • ‘On April 17, 2013, Complainant and her husband, accompanied by Panda
- 13 and Contessa, visited Respondent's store to purchase milk. When
- 14 Respondent saw them entering the store, she asked them to leave.
- 15 Complainant told Respondent that Panda and Contessa were service dogs.
- 16 Respondent asked to see their service identification cards, then asked
- 17 Complainant again to leave the store.
- 18 • ‘On April 18, 2013, Complainant returned to Respondent's store in the
- 19 company of her daughter and one of her service dogs.³ Before Complainant
- 20 entered Respondent's store, one of Respondent’s employees stopped her
- 21 and told her they were not allowed to enter the store because of the events
- 22 of the previous day.
- 23 • ‘On April 19, 2013, Complainant again visited Respondent's store, this time
- 24 accompanied by Heather Murlin, President and Director of Training at
- 25 Sunstone Service Dogs, and Contessa, who was enrolled in training at
- Sunstone. Respondent again did not allow Complainant into the store.
- ‘Respondent’s actions on April 17, 18 and 19, 2013, violated ORS
- 659A.142(4) and OAR 839-006-0300(2) by imposing a distinction,
- discrimination or restriction on Complainant because of her disabilities.

19 **“Respondent’s Answer.**

20 “Summarized, Respondent alleges the following in her answer:

- 21 • ‘Due to lack of knowledge and information, neither admits nor denies that
- 22 Complainant had a disability.
- 23 • ‘Denies that Panda and Contessa were service animals.
- 24 • ‘Denies that Respondent told Complainant that service animals were not
- 25 allowed in Respondent's store.

³ The Formal Charges do not specify which dog accompanied Complainant.

- 'Admits that Complainant told Respondent on April 17, 2013, that her dogs were "service dogs" and that Respondent asked to see their identification cards. Denies that Respondent asked Complainant and her husband to leave Respondent's store.
- 'Admits the actions alleged to have taken place on April 18, 2013.
- 'Admits that Complainant, Murlin, and one dog came to Respondent's store on April 19, 2013, but denies that the dog was a service animal or that Complainant and Murlin were denied access to Respondent's store.

“DISCUSSION

“Respondent, in her answer, does not specifically admit that Complainant, Panda and Contessa were denied access to Respondent’s store on April 17, 2013. However, Respondent’s Memorandum of Law, at page 4, lines 17-18, states ‘[i]t is undisputed that Respondent denied Panda and Contessa access to [Respondent’s] store on April 17, 2013.’ Earlier in the same Memorandum at page 2, lines 3-5, Respondent’s counsel states that, on April 17, 2013, ‘Respondent approached Complainant and her husband as they were entering the store and stated to Complainant: ‘Ma’am, I’m sorry but you need to take the dogs out.’

“For the purpose of evaluating Respondent's motion, and based on the allegations in the Formal Charges, Respondent's answer, and the above quoted statements, the forum finds that the following facts are undisputed: (1) At times material herein, Respondent was a ‘place of public accommodation’ within the meaning of ORS 659A.142(4); (2) Panda was a retired or retiring service dog; (3) Contessa was a service dog in training; (4) Complainant's dogs were denied access to Respondent's store on April 17, 2014; and (5) Complainant, accompanied by her daughter and either Panda or Contessa, was denied access to Respondent's store on April 18, 2014.

“Respondent argues that she is entitled to summary judgment as a matter of law, reasoning as follows:

‘[B]ecause Panda was retired and Contessa was in training, the two dogs were in fact not assistance animals as defined by Oregon law. Consequently, by denying the dogs' access to the store, Respondent did not deny Complainant access to her store on April 17, 2013, nor did Respondent discriminate [against] Complainant because of her alleged disabilities.’

In support of this argument, Respondent relies on OAR 839-006-0345(1), which provides that “[a]ssistance animal” means a dog or other animal designated by administrative rule that has been individually **trained** to do work or perform tasks for the benefit of an individual.’ (Emphasis added) Respondent contends that the inclusion of the word ‘trained’ in the definition of ‘assistance animal’ in OAR 839-006-0345(1) implicitly excludes any dog that is retired or has not been fully trained.

1 “Respondent's argument fails because OAR 839-006-0345(1) is not applicable to
2 this proceeding and because the applicable relevant definition of ‘assistance
3 animal’⁴ does not exclude retired or retiring assistance dogs or assistance dogs in
4 training.

4 **“Inapplicability of OAR 839-006-0345(1)”**

5 “Neither OAR 839-006-0345 nor ORS 659A.143, the statute it interprets,
6 existed at the time of the alleged discrimination. The Oregon Legislature enacted
7 SB 610 in its 2013 regular session. SB 610 went into effect on June 26, 2013, and
8 was renumbered as ORS 659A.143. Among its provisions, ORS 659A.143 defines
9 ‘assistance animal’ in the context of ‘place of public accommodation,’ regulates
10 inquiries that can be made about assistance animals, and gives a person with a
11 disability the right to be accompanied by an assistance animal. In response, BOLI
12 promulgated OAR 839-006-0345(1)-(12), which is virtually identical to ORS
13 659A.143 in its language, differing only in paragraph numbering. OAR 839-006-
14 0345 went into effect until December 30, 2013. There is no language in either the
15 statute or rule to show that they were intended to be applied retroactively. Based
16 on the above, the forum concludes that they do not apply to this proceeding.

12 **“Panda and Contessa were both ‘service animals.’”**

13 “The Formal Charges allege that Respondent violated ORS 659.142(4) and OAR
14 839-006-0300(2) through her alleged actions. Both ORS 659.142(4) and OAR 839-
15 006-0300(2) were in effect in April 2013. ORS 659.142(4) provides that ‘[i]t is an
16 unlawful practice for any place of public accommodation, resort or amusement as
17 defined in ORS 659A.400, or any person acting on behalf of such place, to make
18 any distinction, discrimination or restriction because a customer or patron is an
19 individual with a disability.’ OAR 839-006-0300(2) provides, in pertinent part, that
20 ‘Discrimination on the basis of disability by places of public accommodation is an
21 unlawful practice and the Civil Rights Division of the Bureau of Labor and Industries
22 has the authority to protect the rights of individuals with disabilities through the
23 enforcement of ORS 659A.142(4).’ Neither the statute nor the rule contains any
24 reference to service or assistance animals. Accordingly, the forum turns elsewhere
25 for guidance.

21 “ORS 659A.139 provides that ‘ORS 659A.103 to 659A.144 shall be
22 construed to the extent possible in a manner that is consistent with any similar
23 provisions of the federal Americans with Disabilities Act of 1990, as amended by the
24 federal ADA Amendments Act of 2008 and as otherwise amended.’ In April 2013,
25

⁴ The Formal Charges use the term “service animals,” the term used in the ADA in reference to dogs trained to assist persons with disabilities. Respondent’s motion uses the term “assistance animals,” the term used in ORS 659A.143 and OAR 839-006-0345 in reference to dogs trained to assist persons with disabilities.

1 Title III of the ADA, at 28 C.F.R. §36.104, contained the following definition of
2 'service animal:'

3 'Service animal means any dog that is individually **trained** to do work or
4 perform tasks for the benefit of an individual with a disability, including a
5 physical, sensory, psychiatric, intellectual, or other mental disability. Other
6 species of animals, whether wild or domestic, trained or untrained, are not
7 service animals for the purposes of this definition. The work or tasks
8 performed by a service animal must be directly related to the individual's
9 disability. Examples of work or tasks include, but are not limited to, assisting
10 individuals who are blind or have low vision with navigation and other tasks,
11 alerting individuals who are deaf or hard of hearing to the presence of people
12 or sounds, providing non-violent protection or rescue work, pulling a
13 wheelchair, assisting an individual during a seizure, alerting individuals to the
14 presence of allergens, retrieving items such as medicine or the telephone,
15 providing physical support and assistance with balance and stability to
16 individuals with mobility disabilities, and helping persons with psychiatric and
17 neurological disabilities by preventing or interrupting impulsive or destructive
18 behaviors. The crime deterrent effects of an animal's presence and the
19 provision of emotional support, well-being, comfort, or companionship do not
20 constitute work or tasks for the purposes of this definition.' (Emphasis
21 added)

22 "The ADA contains no accompanying definition of 'trained' to guide the forum in
23 determining whether 'trained' should be given the limited definition sought by
24 Respondent, i.e. a dog that has completed training and is not retired, or whether the
25 term should be interpreted more expansively to include dogs with the 'training'
status of Panda and Contessa in April 2013. Since the word 'trained' is a word of
common usage, the forum gives it the plain, natural and ordinary meaning
contained in *Webster's Third New Int'l Dictionary* (unabridged edition 2002),
reprinted below:

26 '1 : having undergone a course of training <we employ *trained* personnel>
27 <a government-*trained* physician> 2 : formed, shaped, or disciplined by
28 training : qualified or conditioned by training <a trained mind> <a *trained*
29 nose> <readers *trained* to be critical>' *Webster's*, at 2424.

30 "In the context of this case, although the first definition implies that training must be
31 complete for a dog to be 'trained,' the second definition is not so limiting. The
32 legislative policy expressed in ORS 659A.103(1), printed in pertinent part below,
33 assists the forum in choosing the correct definition:

34 'It is declared to be the public policy of Oregon to guarantee individuals the
35 fullest possible participation in the social and economic life of the state * * * to
use and enjoy places of public accommodation * * * without discrimination on
the basis of disability.'

1
2 “Based on this policy statement and the ADA’s failure to exclude dogs that (a) have
3 been trained but are retired or retiring or (b) dogs that are undergoing training but
4 are not yet fully trained from its detailed definition of ‘service animal,’ the forum
5 adopts *Webster’s* second definition. Both Panda and Contessa fit within that
6 definition in April 2013. The forum also notes that Panda, as a fully trained ‘service
7 animal,’ also fits within *Webster’s* first definition.

8
9 **“Conclusion**

10 “Respondent’s motion for summary judgment is denied in its entirety.”

11 The ALJ’s ruling on Respondent’s motion for summary judgment is SUSTAINED. (Ex.
12 X17)

13 9) On May 21, 2014, after the ALJ issued his interim order denying
14 Respondent’s motion for summary judgment, Respondent e-mailed a courtesy copy of a
15 reply to the Agency’s response to Respondent’s motion for summary judgment to the
16 ALJ, indicating that a hard copy of the reply would be mailed the next day. On May 22,
17 2014, the ALJ issued an interim order stating that the forum declined to consider
18 Respondent’s reply. On June 2, 2014, Respondent filed another motion asking the
19 forum to reconsider Respondent’s motion for summary judgment, which the ALJ
20 declined to consider. (Exs. X18, X19, X20)

21 10) On June 19, 2014, Respondent requested another postponement based
22 Respondent’s June 10 receipt of a summons for jury duty in Lane County Circuit Court
23 on July 18, 2014. On June 23, 2014, Agency filed objections to Respondent’s motion.
24 On June 24, 2014, the ALJ issued an interim order that concluded:

25 “Before the forum will consider granting Respondent’s motion to postpone the
hearing, Respondent must provide documentary evidence that (1) she has asked
to have her jury service either deferred or excused and (2) that deferral or excuse
has been denied. Until then, the hearing remains set to begin at 9:00 a.m. on
July 22, 2014.”

(Exs. X23, X24, X25)

1 11) On July 9, 2014, the ALJ issued an interim order changing the hearing
2 location from BOLI's Eugene office to the Eugene offices of the Workers Compensation
3 Board. (Ex. X28)

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

7 13) At 8:30 a.m. on July 24, 2014, the ALJ made an onsite visit to Duck Stop
8 Market. Also present were: Respondent, Complainant, Elizabeth Fuell, Cristin Casey,
9 Jill Fetherstonhaugh, Meng Ouyang, Mark Jordan, and BOLI ALJ Kari Furnanz. The
10 ALJ observed Duck Stop Market's premises and the surrounding environment,
11 measured the distance from Eugene Mobile Village RV to Duck Stop Market, and took
12 photographs to document the visit. The ALJ also noted that there was a white Lexus
13 SUV with Oregon license plate "911FXN" parked outside Duck Stop Market during the
14 visit. Those photographs have been included in the record as Exhibit ALJ1, together
15 with a description of their contents. When the hearing reconvened, the ALJ
16 summarized the observations he made during the onsite visit on the record and gave
17 the participants an opportunity to comment on the accuracy of his observations.
18 (Statement of ALJ; Exhibit ALJ1)

19 15) After the onsite visit and during a break in the hearing that same day, the
20 ALJ took a walk around the building in which the hearing was held. During the walk, the
21 ALJ observed Respondent getting out of a white Lexus SUV with Oregon license plate
22 "911FXN" that was parked adjacent to the hearing location. (Observation of ALJ)

23 16) During the hearing, Respondent called Bill Spiry as an expert witness.
24 The Agency objected to Spiry's testifying as an expert witness after Spiry stated his
25 qualifications to testify as an expert witness, contending that Spiry was not qualified as

1 an expert witness. The forum granted the Agency's objection and Spiry was not
2 allowed to testify. Respondent's counsel was given an opportunity to make an oral offer
3 of proof concerning what Spiry's testimony would be if he had been allowed to testify.
4 (Statements of ALJ, Casey, Fetherstonhaugh)

5 17) During the hearing, different persons were designated as Complainant's
6 "caregiver," including Heather Murlin, Andrew Murlin, Elizabeth Fuell, and Mark Jordan.
7 (Entire Record)

8 18) Panda accompanied Lugene-Hayden to the hearing and sat at his feet
9 while he testified. Under cross examination, Lugene-Hayden testified that Panda was
10 not his service animal and that he brought Panda because he "was told to." (Testimony
11 of Lugene-Hayden; Observation of ALJ)

12 19) At the close of the Agency's case-in-chief, Respondent moved for a
13 directed verdict and requested the opportunity to make an oral or written argument in
14 support of the motion. The ALJ regarded Respondent's motion as a motion to dismiss.
15 Respondent's counsel was given several minutes to argue her motion, and the Agency
16 was given equal time to argue against the motion. After hearing the arguments, the ALJ
17 denied Respondent's motion. (Statements of ALJ, Casey, Fetherstonhaugh)

18 20) On October 9, 2014, the ALJ issued a proposed order that notified the
19 participants they were entitled to file exceptions to the proposed order within ten days of
20 its issuance. Respondent and the Agency both filed exceptions on October 20, 2014.
21 The exceptions are addressed in the Opinion section of this Final Order.

22 **FINDINGS OF FACT – THE MERITS**

23 1) At all times material, Duck Stop Market ("DSM"), a convenience store
24 located at 4791 Franklin Blvd., Eugene, Oregon, was an assumed business name
25 owned and operated by Respondent as a sole proprietorship. (Testimony of Johnson;
Ex. A7)

1 2) Respondent has an OLCC license for DSM and a license from the Oregon
2 Department of Agriculture (“ODA”) to prepare and serve food at DSM. DSM is classified
3 as a “food establishment” by administrative rules promulgated by the Oregon Health
4 Authority.⁵ DSM could be fined and/or shut down by the ODA if Respondent allowed a
5 dog on the premises that is not a service dog and Respondent had been told this by the
6 local health inspector prior to April 17, 2013. (Testimony of Johnson; Observation of
7 ALJ; Ex. ALJ1)

8 3) Complainant is visually impaired and can only see for 6-10 feet.⁶ She
9 recognizes people by their “blobs” and “shapes.” She wears dark glasses because her
10 eyes are light sensitive and light causes her headaches to escalate. Her Oregon
11 driver’s license was revoked in March 2005 because she could not pass DMV’s eye
12 exam and she has not driven since then. Because she has no depth perception, she is
13 easily frightened while riding in the front seat of a vehicle and screams a lot due to her
14 visual misperceptions. At hearing, she was able to read exhibits with the aid of
15 magnifiers, although she was apparently able to read the printing on several exhibits by
16 holding them a few inches away from her face. She carries a collapsible white and red
17 “assistance stick” that she sometimes uses to assist her when walking. She is also hard
18 of hearing and wears one hearing aid. At age 17, Complainant was diagnosed as
19 mentally ill and has since been diagnosed as having PTSD, agoraphobia,⁷ and
20 schizophrenia. At the time of hearing, she was taking 23 separate daily medications for
21 these three conditions and had to take medications every two hours. Throughout

22 _____
23 ⁵ See Oregon Health Authority administrative rules, Chapter 150, subpart 1-201.10.

24 ⁶ As a more concrete example of the extent of her visual impairment, Complainant testified that she has to
25 get her face within three inches of her toilet to see if it is clean. At hearing, when asked to read Ex. A24,
Complainant testified she was only able to read it by using one of the magnifiers she brought to the
hearing.

⁷ Complainant testified she was diagnosed with agoraphobia in 2010.

1 the hearing, Complainant had her assistance stick, wore dark sunglasses, and had
2 Contessa with her, in addition to one or more caregivers.⁸ (Testimony of Complainant,
3 Fuell; Observation of ALJ)

4 4) Schizophrenia causes Complainant to see and hear things that aren't
5 really there. Agoraphobia makes it difficult for Complainant to leave her house⁹ and she
6 is "heavily sedated" when she leaves her house. PTSD and agoraphobia make it
7 unpleasant for her to look at people, meet new people, or talk to people in public. In
8 particular, PTSD gives her "trouble in public." Because of her mental conditions, she
9 has panic attacks while awake and while sleeping. She usually keeps her shades
10 drawn at home. However, she is able to leave her home and take the bus several times
11 a week with Contessa, her service dog, to attend appointments. On days when
12 Complainant has to leave home and take the bus, it takes her about six hours of
13 extensive preparation to prepare herself to go out because of her mental conditions.
14 (Testimony of Complainant)

15 5) In 2007, a Psychiatric Mental Health Nurse Practitioner ("PMHND")
16 prescribed "one service dog" for Complainant for "medical and mental impairments." At
17 that time, Complainant owned Panda, a dog who was born in her household. At her
18 home, Complainant trained Panda to perform several mitigation tasks to assist her with
19 her disabilities. Prior to April 2013, those tasks included: (a) "covering" and chest
20 compression when Complainant had a PTSD attack; (b) waking Complainant at night
21 when she has nightmares and calming her down; (c) dropping on Complainant's chest
22 and getting her to breathe again when Complainant stops breathing at night; and (d)

23
24 ⁸ See Finding of Fact #18 – The Merits.

25 ⁹ Complainant testified that at one point in 2010-2011 she was tying furniture to her door handles so that she could not go out and no one could come into her house. She also testified that she began getting treatment for this condition in 2011.

1 keeping Complainant from running into street curbs and objects in her house. Since
2 2007, Complainant's disabilities have worsened so that Complainant now needs a more
3 highly trained and sophisticated dog than Panda. Panda, who was 13 years old at the
4 time of hearing, can no longer perform her mitigation tasks on a fulltime basis because
5 of her age. In addition, Panda began having seizures two years ago.¹⁰ (Testimony of
6 Complainant; Ex. A24)

7 6) On December 8, 2011, Marilyn Krueger, PMHND, wrote a prescription for
8 Complainant that read: "Ms. Hilt-Hayden, due to mental disorders and visual
9 impairment, must be allowed to have her service dog with her at all times." On January
10 5, 2012, Krueger wrote and signed another letter that read as follows:

11 "To whom it may concern,

12 "My client Michel A. Hilt-Hayden being determined to have an irreversible
13 disability as defined under the guidelines of the DSMVIII. Michel's care team
14 and I have determined that the only suitable option to mitigate her disability/s is
15 through an appropriate paring (sic) with a service dog. There is no other
16 equipment or combination of equipment that has the ability to assist my client to
17 the fullness of her disability.

18 "We have located a service dog program in Oregon that meets her needs.
19 Oregon Assistance Dogs; who are a non-profit service dog training organization.
20 Service dogs as well as all related supplies, training, and travel are to be billed as
21 durable medical equipment to the client's insurance.

22 "Oregon Assistance dogs fees total 2,130 which includes the dog, training, shots,
23 vests, spay/neuter, and all other costs for a dog previous to being placed with a
24 disabled client."

25 (Testimony of Complainant; Ex. A24)

7) In 2012, Heather Murlin worked for Oregon Assistance Dogs ("OAD") as
an apprentice trainer under the supervision of OAD's director. At that time, she had
eight years of experience working with service dogs. She met Complainant through the

¹⁰ Complainant credibly testified that she stopped feeding Panda commercial dog food after he began

1 Willamette Valley Assistance Dog Club. After OAD's director was fired in early 2012,
2 Murlin became OAD's interim director. In early 2012, Complainant applied to OAD for a
3 service dog and met Contessa, a collie dog born in September 2011 who was owned
4 and being trained by OAD. Contessa immediately bonded with Complainant and was
5 "matched" with her. About the same time, Murlin started Sunstone Service Dogs
6 ("SSD"), a non-profit corporation that trains service dogs, providing training specific to
7 each client's disabilities, and SSD took over all of OAD's assets and liabilities. Murlin
8 has been SSD's director of training since SSD's inception. In exchange for agreeing to
9 serve as treasurer on SSD's Board of Directors and as SSD's Finance
10 Director/bookkeeper, Murlin agreed that Complainant did not have to pay for Contessa.
11 Since then, Complainant and Murlin have been the primary operators of SSD and have
12 become good friends. Murlin operates SSD from her home in St. Helens and spends a
13 considerable amount of time talking on "Skype" with Complainant. (Testimony of Murlin,
14 Complainant)

15 8) SSD maintains ownership of its dogs until they are three years old. At the
16 time of hearing, Complainant did not yet own Contessa. (Testimony of Murlin,
17 Complainant)

18 9) In Oregon, there are no legal standards that specify the training a dog
19 must undergo to become a "trained" service dog. Nationally, an organization called
20 Assistance Dogs International ("ADI") sets the industry standards and membership in
21 ADI is considered a desirable goal for service dog trainers. SSD has applied for and is
22 actively seeking ADI membership, and Murlin has attempted to adhere to ADI industry
23 standards since SSD started. (Testimony of Murlin, St. Peter)

24
25

having seizures, with the result that Panda's health has improved "dramatically."

1 10) Dogs in SSD's service dog training program train for 24 months before
2 they "graduate." SSD's standard program involves the following training:

- 3 • Basic potty, crate, and manners training, along with an evaluation of the puppy's
4 temperament for suitability as a service dog.
- 5 • At eight weeks of age, a puppy begins a six week course called "Puppy Star"
6 training.
- 7 • After "Puppy Star" training, more detailed training is conducted, including skills
8 that will help the dogs when they are out in public. At the conclusion of that
9 training, each dog is required to pass the "CGC" test (Canine Good Citizen), a
10 test designed by the American Kennel Club that has 10 different subtests.
11 Among other things, this training prepares dogs for public circumstances that
12 may scare them, e.g. people with skateboards, bicycles, hats, or umbrellas, or
13 children pulling their ears. This training involves three classes a month and is
14 attended by people with disabilities who are training their own dogs ("tandem
15 training"), and puppy raisers who are training dogs for SSD's clients who unable
16 to participate in the training at that point. The CGC test is usually taken when a
17 dog is about eight months of age.
- 18 • "Operant" conditioning.
- 19 • Training for and taking two Public Access Tests ("PAT") that are designed by
20 ADI.
- 21 • Training for and passing the Community Canine test.

22 In all, SSD's 24 month training program includes 72 classes that last two to three hours
23 each, held three times a month, in classroom settings and on field trips. (Testimony of
24 Murlin)

25 11) Contessa is a 50 pound collie dog who was born in September 2011.
26 OAD acquired Contessa on December 21, 2011. Per OAD's usual procedures, Murlin
27 temperament tested Contessa and quarantined her in Murlin's house for two weeks.
28 Contessa lived with Murlin for several months, during which Contessa learned crate
29 training, underwent "socialization training" with six other dogs living at Murlin's house,
30 learned to eat around other dogs without being defensive about her food, learned to go
31 to the bathroom when cued, and learned how to walk on a "loose leash." (Testimony of
32 Murlin)

1 12) When Contessa left Murlin's house, she lived with volunteers associated
2 with SSD for several months while she was simultaneously being gradually acclimatized
3 to Complainant's environment. The volunteers taught Contessa how to "walk nicely
4 beside a wheelchair," how to open cupboards, started to teach her how to turn on lights,
5 and taught her not to bark,¹¹ how to "target" items she was asked to "target," and how to
6 respond to verbal directions. (Testimony of Murlin)

7 13) Complainant began tandem training with Contessa in preparation for the
8 CGC test when Contessa was first matched with her in early 2012. In May 2012,
9 Contessa was transitioned into Complainant's home and has lived with Complainant
10 ever since. From May 2012 until Contessa's "graduation" on June 25, 2014,
11 Complainant and Contessa continued SSD's regular course of training, which included
12 attending two three-hour class sessions a month and going on field trips with SSD
13 trainers and other SSD teams in training. (Testimony of Complainant, Murlin)

14 14) After failing the CGC test the first time she took it because she "shied,"
15 Contessa passed the CGC test in December 2012 and Public Access Tests ("PAT") in
16 September 2013 and June 2014. She had the skills to pass the first PAT test before
17 September 2013. (Testimony of Complainant, Murlin)

18 15) Panda has continued to live with Complainant since Contessa moved into
19 Complainant's house. Contessa has learned skills from Panda by imitating Panda
20 whenever Panda has performed work that mitigates Complainant's disabilities. At the
21 time of hearing, Complainant needed both of her dogs present at night and in a hospital
22 situation, as when she had all her teeth extracted.¹² At the time of hearing, Contessa
23 was Complainant's "day dog" whom Complainant uses "out and about" during the day
24

25 _____
¹¹ Murlin testified that collies tend to bark when they are upset.

1 and Panda was her “night dog,” which gives Contessa “a rest” and keeps Panda “feeling
2 special.” (Testimony of Complainant)

3 16) Complainant, her husband, Kevin Lugene-Hayden, and her son Brad Hilt,
4 moved to Eugene Mobile Village RV Park (“EMV”) on April 17, 2013, where they lived in
5 their 34’ Mallard recreational vehicle (“Mallard”). The Mallard has a small refrigerator
6 that will only hold a three day stock of perishable food. At that time, Complainant,
7 Lugene-Hayden, and Hilt drank about a gallon of milk per day. They lived at EMV for
8 eight weeks before moving to another location. (Testimony of Complainant, Lugene-
9 Hayden, Fuell; Ex. A29)

10 17) Lugene-Hayden, Complainant’s husband, has PTSD and problems
11 walking because one of his legs is longer than the other. He had PTSD in April 2013.
12 (Testimony of Complainant, Lugene-Hayden)

13 18) In April 2013, and continuing to the present day, Brad Hilt, Complainant’s
14 son, has been Complainant’s and Lugene-Hayden’s daily “brains and brawn” caregiver.
15 Elizabeth Fuell, Complainant’s daughter, has been their “administrative” caregiver.
16 (Testimony of Complainant; E. Fuell)

17 19) Although Contessa was still “in training” in SSD’s program in April 2013,
18 she was trained at that time to perform specific tasks to mitigate Complainant’s
19 impairments that are described in Findings of Fact ##3 & 4 – The Merits. Those tasks
20 included the following: (1) “covering” and chest compression when Complainant had a
21 PTSD attack; (2) assisting Complainant to walk through crosswalks, including pushing
22 the “walk” button; (3) leading Complainant to a vehicle that she was to ride in; (4)
23 locating bus stops; (5) alerting Complainant to traffic; (6) alerting Complainant to take
24

25 ¹² Complainant gave this answer in response to a question on direct examination regarding whether there were situations in which she needs both Contessa and Panda present.

1 her medication every two hours; (7) helping Complainant breathe properly when
2 Complainant suffers panic attacks in her sleep; (8) opening and closing doors; (9)
3 providing “tactile” stimulation; and (10) helping Complainant avoid objects while walking.
4 At that time and since then, when Complainant has ridden a public bus, Contessa has
5 been the only dog accompanying her. (Testimony of Complainant, Murlin)

6 20) EMV is located on the west side of Franklin Boulevard, with its driveway
7 connected directly to Franklin. At that location, Franklin is a two-way, two-lane street
8 that is approximately 40 feet across, including a ten foot wide paved shoulder on both
9 sides of Franklin. At EMV’s driveway exit onto Franklin, the posted speed limit is 40
10 miles per hour. DSM is on the east side of Franklin, across the street from EMV, and
11 approximately 80 feet north of EMV’s driveway entrance. There is a sign posted
12 immediately south of DSM that changes Franklin’s speed limit to 30 miles per hour for
13 vehicles driving north. The front door of DSM is approximately 100 feet from the
14 driveway entrance to Eugene Mobile. (Observation of ALJ; Ex. ALJ1)

15 21) On April 17, 2013, Complainant, accompanied by Contessa, met Lugene-
16 Hayden, who was accompanied by Panda, as she was returning on foot from a doctor’s
17 appointment. Both dogs were on leash. Contessa was wearing a blue SSD service dog
18 in training vest,¹³ as well as a training harness called a “pre-harness” and a “haltie,” a
19 type of soft muzzle.¹⁴ Complainant told Lugene-Hayden they needed milk and Lugene-
20 Hayden told her that there was a grocery store right across the street from their new
21 home. Together, they crossed Franklin to buy milk at DSM, accompanied by Contessa
22 and Panda. (Testimony of Complainant, Lugene-Hayden; Ex. ALJ1)

23
24 ¹³ Exhibit ALJ1 contains several pictures of Contessa’s “service dog in training” vest. The words
25 “Sunstone Service Dogs” and “Service Dog in Training” are conspicuously printed in gold letters on the vest.

¹⁴ Exhibit ALJ1 has two pictures of Contessa wearing the same “haltie” she wore on April 17, 2013.

1 22) Lugene-Hayden had previously been in DSM by himself to purchase MD
2 20-20, a type of fortified wine. Lugene-Hayden uses Panda to assist him with his
3 PTSD, but there is no evidence in the record that he has been prescribed a service dog
4 or that he was accompanied by Panda on his previous visits to DSM. (Testimony of
5 Complainant, Respondent; Ex. A8; Entire record)

6 23) On April 17, 2013, Complainant and Lugene-Hayden entered DSM's front
7 door with Contessa and Panda, with the intent of buying milk, and began to walk down
8 the aisle to the right of the door. Panda remained under Lugene-Hayden's control
9 during Complainant's and Lugene-Hayden's visit to DSM. Charlotte Gordon was
10 working as a store clerk at DSM that day. Respondent, who had been working at her
11 work station located in the back of DSM, saw Complainant and Lugene-Hayden on her
12 security monitor, came into the front of DSM and told Complainant that she could not
13 bring her dogs into the store. Complainant responded "I'm sorry; they're service dogs –
14 why can't they come in? They're allowed in by law." Respondent replied "no dogs are
15 allowed in this facility" and told Complainant that she and Lugene-Hayden needed "to
16 leave." When Complainant asked again why her service dogs weren't allowed in,
17 Respondent told her there was a sign outside that said "no service dogs – go read it."
18 Complainant read the sign, then went back in the store and told the lady to read the
19 sign, as it read "service animals welcome." Respondent told Complainant "I can't let
20 them in" and told Complainant that there was a drive-in window Complainant could use.
21 Respondent also told Complainant that she and Gordon could hold the dogs outside
22 while Complainant shopped. At some time during the conversation, Complainant told
23 Johnson that Contessa and Panda were service dogs and that Panda was "retired" and
24 Contessa was "in training." At the conclusion of this conversation, Complainant stayed
25

1 outside with Contessa and Panda while Lugene-Hayden went into DSM. Lugene-
2 Hayden did not buy milk while in DSM.¹⁵ (Testimony of Complainant, Respondent)

3 24) Except for Complainant's dogs, Respondent has never had a dog in her
4 store during the entire 12 years she has owned DSM. (Testimony of Respondent)

5 25) At all times material, a sign was conspicuously posted in a front window of
6 DSM that read:

7 **"PETS ARE NOT ALLOWED IN FOOD ESTABLISHMENTS**

8 Oregon law prohibits all animals, in grocery stores, restaurants, and other food
9 establishments. Service animals are trained working animals, NOT pets. The
10 Americans with Disabilities Act (ADA) authorizes the use of service animals in a food
11 establishment ONLY for the benefit of individuals with disabilities.

12 **SERVICE ANIMALS WELCOME**

13 People with disabilities may bring service animals into all areas where customers are
14 normally allowed to go. A service animal is a dog that is individually trained to do work
15 or perform tasks for people with disabilities. Dogs whose function is to provide comfort
16 or emotional support DO NOT qualify as service animals according to the ADA."

17 (Testimony of Complainant, Respondent; Observation of ALJ; Ex. ALJ1)

18 26) This was the first time Complainant had ever been "disallowed" entry with
19 her service dogs in a place of public accommodation. She felt angry and insulted, and
20 became really upset and "was maxing out" from her PTSD. She left DSM to control her
21 anger. (Testimony of Complainant)

22 27) Respondent maintains a log book at DSM in which Respondent and her
23 employees make handwritten notes about significant events. Respondent wrote the
24 following in DSM's log book on April 17, 2013: "New people across street – one I

25 ¹⁵ On cross examination, Complainant testified as follows:

Q: "So your husband was able to make his purchases that day, correct?"

A: "He did not get the milk."

1 ordered MD 20 20 for. Came in with wife & 2 service dogs. Told them no dogs in store,
2 wife not happy – Too BAD!” (Testimony of Respondent, Khoshnaw; Ex. A8)

3 28) The next closest grocery store to DSM is a “Dari-Mart” located .5 miles
4 north of DSM. Dari-Mart is on the same side of the street as EMV. There is a bus stop
5 for north-proceeding passengers located immediately north of DSM on the east side of
6 Franklin Blvd. The closest crosswalk to EMV that crosses Franklin Blvd. is .4 miles
7 north. (Testimony of Complainant; Observation of ALJ; Ex. ALJ1)

8 29) After the incident with Complainant on April 17, Respondent told her
9 employees about the incident and told them that she did not want Complainant’s dogs in
10 DSM. (Testimony of Respondent)

11 30) On the evening of April 17, 2013, Complainant completed an online BOLI
12 “Civil Rights Division Public Accommodation Discrimination Questionnaire” describing
13 her experience that day at DSM. (Testimony of Complainant; Ex. A4)

14 31) On the evening of April 17, Complainant asked Fuell to come over and
15 help her organize some paperwork about service dogs to take to DSM and to
16 accompany her to DSM the next day as an observer. (Testimony of Complainant)

17 32) At all times material, DSM’s front door opened inward, with the door
18 hinged on the right side. The door opens to a maximum angle of about 110 degrees.
19 There is a tall, moveable candy rack located several feet behind the door. (Observation
20 of ALJ; Ex. ALJ1)

21 33) On April 18, Complainant and Fuell visited DSM, accompanied by
22 Contessa, who wore her SSD service dog in training vest. Complainant asked Fuell to
23 bring her cell phone so she could make a video recording, if necessary, to help
24 Complainant recall what happened. Complainant also intended to buy milk during the
25

1 visit. Respondent was not at DSM that day and Cathy Bailey¹⁶ was the store clerk on
2 duty. Fuell entered DSM first to hold the door open for Complainant and Contessa,¹⁷
3 then stood behind the door with DSM's candy rack at her back. As Complainant
4 entered DSM with Contessa, Bailey approached Complainant, put her hand on the door,
5 and stood in a position that prevented Fuell from moving out from behind the door. In a
6 loud voice, Bailey told Complainant "You're not welcome here; your dog needs to
7 leave." At that point, Complainant's PTSD "kicked in." Complainant told Bailey that
8 Contessa was a service dog and Fuell said she was recording the conversation.¹⁸
9 Bailey stated that she didn't care, that they needed to leave, and threatened to call the
10 police if Complainant and Fuell did not go outside. In response, Complainant and Fuell
11 said they would call the "cops." Fuell then called the sheriff's department, and
12 Complainant and Fuell waited inside Fuell's car that was parked on the south side of
13 DSM's parking lot. While they waited, someone came out from DSM and told them "No
14 matter what happens, you are 86'd off the property," which Complainant understood to
15 mean that she was not allowed to come into DSM under any circumstance. Three hours
16 later, two deputies showed up. In the interim, Respondent and Complainant had
17 separate phone conversations with Gordon Gill, the sergeant supervising the patrol
18 shift, concerning the ongoing incident. Complainant told Gill she wanted access into
19 DSM and Gill explained to Complainant that Respondent did not want Complainant on
20 the property. When the deputies arrived, Complainant and Fuell told the deputies that
21 they had gone into DSM to buy milk and had been told to leave and that they were not
22 welcome. The deputies took Complainant's handouts and gave them to Bailey, then

23 _____

24 ¹⁶ Respondent did not call Bailey as a witness and offered no explanation for not calling her.

25 ¹⁷ Fuell testified that when she accompanies Complainant to stores, she usually enters the store first because of Complainant's visual impairment, then tells her when it is alright to enter.

¹⁸ The Agency did not offer the recording into evidence and offered no explanation for not offering it.

1 asked Complainant and Fuell to leave, asking Complainant if she could come back the
2 next day and meet with Respondent and see if they could work out “an amicable
3 solution.” The deputies also asked Complainant not to return before she met with
4 Respondent the next day. In all, Complainant spent about four hours at Duck Stop
5 Market on April 18 and “still didn’t get” her milk. (Testimony of Complainant, Fuell)

6 34) The following handwritten entry appears in Respondent’s store log for
7 April 18, 2013: “Next drama! DOG & BLIND LADY & daughter come in refuse to leave
8 – call cops on me! 2 hours later – sherriff (sic) (2 of them show up.) HOLLY SHIT!!”
9 (Testimony of Khoshnaw; Ex. A8)

10 35) The April 18 incident at DSM upset Complainant. In her words, “I was
11 starting to get perturbed” and she began to wonder “how many others are being treated
12 this way?” Complainant decided the solution was to come back the next day with Murlin
13 in an attempt to “educate” Respondent about service dogs. That evening at home, she
14 completed a second online BOLI “Civil Rights Division Public Accommodation
15 Discrimination Questionnaire” describing her experience on April 18 at DSM.
16 (Testimony of Complainant, Fuell; Ex. A4)

17 36) On April 19, 2013, Complainant and Murlin visited Cesar Chavez
18 Elementary School with Contessa and Liberty, another SSD dog, conducting dog safety
19 classes for students from 9 a.m. to 3 p.m. At Complainant’s request, Murlin agreed to
20 go with her to DSM after their Chavez visit to educate Respondent about service dogs.
21 Complainant and Murlin went to Complainant’s house and called DSM. They were told
22 that Respondent had just left, but would be back soon. After waiting a few minutes,
23 they left Liberty in the Mallard and walked to DSM with Contessa, who wore her SSD
24 “service dog in training” vest and a green and black body harness. Respondent and
25 Cathy Bailey met Complainant and Murlin outside and stood in front of DSM on the

1 paved walkway on the south side of DSM's front door, with their arms crossed.
2 Complainant and Murlin stood a few feet south of Respondent and Bailey on the same
3 paved walkway. Complainant felt that Respondent and Bailey were blocking the
4 doorway and felt "unwelcome." During the subsequent conversation, Complainant told
5 Respondent she was there to try and work on an amicable solution and had brought
6 some ADA materials about service dogs for Respondent to read. Respondent agreed
7 to read the materials and get back to Complainant within a week. During the meeting,
8 Murlin also explained to Respondent that Contessa was a service animal. In all, the
9 meeting lasted about 20 minutes. During the meeting, Complainant did not ask or
10 attempt to enter DSM¹⁹ and Respondent did not invite Complainant and Murlin into the
11 store because of Respondent's desire to keep the meeting private, away from
12 customers who were in the store. Respondent told Complainant and Murlin that dogs
13 were not allowed in DSM and that Complainant was not allowed back on the property
14 until Respondent determined what to do with Complainant's service dogs. (Testimony
15 of Complainant, Murlin; Exhibit ALJ1; Stipulation of Respondent, Complainant)

16 37) On April 22, 2013, Respondent called Complainant and said that she had
17 read the paperwork Complainant had given to her. Respondent asked Complainant
18 "what service is your dog trained to provide for you?" Complainant said "for mental
19 disorder and visual impairment." Respondent told Complainant that she had to let
20 Complainant into DSM, and that she would let Complainant shop at DSM so long as
21 Complainant was only accompanied by one dog.²⁰ When Complainant went home, she
22 told her family that they could shop at DSM and told Lugene-Hayden that he was "more

23 _____
24 ¹⁹ Complainant did not testify that she visited DSM on April 19 for any other purpose than meeting with
25 Respondent and giving Respondent the ADA materials. Neither Complainant nor Murlin testified that they
attempted to enter DSM on April 19.

²⁰ Respondent testified that she was "satisfied" with this answer, although she still did not believe that
Complainant's dogs were "service animals."

1 than welcome to go across and do our shopping.” (Testimony of Complainant,
2 Respondent, Khoshnaw; Exs. A8, A12)

3 38) Prior to April 22, 2013, Complainant would have shopped at DSM daily,
4 had she been allowed to do so. (Testimony of Complainant)

5 39) Complainant did not return to DSM after April 22 because she believed
6 Respondent was unlawfully restricting her access by limiting her to only one dog.²¹
7 However, the rest of her family elected to shop at DSM.²² (Testimony of Complainant)

8 40) Complainant experienced “trauma” from not being able to take Contessa
9 or Panda into DSM and subsequently “went through a stage where the world hated her
10 and she couldn't do nothing.” Complainant became even more reticent about leaving
11

12
13 ²¹ Complainant’s testimony on this issue was as follows:

14 Q: “Ms. Johnson called you on the 22nd and told you that you could bring one dog into the store?”

15 A: “Yes.”

16 Q: “And so why didn’t you just start bringing one dog into the store?”

17 A: “She made it conditional, and that’s not appropriate.”

18 Q: “What do you mean, it’s not appropriate?”

19 A: “There is no restrictions on how many service dogs I can have.”

20 Q: “So it’s your testimony that you could bring in – you could train one animal to do one task and have 10
21 tasks you need and bring in 10 service animals to a store; is that your testimony?”

22 A: “That’s correct. If that’s the way I trained the service dogs, yes. There are no restrictions on how
23 many service dogs a person can use. She limited, again, my access.”

24 ²² Complainant testified as follows on cross examination:

25 Q: “After April 22, even though you were invited back to the store, you elected not to shop there again. Is
that your testimony?”

A: “I elected not to; the rest of the family did.”

Q: “You didn’t elect not to?”

A: “I elected not to; the rest of the family chose to....my husband, my son, my daughter, whoever.”

“* * * *”

“Just to minimize it, I’m going to stay away because I’m really hot-headed about this and I’m having
problems about this whole scenario. It still doesn’t set right with me. They’ve agreed but there are
conditions. That’s not right by law. I was reading up on ADA and reading more thoroughly and the whole
thing was sitting wrong with me.”

1 her home, only leaving when she had to, and it took “weeks to get [Complainant] back
2 to what we called normal at the time.” (Testimony of Complainant, Fuell)

3 41) Shortly after Complainant filed her complaint with BOLI, Respondent
4 called Lugene-Hayden when he was shopping in DSM and told him that she would be
5 “more comfortable” if he didn’t shop in DSM until the complaint was resolved.
6 (Testimony of Respondent)

7 42) Lugene-Hayden then began walking to Glenwood to buy milk and butter.
8 There is no evidence that Contessa or Panda accompanied him on those trips. This
9 was physically difficult for him. There were times when he fell when walking home and
10 had to be assisted by the police; on some of these occasions the problem was caused
11 because of his consumption of alcohol. (Testimony of Complainant)

12 43) Complainant and Lugene-Hayden moved out of EMV on June 11, 2013.
13 (Testimony of Complainant; Ex. A29)

14 44) In October 2013, Complainant moved to the apartment complex where
15 she continued to live at the time of the hearing. (Testimony of Complainant)

16 45) On December 2, 2013, Respondent mailed the following letter to
17 “Sunstone Service Dogs,” attention “Heather Murlin:”

18 “Dear Heather,

19 “I am the owner of [Duck Stop Market].

20 “I found your organization on line and read through it. Some of the information
21 conflicts with the information on the ADA website. I noticed Michel is the
22 treasurer of the organization.

23 “I have purposely sought out people in stores who have service dogs and had
24 shared by incident with Michel. Their reactions have been stunned. All of these
25 dogs were wearing vests and one woman told me this was a requirement which I
cannot find in any of the literature. They have offered to speak on my behalf.

“As you know, Michele is asking for compensation from me. Most recently she is
asking for \$5,000.00. I told Eric Yates she could sue me, I offered her \$300.00.

1 "There have been two articles in the register guard²³ in the past two months
2 regarding the ambiguous laws on service dogs.

3 "I plan to go public with this and will mention your organization and its affiliation
4 with Michel. The register guard is awaiting my story. I have also had
5 conversations with my other business associates about this and informed them
6 where to get information to prevent this ordeal in their stores. I phoned Michel on
7 April 22nd and told her she could enter my store with one dog. She filed a
8 complaint with Civil Rights on May 10. I was mortified to think I was being
9 accused to (sic) discrimination.

10 "This entire situation needs to be dropped. Michel has a very large attorney bill
11 and there is no guarantee how that bill might be paid. Rather than her wanting
12 compensation she should be advocating to inform people of the rights of the
13 service dog issue.

14 "Sincerely
15 Kara Johnson"

16 (Testimony of Murlin, Complainant; Ex. A28)

17 46) Complainant opened Johnson's letter when it arrived in SSD's Post Office
18 Box. It concerned her because SSD had nothing to do with her complaint except for
19 SSD's ownership of Contessa. She felt the letter was "very much of a threat" to SSD,
20 felt personally threatened, and was upset and experienced stress because SSD still
21 owned Contessa and owns dogs used by other disabled persons. Murlin and
22 Complainant discussed the contents of the letter while having a lengthy conversation
23 using "Skype." During the conversation, Murlin observed Complainant scratching and
24 "rocking," two activities Complainant does when she is under stress. (Testimony of
25 Complainant, Murlin)

47) Complainant and Murlin turned the letter over to Mark Jordan,
Complainant's attorney. (Testimony of Complainant)

²³ The forum takes judicial notice that "The Register-Guard" is the name of Eugene's daily local newspaper.

1 48) On April 15, 2014, Respondent's employee Charlotte Gordon saw
2 Complainant at a bus stop at 5th Avenue and B Street²⁴ in Springfield, Oregon. At the
3 time, Respondent was in Gordon's car and told Gordon to follow the bus to see where
4 Complainant went. Gordon followed the bus for about 20 minutes, then drove
5 Respondent back to DSM after Complainant got off the bus on Olympic Street in front of
6 a Winco store. On April 21, 2014, Gordon signed an affidavit, printed on the letterhead
7 of Respondent's attorneys that included the following statement:

8 "On the afternoon of April 15, 2014, I was driving the car and observed Michel
9 with a leashed dog lying at her feet and a child in a stroller waiting at the bus stop
10 at the 5th Avenue and B Street in Springfield, Oregon. The dog lying at Michel's
11 feet was a dog looked like 'Lassie dog' and was not either 'Panda' or 'Contessa.'
12 I follow the bus that Michel boarded to see where Michel was going.
13 Approximately 20 minutes later I observed Michel get off the bus on Olympic
14 street in front of WinCo, pushing the child in a stroller with both hands on the
15 stroller and also holding a white cane with red on it like holding an umbrella. I
16 also observed the 'Lassie dog' walking behind her and definitely not guiding
17 Michel. There was no one else walking with Michel."

18 (Testimony of Gordon; Ex. A26)

19 49) Complainant has been co-parenting Callie, her 21-month-old
20 granddaughter, since Callie was very young. Each week, Callie arrives on Friday or
21 Saturday and leaves on Sunday, Monday, or Tuesday. In or around May 2014,
22 Complainant and Callie were walking on a Springfield sidewalk, accompanied by
23 Contessa. At the time, Complainant was not using Callie's stroller because Callie
24 wanted to walk. As Complainant bent down to pick up Callie, "a lady" driving a white
25 SUV-type vehicle stopped in front of her, took pictures, and asked if "the baby" was
okay. At that time, Complainant did not recognize the car or the lady taking pictures.
Further along in their walk, the lady took pictures of them again, standing next to the

²⁴ The forum takes judicial notice that 5th Avenue and B Street in Springfield is approximately 1.2 miles away from DSM.

1 white SUV Complainant had seen earlier. Complainant asked the lady who she was
2 and asked her to stop taking pictures. The lady told Complainant that she was from
3 Portland. Complainant got close enough to the lady's vehicle to read its license plate
4 and wrote down the number on a scrap of paper she had with her that had "prayer
5 chain" notes on it. The number she wrote down was "911FXN."²⁵ This incident was
6 very upsetting to Complainant, as she sensed she was being followed. During this
7 encounter, Contessa kept looking behind her and showing signs of stress and
8 Complainant feared that Contessa's training would suffer. (Testimony of Complainant,
9 Murlin)

10 50) At some point prior to the hearing, Complainant received an eviction
11 notice from her landlord at her current apartment because of complaints that someone
12 associated with her was taking pictures at Complainant's apartment. By this time, Mark
13 Jordan, Complainant's attorney had received the affidavit signed on April 21, 2014, by
14 Charlotte Gordon, as well as a second affidavit signed the same day by Patricia Wiest,
15 another of Respondent's employees, also printed on the letterhead of Respondent's
16 attorneys. Attached to Wiest's affidavit were two photos of Complainant's apartment
17 and Complainant's neighbor's car, which was parked in front of Complainant's
18 apartment. In the affidavit, Wiest swore that the car in the photos was "just like the one"
19 that Wiest saw Complainant driving on April 29, 2013. One of the photos was taken
20 from inside the cab of a vehicle that had a white mirror. Jordan showed these affidavits
21 to Complainant. After Complainant explained to her landlord that "she was being
22 stalked" by Respondent and showed the landlord the photos attached to Wiest's
23

24 ²⁵ At hearing, to refresh her recollection, Complainant produced the contemporaneous note on which this
25 license plate number was handwritten in blue ink. The note was written on a piece of paper that also had
"prayer chain" notes on it. The ALJ, the participants, and their representatives were all given an
opportunity to examine the paper. It was not offered into evidence.

1 affidavit, the landlord rescinded the eviction and told her that they would do their best to
2 keep trespassers off the property. The affidavits confirmed Complainant's feeling that
3 she had been followed, which in turn exacerbated her PTSD. She had felt like a "target"
4 before when she perceived she was being followed and the two affidavits confirmed that
5 she had been followed. This made her feel that she was being stalked and "couldn't
6 feel safe anywhere." It made her feel "very, very angry" to know that she had been
7 followed, and she felt "frustrated and violated." She felt that her "private life was being
8 invaded upon" and feels less safe in her home now. When she first moved to her new
9 apartment, she opened the blinds to her kitchen but has now shut them again.
10 (Testimony of Complainant, Murlin, Wiest; Exs. A27, R7)

11 51) Complainant's new apartment is "five to seven miles" away from DSM,
12 located at the back of a large apartment complex. To take the photos attached to
13 Wiest's affidavits, the photographer needed to navigate a series of parking lots to get to
14 Complainant's apartment.²⁶ (Testimony of Complainant)

15 **CREDIBILITY FINDINGS**

16 52) Charlotte Gordon is a current employee of Respondent who was working
17 at DSM on April 17, 2013. Her bias in this matter was demonstrated by Gordon's
18 willingness to chauffeur Respondent in Gordon's car, at Respondent's request, to follow
19 Complainant's bus for 20 minutes "to see where Michel was going," see where
20 Complainant got off the bus, then drive Respondent back to DSM, with no evidence
21 presented that this occurred during her work time. In her affidavit she stated that the
22

23 ²⁶ With reference to the photos attached to Exhibit A27, Complainant testified as follows:

24 Q: "Is this the apartment you currently live in?"

25 A: "Yes, it is, and they have to go all the way past private property, no solicitation, no trespassing signs,
go past a parking lot on this side, a parking lot on this side, turn down a parking lot and go all the way to
the end to get to this car and take a picture."

1 dog with Complainant that day was not Contessa or Panda. In contrast, at hearing, she
2 testified that the dog with Complainant that day was Contessa. Besides her testimony,
3 she also signed an affidavit, apparently prepared by Respondent's attorneys,²⁷ stating
4 that on two occasions she saw Complainant walking on Franklin Blvd. in "April or May,
5 2013," pushing a baby stroller while unaccompanied by a dog. Although Complainant
6 did not testify that she is "legally blind," her level of visual impairment is such that the
7 forum finds this testimony simply unbelievable. Given the character of the other entries
8 made in Respondent's store log book²⁸ contained in Exhibit A8 that were submitted by
9 Respondent during the Agency's investigation, the forum would have expected the
10 Gordon's two "viewings" of Complainant to be noted in that log book, but no such
11 entries were offered into evidence. The forum has only credited Gordon's testimony
12 when it was corroborated by other credible evidence. (Testimony of Gordon)

13 53) Patricia Wiest, who still works for Respondent, was not a credible witness.
14 Although she had never seen Complainant in DSM, she testified that an unnamed co-
15 worker had pointed Complainant out to her and, on two occasions, while at her clerk's
16 station in DSM, she saw Complainant walking in public. Like Gordon, she signed an
17 affidavit in which she declared that she saw Complainant walking on Franklin Blvd.
18 "[a]round the end of April 2013 and the beginning of May 2013," pushing a baby stroller
19 and without a dog. In the same affidavit, she stated that, on April 29, 2013, she saw
20 Complainant driving a tan car into EMV that "look[ed] like" the "exact" car in the photo
21 attached to her affidavit.²⁹ Under cross examination, she testified that she saw
22 Complainant driving "this car," referring to the car photographed in Exhibits A27 and R7,

24 ²⁷ The affidavit is prepared on the letterhead of Respondent's counsel.

25 ²⁸ Some of the entries are quoted in Findings of Fact ##32 & 34 – The Merits.

²⁹ Her affidavit is attached to Exhibit A27.

1 adding that it “looks like the exact same car I saw.” Given the lack of evidence that
2 Complainant owned a car in 2013, the undisputed fact that she has not had a driver’s
3 license since 2005 because of her severe visual impairment, and Complainant’s
4 credible testimony that the car in the photographs belongs to her neighbor at the
5 apartment complex where Complainant presently lives, located some “five to seven
6 miles” from DSM, the forum finds this testimony to be preposterous. In addition,
7 Respondents offered no contemporaneous entries from Respondent’s store log book to
8 corroborate Wiest’s two “viewings” of Complainant. The forum has discounted Wiest’s
9 testimony in its entirety except for her testimony that Complainant has never come into
10 DSM when Wiest was there and that she is an employee of DSM. (Testimony of Wiest)

11 54) Kevin Lugene-Hayden had a natural bias because Complainant is his wife
12 and he presumably stands to gain financially if Complainant prevails. He testified that
13 he has short-term memory problems as a result of his PTSD, but that his long-term
14 memory is not impaired and that he clearly recalled the events of April 2013. However,
15 his testimony demonstrated otherwise. First, contrary to every other witness, he
16 testified that he talked to DSM’s clerk and showed Panda’s service dog ID to the clerk
17 working at DSM on April 17, 2013. Second, he testified that he had never gone into
18 DSM before April 17, 2013, whereas Respondent credibly testified he had come in
19 several days earlier and attempted to order MD 20-20, a cheap type of fortified wine,
20 and that Respondent had placed a special order for him. Third, Lugene-Hayden and
21 Complainant spent most of their time together in the Mallard. Complainant testified in
22 considerable detail about her emotional distress. In contrast, when Lugene-Hayden
23 was asked how Respondent’s actions affected Complainant, the only thing that he could
24 recall, despite being given ample time to answer the question, was that “she was
25 fidgety” and “she said she didn’t like going outside and wouldn’t go outside.” The forum

1 has only credited his testimony when it was either undisputed or corroborated by other
2 credible evidence. (Testimony of Lugene-Hayden)

3 55) Elizabeth Fuell had a natural bias as Complainant's daughter and
4 "administrative caregiver." Although she had a clear recollection of the events on April
5 18, 2013, that was consistent with Complainant's testimony, her recollection was not
6 perfect. As to her April 18, 2013, visit to DSM with Complainant, she initially testified:
7 "It was May; it had to have been between the 15th and 21st last year." When prompted,
8 she allowed that it could "possibly have" been in April 2013. Although Fuell's
9 recollection of dates was not perfect, her testimony as to her observations was credible
10 and the forum has credited her testimony of those observations in its entirety.
11 (Testimony of Fuell)

12 56) Gordon Gill is a sergeant with the Lane County Sheriff's Department who
13 has visited DSM numerous times in past few years. He testified as to his recollection of
14 events on April 18, 2013, in extensive detail without reviewing any notes, and testified
15 that neither he nor his deputies visited DSM that day. In contrast, Complainant and
16 Fuell credibly testified that two deputies showed up. DSM's store log book also
17 contains a contemporaneous note that two deputies appeared, and Respondent stated
18 in her May 28, 2013 response to the complaint that a deputy came to DSM. Because
19 Gill's recollection is suspect, the forum has given his testimony no weight except when it
20 was undisputed or corroborated by other credible evidence. (Testimony of Gill)

21 57) Moayyad Khoshnaw is the Agency's senior investigator who investigated
22 Complainant's complaint. In that process, he interviewed witnesses, and typed notes of
23 his interviews, and wrote the substantial evidence determination and amended
24 substantial evidence determination in the record as Exhibits A16 and A17. With one
25 exception, the forum has credited this testimony in its entirety. That exception is a

1 sentence in his interview notes from his August 12, 2013, interview with Murlin that
2 reads: "[t]he small dog is still in training she is more than 18 months old and she **needs**
3 the ADA definition of trained animal to mitigate the need for Michel's disability we just do
4 not graduate them until they are two years old." (Bolded emphasis added) Khoshnaw
5 testified that his notes reflect what he was told. Based on Murlin's credible testimony
6 that she told Khoshnaw "meets" instead of "needs," and the fact that the word "needs" in
7 the above sentence makes little sense, whereas "meets" is logical and gives the
8 sentence meaning, the forum concludes that Murlin spoke the word "meets" instead of
9 "needs." (Testimony of Khoshnaw)

10 58) Joy St. Peter was called as an expert witness by Respondent. She is the
11 founder, owner, and executive director of The Joys of Living Assistance Dogs ("JLAD"),
12 a 501(c)(3) company "dedicated to the breeding, raising, training and placement of
13 assistance dogs with people living with disabilities." Her testimony established that she
14 is clearly an expert regarding service dogs and their training. She testified as to the
15 training she requires her JLAD dogs to undergo and training she requires her trainers to
16 undergo, the industry standards set by ADI, her knowledge of the ADA, and expressed
17 her opinion about how ADI standards apply to Contessa and Panda. The forum has
18 credited her testimony in its entirety. (Testimony of St. Peter)

19 59) Heather Murlin had a potential bias because of SSD's training and
20 ownership of Contessa, her business relationship and friendship with Complainant, and
21 Respondent's threat against her company, as expressed in Respondent's December 2,
22 2013, letter.³⁰ She testified at length, from personal observation and without
23 exaggeration, as to Complainant's mental and physical impairments, Contessa's
24 training, and the tasks Contessa was trained to perform as of April 17, 2013, that

25 _____
³⁰ See Finding of Fact #45 – The Merits.

1 mitigated Complainant's disabilities. She had a clear recollection of the events on April
2 19, 2013, Complainant's reaction to receiving Respondent's December 2, 2013, letter,
3 and Complainant's statements to her regarding her observations that she was being
4 "stalked" by Respondent. She was not impeached with regard to any of this testimony.
5 Murlin and St. Peter are both experienced service dog trainers and both testified about
6 the significance of Contessa's "training" with relationship to the ADA. However, the
7 forum has given Murlin's testimony about Contessa's training more weight because
8 Murlin was directly involved in Contessa's training and observed Contessa with
9 Complainant on numerous occasions, whereas St. Peter never observed Contessa and
10 only testified in reference to the "training standards" that her company follows and
11 industry standards in general. (Testimony of Murlin)

12 60) Respondent was an articulate witness who responded directly to
13 questions asked of her during direct and cross examination. The forum finds that her
14 testimony was not credible on four key points for the reasons described below.

15 First, she testified that on April 17, 2013, she did not believe that Complainant's
16 dogs were "service dogs" because they had no identification and thought Complainant
17 was "lying." Specifically, on direct examination by Respondent's counsel, she testified
18 as follows:

19 Q: "Did you think they were service animals when [Complainant] told you [that
20 one dog was retired and the other was in training]?"

20 A: "No."

21 Q: "Why not?"

21 A: "One's retired and one's in training and I honestly thought at that time that
22 service dogs had to have identification, either, you know, a vest, and when she
23 wouldn't provide me with when I asked her for identification, she wouldn't provide
24 it to me, so I thought she was lying."

23 Q: "So did you demand ID?"

24 A: "No."

24 Q: "Did you request she give you ID?"

25 A: "I asked for it, politely."

1 In Respondent's May 28, 2013, written response to the complaint, Respondent also
2 claimed that neither Contessa nor Panda "was wearing service dog identification." In
3 contrast, Complainant credibly testified that Contessa was wearing her SSD "service
4 dog in training" vest on April 17, 2013. Significantly, Respondent wrote the following in
5 DSM's store log book on April 17, 2013:

6 "New people across street – one I ordered MD 20 20 for. Came in with wife & 2
7 service dogs. Told them no dogs in store, wife not happy – Too BAD!"

8 Respondent's entry is notable for two reasons. First, it establishes that in 2013
9 Respondent contemporaneously recorded events she perceived as significant to DSM.
10 Second, it refers to Complainant's dogs as the "2 service dogs." Based on
11 Respondent's testimony, if she sincerely believed at the time at the time she wrote the
12 note that Complainant was lying, the forum finds it probable that she would not have
13 identified Contessa and Panda as "service dogs" but would have qualified that phrase
14 by noting that Complainant claimed they were service dogs. Finally, Respondent said
15 nothing in her initial position statement about not allowing Contessa or Panda to enter
16 DSM with Complainant because one was "retired" and the other was "in training."

17 Second, Respondent testified that Complainant "yelled" at her during their April
18 17, 2013, encounter, a point also emphasized by Gordon in her testimony, and both
19 Respondent and Gordon demonstrated the yelling by raising their voices. However, in
20 Respondent's three prior statements – the log book entry, her May 28 written response
21 to the complaint, and her interview with Khoshnaw -- she said nothing about any yelling.

22 Third, Respondent testified that she decided to let Complainant come into DSM
23 with one dog, even though she believed that neither Contessa nor Panda were service
24 dogs, because "I didn't want to fight with her" and "wanted to be a good neighbor." She
25 testified that she "was running a huge risk" in conceding that Complainant could come
into DSM with one dog, but "tried to give [Complainant] the benefit of the doubt." Given

1 Respondent's acute awareness that the Health Department could fine or shut down
2 DSM if she allowed a non-service dog in the store, it is simply not credible that
3 Respondent would let Complainant come into the store with a dog Respondent
4 genuinely believed was not a service dog.

5 Fourth, Respondent wrote the following in her May 28, 2013, response to the
6 complaint:

7 "On April 17th [Lugene-Hayden] came in with his wife with 2 large dogs, one
8 appeared to be an old black dog, the younger dog had a noose around it's (sic)
9 nose. The dog with the noose alarmed me as it was my experience dogs with a
noose might be harmful."

10 At hearing, Respondent acknowledged that Contessa and Panda were on leashes and
11 testified that Contessa was wearing a "muzzle" that was unlike any muzzle Respondent
12 had seen before. However, Respondent did not testify as to any prior experiences with
13 dogs wearing nooses that would have caused her to think Contessa "might be harmful"
14 or to any aggressive behavior by Contessa. Charlotte Gordon, Respondent's employee
15 who also witnessed the events on April 17, 2013, did not testify that Contessa appeared
16 threatening. Further, although Respondent testified at some length about her familiarity
17 with Oregon Health Authority administrative rules and her related concern that Contessa
18 and Panda might be a "direct threat" under those rules, there was no evidence
19 presented to show that Contessa and Panda were "out of control" or were not
20 "housebroken."³¹

21
22 ³¹ Effective September 4, 2012, Oregon Health Authority administrative rules, Chapter 150, subpart 6-
501.115 ("Prohibiting Animals") have provided as follows:

23 *"(B) A food establishment shall permit the use of a service animal by an individual with a disability on its
premises unless the service animal poses a direct threat to the health and safety of others.*

24 *"(1) For purposes of section 6-501.115 the term 'direct threat' means a significant risk that to the health or
safety of others that cannot be eliminated by modification of policies, practices, or procedures or by
25 provision of auxiliary aids or services.*

*"(2) In determining whether a service animal poses a direct threat to the health or safety of others, a food
establishment must make an individualized assessment, based on reasonable judgment that relies on the*

1 In conclusion, the forum has only credited Respondent's testimony when it was
2 undisputed or supported by other credible evidence. (Testimony of Respondent)

3 61) Complainant was an emotional witness. At all times during her testimony,
4 Contessa was lying down at or on her feet. Complainant also held a small "worry stone"
5 that she continually rubbed back and forth in her hands and testified that it helps her to
6 focus. She also "rocked" in her chair frequently and her caregiver had to intercede at
7 least twice to stop her from scratching her neck and hurting herself. With the following
8 two exceptions, the forum found Complainant's testimony to be credible. First, her
9 identification of Respondent was inconsistent. At hearing, she testified on July 24th that
10 the lady she talked with at DSM on April 17, 2013, had not been present during the
11 entire hearing and unequivocally testified that "we did not meet Ms. Johnson on the
12 17th." She further testified it was a "blonde-haired lady" she spoke with on the 17th. In
13 contrast, in the intake questionnaire she filled out on the night of April 17th, she wrote
14 "[t]he owner confronted us." On July 23, 2013, she told Khoshnaw that she spoke with
15 "a dark hair (sic) lady in the store. I have to wear dark glasses, and all I remember [is]
16 dark hair and [a] white face." That is an accurate description of Respondent. Second,
17 she exaggerated her family's inability to obtain milk, butter, and half and half as a result
18 of Respondent's actions and the resulting inconvenience to her family. Lugene-Hayden,
19 who did not need a service dog to shop, was able to buy these products at DSM up to
20 the time Complainant filed her complaint. In addition, Complainant's son, who lived with

21
22 *best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the*
23 *probability that the potential injury will actually occur; and whether reasonable modifications in policies,*
24 *practices, or procedures will mitigate the risk.*

25 *"(3) A food establishment may ask an individual with a disability to remove the service animal from the*
premises if:

(a) the animal was out of control and the animals handwork does not take effective action to control
it; or

(b) The animal is not housebroken."

1 Complainant and Lugene-Hayden, could have bought these products at any time at
2 DSM. (Testimony of Complainant; Observation of ALJ)

3 **CONCLUSIONS OF LAW**

4 1) At all times material herein, Respondent Kara Johnson was an individual
5 “person” as defined in ORS 659A.001(9)(a) and a sole proprietor who owned and
6 operated DSM, a place of “public accommodation” as defined in ORS 659A.400(1).

7 2) At all times material herein, Complainant was an individual with a disability
8 under ORS 659A.104.

9 3) On April 17 and 18, 2013, Respondent refused to let Complainant enter
10 DSM to purchase groceries while accompanied by her service animal, thereby making a
11 distinction, discrimination or restriction against Complainant because of her disability in
12 violation of ORS 659A.142(4).

13 4) On April 19, 2013, Respondent told Complainant that her dogs were not
14 allowed in DSM and that Complainant was not allowed on DSM’s property until
15 Respondent determined what to do with Complainant’s service dogs, thereby making a
16 distinction, discrimination or restriction against Complainant because of her disability in
17 violation of ORS 659A.142(4).

18 5) The Commissioner of the Bureau of Labor and Industries has jurisdiction
19 of the persons and of the subject matter herein and the authority to eliminate the effects
20 of any unlawful practices found. ORS 659A.800 to ORS 659A.865.

21 6) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the
22 Bureau of Labor and Industries has the authority under the facts and circumstances of
23 this case to issue a cease and desist order, including an award of compensatory
24 damages to Complainant, based on Respondent’s unlawful practices. The sum of
25 money awarded and other actions Respondent is required to take in the Order below
are an appropriate exercise of that authority.

1 **OPINION**

2 **Introduction**

3 The Agency alleges that Respondent unlawfully discriminated against
4 Complainant in April 2013, in violation of ORS 659A.142(4) and OAR 839-006-0300(2),
5 by denying her access to DSM when Complainant was accompanied by her service
6 dogs. This is the first case brought before the forum involving service animals and
7 places of public accommodation.

8 To prevail in this matter, the Agency must prove the following by a
9 preponderance of the evidence: (1) Respondent is a place of public accommodation as
10 defined in ORS 659A.400; (2) Complainant is an individual with a disability; (3)
11 Respondent made a distinction, discrimination or restriction against Complainant
12 because she is an individual with a disability; and (4) Complainant was harmed by
13 Respondent's conduct. *In the Matter of C. C. Slaughters, Ltd.*, 26 BOLI 186, 193
14 (2005).

15 **1. Duck Stop Market Is a "Place of Public Accommodation"**

16 ORS 659A.142(4) provides that "It is an unlawful practice for any place of public
17 accommodation, resort or amusement as defined in ORS 659A.400, or any person
18 acting on behalf of such place, to make any distinction, discrimination or restriction
19 because a customer or patron is an individual with a disability."

20 ORS 659A.400(1)(a) defines "place of public accommodation" as "[a]ny place or
21 service offering to the public accommodations, advantages, facilities or privileges
22 whether in the nature of goods, services, lodgings, amusements, transportation or
23 otherwise." DSM, a retail convenience store, fits within this definition, which
24 Respondent admitted in her Answer to the Formal Charges.

25 **2. Complainant Is An Individual With Multiple Disabilities**

ORS 659A.104 provides, in pertinent part:

1 “(1) An individual has a disability for the purposes of ORS 659A.103 to 659A.145
2 if the individual meets any one of the following criteria:

3 “(a) The individual has a physical or mental impairment that substantially
4 limits one or more major life activities of the individual.

5 “* * * * *

6 “(2) Activities and functions that are considered major life activities for the
7 purpose of determining if an individual has a disability include but are not limited
8 to:

9 (a) Caring for oneself;

10 * * * * *

11 (b) Seeing;

12 * * * * *

13 (f) Sleeping;

14 * * * * *

15 (s) Socializing;

16 * * * * *

17 (v) Interacting with others;

18 * * * * *

19 “(3) An individual is substantially limited in a major life activity if the individual has
20 an impairment * * * that restricts one or more major life activities of the individual
21 as compared to most people in the general population. An impairment need not
22 prevent, or significantly or severely restrict, the individual from performing a
23 major life activity in order to be considered substantially limiting. An impairment
24 that substantially limits one major life activity of the individual need not limit other
25 major life activities of the individual. * * *

“(4) When determining whether an impairment substantially limits a major life
activity of an individual, the determination shall be made without regard to the
ameliorative effects of mitigating measures, including:

(a) Medication;

* * * * *

(c) Low vision devices or other devices that magnify, enhance or otherwise
augment a visual image, except that ordinary eyeglasses or contact lenses or
other similar lenses that are intended to fully correct visual acuity or eliminate

1 refractive error may be considered when determining whether an impairment
2 substantially limits a major life activity of an individual;

3 * * * * *

4 (i) Reasonable accommodations or auxiliary aids or services[.]”

5 OAR 839-006-0205 contains language similar to the above.

6 Complainant’s credible testimony, corroborated by the testimony of Murlin and
7 Fuell and the medical records in Exhibit A24, established that she has multiple physical
8 and mental impairments, including visual, hearing, PTSD, agoraphobia, and
9 schizophrenia. Complainant also credibly testified that these impairments affect her
10 major life activities of seeing, caring for herself, sleeping, socializing, and thinking
11 clearly. Although she testified that she is hard of hearing, she did not testify how this
12 restricted any major life activity, other than her statement that she wears one hearing
13 aid. The extent of the effect that her impairments have on her major life activities are
14 described in detail in Findings of Fact ##3 & 4 – The Merits. The forum has no difficulty
15 in concluding that each of her impairments, except for her hearing, restricts one or more
16 Complainant’s major life activities as compared to most people in the general
17 population.

18 Based on the above, the forum concludes that the Agency has met its burden of
19 showing that Complainant is an individual with a disability under ORS 659A.104.

20 **With Certain Exceptions, Service Animals Must Be Allowed to Accompany**
21 **Individuals with Disabilities in Places of Public Accommodation**

22 Respondent moved for summary judgment on the grounds that Respondent was
23 not required to allow Complainant to be accompanied by Contessa or Panda in DSM
24 because neither dog was a “service animal.” The forum denied Respondent’s motion,
25 concluding that Contessa and Panda were both “service animals” in April 2013 under

1 Oregon law and the ADA. In light of the evidence presented at hearing, the forum
2 revisits and expands on that ruling.

3 In April 2013, neither ORS chapter 659A nor the Agency’s administrative rules
4 contained any reference to “service animals” in the context of public accommodation.
5 ORS 659A.139(1) provides that “ORS 659A.103 to 659A.144 shall be construed to the
6 extent possible in a manner that is consistent with any similar provisions of the federal
7 Americans with Disabilities Act of 1990, as amended by the federal ADA Amendments
8 Act of 2008 and as otherwise amended.” Accordingly, the forum turns for guidance to
9 Title III of the ADA and 28 C.F.R. §36.302(c), the interpretive regulations promulgated
10 by Department of Justice in the Code of Federal Regulations. Those regulations
11 provide:

12 “(c) *Service animals*—(1) *General*. Generally, a public accommodation shall
13 modify policies, practices, or procedures to permit the use of a service animal by an
14 individual with a disability.

15 “(2) *Exceptions*. A public accommodation may ask an individual with a
16 disability to remove a service animal from the premises if:

17 “(i) The animal is out of control and the animal's handler does not take effective
18 action to control it; or

19 “(ii) The animal is not housebroken.

20 “(3) *If an animal is properly excluded*. If a public accommodation properly
21 excludes a service animal under §36.302(c)(2), it shall give the individual with a
22 disability the opportunity to obtain goods, services, and accommodations without
23 having the service animal on the premises.

24 “(4) *Animal under handler's control*. A service animal shall be under the control
25 of its handler. A service animal shall have a harness, leash, or other tether, unless
26 either the handler is unable because of a disability to use a harness, leash, or other
27 tether, or the use of a harness, leash, or other tether would interfere with the
28 service animal's safe, effective performance of work or tasks, in which case the
29 service animal must be otherwise under the handler's control (e.g., voice control,
30 signals, or other effective means).

31 “(5) *Care or supervision*. A public accommodation is not responsible for the
32 care or supervision of a service animal.

1 “(6) *Inquiries*. A public accommodation shall not ask about the nature or extent
2 of a person's disability, but may make two inquiries to determine whether an animal
3 qualifies as a service animal. A public accommodation may ask if the animal is
4 required because of a disability and what work or task the animal has been trained
5 to perform. A public accommodation shall not require documentation, such as proof
6 that the animal has been certified, trained, or licensed as a service animal.
7 Generally, a public accommodation may not make these inquiries about a service
8 animal when it is readily apparent that an animal is trained to do work or perform
9 tasks for an individual with a disability (e.g., the dog is observed guiding an
10 individual who is blind or has low vision, pulling a person's wheelchair, or providing
11 assistance with stability or balance to an individual with an observable mobility
12 disability).

13 “(7) *Access to areas of a public accommodation*. Individuals with disabilities
14 shall be permitted to be accompanied by their service animals in all areas of a
15 place of public accommodation where members of the public, program participants,
16 clients, customers, patrons, or invitees, as relevant, are allowed to go.”

17 Based on these rules, the forum concludes that Oregon law in April 2013 required
18 places of public accommodation to allow individuals with disabilities to be accompanied
19 by their service animal: (a) unless the animal is out of control and the animal's handler
20 does not take effective action to control it or (b) the animal is not housebroken. There is
21 no evidence in this case that either of these exceptions applied to Contessa or Panda in
22 April 2013. Consequently, Respondent was required to allow Complainant to access
23 DSM with her service animal **unless** the forum concludes that neither Contessa nor
24 Panda was a “service animal.”

25 **Contessa and Panda Were Both Service Animals in April 2013**

 In April 2013, the ADA defined “service animal” as follows:

 ‘*Service animal* means any dog that is individually trained to do work or perform
tasks for the benefit of an individual with a disability, including a physical,
sensory, psychiatric, intellectual, or other mental disability. * * * The work or tasks
performed by a service animal must be directly related to the individual’s
disability. Examples of work or tasks include, but are not limited to, assisting
individuals who are blind or have low vision with navigation and other tasks,
alerting individuals who are deaf or hard of hearing to the presence of people or
sounds, * * * alerting individuals to the presence of allergens, retrieving items
such as medicine or the telephone, * * * and helping persons with psychiatric and

1 neurological disabilities by preventing or interrupting impulsive or destructive
2 behaviors. * * *

3 28 C.F.R. §36.104. Pursuant to ORS 659A.139(1)'s deference to the ADA, the forum
4 relies on this definition of "service animal" in this case. In Respondent's motion for
5 summary judgment, Respondent argued that, regardless of any tasks they were trained
6 to perform, Contessa was not a "service animal" because she was not "trained," in that
7 she had not completed her training, and that Panda was not a "service animal" because
8 he was "retired or retiring." The forum rejected Respondent's argument based on the
9 policy statement contained in ORS 659A.103(1) and the ADA's failure to exclude dogs
10 that (a) have been trained but are retired or retiring or (b) dogs that are undergoing
11 training but are not yet fully trained from its detailed definition of "service animal."³²

12 At hearing, Complainant and Murlin credibly testified as to numerous tasks that
13 Contessa and Panda were trained to perform, as of April 2013, which mitigate
14 Complainant's multiple disabilities. Tasks Contessa was trained to perform included: (1)
15 "covering"; (2) assisting Complainant to walk through crosswalks, including pushing the
16 "walk" button; (3) leading Complainant to a vehicle that she was to ride in; (4) locate bus
17 stops; (5) alerting Complainant to traffic; (6) alerting Complainant to take her medication
18 every two hours; (7) helping Complainant breathe properly when Complainant suffers
19 panic attacks in her sleep; (8) opening and closing doors; (9) providing "tactile"
20 stimulation; and (10) helping Complainant avoid objects while walking. Tasks Panda
21 was trained to perform included: (a) "covering" and chest compression when
22 Complainant had a PTSD attack; (b) waking Complainant at night when she has
23 nightmares and calming her down; (c) dropping on Complainant's chest and getting her
24 to breathe again when Complainant stops breathing at night; and (d) keeping

25 _____
³² See Finding of Fact #8 – Procedural.

1 Complainant from running into street curbs and things in her house. Based on this
2 evidence, the forum concludes that Contessa and Panda were both “individually trained
3 to do work or perform tasks for the benefit of an individual (Complainant) with a
4 disability as of April 2013 and were “service animals” under Oregon law.

5 **3. Respondent Made a Distinction, Discrimination or Restriction against**
6 **Complainant Because She is an Individual with a Disability in Violation of ORS**
7 **659A.142(4).**

8 In its Formal Charges, the Agency alleges that Respondent violated ORS
9 659A.142(4) by refusing to allow Complainant to enter DSM with her service dogs on
10 multiple occasions, as discussed below.

11 **April 17, 2013**

12 On April 17, Complainant and Lugene-Hayden entered DSM for the purpose of
13 buying milk, respectively accompanied by Contessa and Panda, who were both
14 leashed. Contessa wore her service dog in training vest (“vest”), a training harness,
15 and a “haltie,” a type of soft muzzle. Almost immediately, they were accosted by
16 Respondent, who told them they could not bring dogs into DSM and that they needed to
17 leave. Complainant responded by telling Respondent that Contessa and Panda were
18 service dogs and pointed out the poster in DSM’s front window that said service dogs
19 were allowed. Respondent again told Complainant she could not let the dogs come into
20 DSM, but she could use DSM’s drive-up window or Respondent and DSM’s clerk would
21 hold the dogs outside while Complainant shopped. At no time did Respondent ask
22 Complainant either of the questions permitted by the ADA -- if Contessa and Panda
23 were required because of a disability and what work or task they had been trained to
24 perform. Finally, there is no evidence that either Contessa or Panda was out of control
25 or not housebroken, the two exceptions that would have justified Respondent’s refusal
to allow Complainant entry with her dogs. 28 C.F.R. §36.302(c)(2). In conclusion,

1 Respondent violated ORS 659A.142(4) by not allowing Complainant to shop in DSM
2 while accompanied by her service animals.

3 **April 18, 2013**

4 On April 18, Complainant and Fuell visited DSM together with Contessa, who
5 wore her vest.³³ Complainant again intended to buy milk. Respondent was not at DSM
6 that day, but on the previous day had told her employees about the incident with
7 Complainant and her dogs and told them she did not want Complainant's dogs in DSM.
8 Fuell entered DSM first to hold the door open for Complainant and Contessa. As
9 Complainant entered with Contessa, Bailey -- Respondent's store clerk on duty at that
10 time -- approached Complainant, put her hand on the door, stood in a position that
11 prevented Fuell from moving out from behind the door, and loudly told Complainant
12 "You're not welcome here; your dog needs to leave." As on the previous day,
13 Complainant stated that her dog was a service dog. Bailey responded that she didn't
14 care, that they needed to leave, and that she would call the police if Complainant, Fuell,
15 and Contessa did not go outside. Complainant, Fuell, and Contessa went outside and
16 the events transpired involving the sheriff's department, Complainant, and Respondent,
17 described in detail in Finding of Fact #33 – The Merits. Sergeant Gill, who spoke with
18 both Respondent and Complainant that day, also told Complainant that Respondent did
19 not want her on the property.

20 Again, there is no evidence that Contessa was out of control or was not
21 housebroken, the two exceptions that would have justified Respondent's refusal to allow
22 Complainant to shop in DSM with Contessa. In conclusion, Respondent violated ORS
23
24

25 ³³ There was no testimony as to whether Contessa was on a leash and Respondent did not contend that she was not leashed.

1 659A.142(4) by not allowing Complainant to shop in DSM while accompanied by
2 Contessa, her service animal.

3 **April 19, 2013**

4 On April 19, Complainant and Murlin visited DSM with Contessa, who wore her
5 vest and training harness.³⁴ The primary reason for their visit was to educate
6 Respondent about service dogs. Respondent and one of her store clerks met them
7 outside DSM with crossed arms, standing between the door and Complainant, Murlin,
8 and Contessa. This made Complainant feel that she was being blocked from DSM's
9 doorway. In a meeting that lasted about 20 minutes, Complainant told Respondent she
10 was there to try and work on an amicable solution and had some ADA materials about
11 service dogs for Respondent to read. Respondent agreed to read the materials and get
12 back to Complainant within a week. During the meeting, Murlin also explained to
13 Respondent that Contessa was a service animal. During the meeting, Complainant did
14 not ask or attempt to enter DSM. Respondent did not invite Complainant into the store.
15 Respondent also told Complainant that dogs were not allowed in DSM and that
16 Complainant was not allowed on the property until Respondent determined what to do
17 with Complainant's service dogs, thereby violating ORS 659A.142(4).

18 **Post-April 19, 2013**

19 On April 22, 2013, Respondent called Complainant, told her she had read the
20 paperwork Complainant had given to her, and asked "what service is your dog trained to
21 provide for you?" Complainant responded "for mental disorder and visual impairment."
22 Respondent told Complainant that she had to let her into DSM, and that Complainant
23 could shop at DSM so long as she was accompanied by only one dog. When
24 Complainant went home, she told her family that they could shop at DSM, and they

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³⁴ *Id.*

1 subsequently did so. Complainant herself chose not to shop at DSM because she
2 believed Respondent was unlawfully restricting her access by limiting her to only one
3 dog. Later, shortly after Complainant filed her complaint with BOLI, Respondent asked
4 Lugene-Hayden not to shop at DSM until Complainant's complaint was resolved, and
5 there is no evidence that he attempted to shop at DSM again.

6 **4. Complainant was Harmed by Respondent's Refusal to Allow Her to Shop at**
7 **DSM with Panda or Contessa.**

8 Respondent's refusal to allow Complainant to enter DSM with Contessa or
9 Panda from April 17 until April 22, 2013, effectively prevented her from shopping at
10 DSM based on her multiple disabilities and harmed Complainant. The fact that Lugene-
11 Hayden and the rest of her family was allowed to shop at DSM on those days does not
12 alter that fact.

13 **DAMAGES**

14 The Formal Charges seek damages for "physical, mental and emotional distress
15 in an amount estimated to be at least \$30,000.00, to be proven at hearing."

16 In determining an award for emotional and mental suffering, the forum considers
17 the type of discriminatory conduct, and the duration, frequency, and severity of the
18 conduct. It also considers the type and duration of the mental distress and the
19 vulnerability of the Complainant. The actual amount depends on the facts presented by
20 each complainant. A complainant's testimony, if believed, is sufficient to support a
21 claim for mental suffering damages. *In the Matter of Dr. Andrew Engel, DMD, PC, 32*
22 *BOLI 100, 152 (2012)*. Additionally, this forum has long held that Respondents must
23 take Complainants "as they find them."³⁵

24
25 ³⁵ See, e.g., *In the Matter of Charles Edward Minor*, 31 BOLI 88, 104 (2010) (with regard to the particular sensitivity of a complainant who was sexually harassed by respondent).

1 Through the credible testimony of Complainant, Murlin, and Fuell, the Agency
2 established that Complainant experienced the physical, mental and emotional distress
3 as a result of Respondent's unlawful discrimination described below.

4 In April 2013, Complainant had been using a service dog for six years. Because
5 of her background, she was very aware of the law regarding places of public
6 accommodations and service dogs. The April 17, 2013, incident described in Finding of
7 Fact #23 – The Merits, was the first time Complainant had ever been “disallowed” entry
8 with her service dogs in a place of public accommodation. She had entered DSM with
9 the intent of purchasing milk and was told she could not bring either dog into DSM while
10 she shopped, even after she told Respondent that Contessa and Panda were “service
11 dogs.” Alternatively, Respondent offered to let Complainant shop while Respondent
12 and Bailey held the dogs or let Complainant use DMS's drive-in window. Not
13 surprisingly, Complainant felt angry and insulted, became really upset, and “was maxing
14 out” from her PTSD to the extent that she left DSM to control her anger. At the hearing,
15 Complainant testified with considerable emotion -- “All I wanted was a quart of milk so I
16 could drink. There was no sign of respect for a disabled person or her husband who is
17 disabled. All we wanted was milk.”

18 On April 18, 2013, Complainant returned to DSM to buy milk, accompanied by
19 Fuell and Contessa. The events described in Finding of Fact #33 – The Merits, then
20 transpired. During this incident, Complainant's PTSD “kicked in,” she endured a long
21 wait for the sheriff, and she was again frustrated by her inability to purchase milk. The
22 incident further upset Complainant. In her words, “I was starting to get perturbed” and
23 she began to wonder “how many others are being treated this way?”

24 On April 19, 2013, Complainant returned to DSM with Contessa, Murlin, and
25 some ADA educational literature for the primary purpose of educating Respondent

1 about the Oregon law, the ADA, and its requirements as to service dogs. During her
2 meeting with Respondent and Gordon, Complainant perceived that they were blocking
3 DSM's doorway and felt "unwelcome" as a result.

4 Complainant experienced "trauma" from not being able to take Contessa and
5 Panda into DSM and, according to Fuell, subsequently "went through a stage where the
6 world hated her and she couldn't do nothing" and became even more reticent about
7 leaving her home, only leaving when she had no choice. Again based on Fuell's
8 credible testimony, it took "weeks to get [Complainant] back to what we called normal at
9 the time."

10 At this point, it is relevant to quote ORS 659A.103, the Oregon Legislature's
11 statement of policy with regard to individuals with a disability and access to places of
12 public accommodation. In pertinent part, that statute provides:

13 "(1) It is declared to be the public policy of Oregon to guarantee individuals the
14 fullest possible participation in the social and economic life of the state, * * * to
15 use and enjoy places of public accommodation * * * without discrimination on the
basis of disability.

16 "(2) The guarantees expressed in subsection (1) of this section are hereby
17 declared to be the policy of the State of Oregon to protect, and ORS 659A.103 to
659A.145 shall be construed to effectuate such policy."

18 This policy statement clearly establishes that the State of Oregon considers access by
19 individuals with a disability to places of public accommodation to be a fundamental
20 human right. Correspondingly, the forum concludes that denial of that right is an affront
21 to a disabled individual's fundamental human dignity, an affront that Complainant
22 experienced as a result of Respondent's refusal to allow her to shop at DSM while
23
24
25

1 accompanied by Contessa or Panda from April 17 to 22, 2013, and Respondent's
2 subsequent conditional permission for her to enter with one service dog.³⁶

3 As a result of Respondent's post-April 22, 2013 activities described in Findings of
4 Fact ##45, 46, and 48-51, Complainant's emotional and mental suffering and distress
5 continued long after Complainant moved to a different neighborhood located a
6 considerable distance from DSM. Based on Respondent's threats against SSD, she felt
7 personally threatened, was upset, and experienced considerable stress. She feared
8 that Contessa's training would suffer when Respondent, or someone driving
9 Respondent's vehicle, followed her and her granddaughter as described in Finding of
10 Fact #49 – The Merits. Finally, she received an eviction notice from her current
11 residence because Respondent, or someone working in conjunction with Respondent,
12 drove to her apartment complex and took photographs of her neighbor's car and
13 Complainant's apartment. After receiving affidavits from Respondent's attorneys that
14 included photographs of her current apartment, she had a reasonable belief that she
15 was being "stalked," which exacerbated her PTSD and she no longer felt "safe
16 anywhere." It made her feel "very, very angry" to know that she had been followed, and
17 she felt "frustrated and violated." She felt that her "private life was being invaded upon"
18 and feels less safe in her home now. When she first moved to her new apartment, she
19 opened the blinds to her kitchen but has now shut them again. Complainant is entitled
20 to damages for physical, emotional, and mental suffering for all of the suffering
21 described in this section.³⁷

22
23 ³⁶ The forum notes that there is no evidence in the record that Respondent was aware, from April 17 until
24 June 11, 2013, when Complainant moved away from EMV, that Complainant did not require the presence
of both Contessa and Panda in order to shop by herself.

25 ³⁷ This forum has previously held that the stress inherent in litigation does not form a basis for an award
of mental distress damages. See, e.g., *In the Matter of Katari, Inc.*, 16 BOLI 149, 160 (1997), *aff'd*
without opinion, Katari, Inc. v. Bureau of Labor and Industries, 154 Or App 192, 957 P2d 1231, *rev den*,
327 Or 583 (1998). In the forum's view, the stress experienced by Complainant described in this

1 Tellingly, Respondent offered no rebuttal testimony or explanation regarding the
2 “stalking” activity and did not cross examine Complainant about her physical, mental, or
3 emotional distress.

4 The forum has only issued one final order in a case involving disability and a
5 place of public accommodation. *In the Matter of C. C. Slaughter’s, Ltd.*, 26 BOLI 186,
6 196-97 (2005). In *Slaughter’s*, a complainant who had Parkinson’s disease was
7 accused of being drunk because of the way he walked and was told to leave the
8 respondent’s club on two occasions. He was embarrassed, shaken, and upset by
9 respondent’s refusal to let him stay in respondent’s club, felt like the incident had
10 created a scene and that he had been on public display in front of 30 patrons, and
11 thought other patrons might think he was a drunk. After he went home, he thought a lot
12 that night about the way he was treated and had trouble sleeping that night and the next
13 couple of nights. It upset him enough that he talked to a number of people about the
14 incident. He felt even worse after the second time he was asked to leave because it
15 was the second time he had been told to leave and respondent’s manager refused to
16 look at the medical documentation he had told complainant to obtain to prove that he
17 had Parkinson’s. Again, he was upset and stressed and felt that he had been on public
18 display again, this time in front of 60 patrons. He had trouble sleeping, began to think
19 more about how Parkinson’s had negatively impacted his social life, and felt even more
20 self-conscious about his appearance. The respondent’s refusal to let complainant
21 remain in its club made complainant very apprehensive about shopping in new places,
22 and particularly about visiting new bars, in that he was afraid he would be stopped again
23 and accused of being drunk because of his Parkinson’s. The commissioner awarded
24

25 paragraph does not follow that category, but is part of a continuum of stress at Complainant experienced
as a result of Respondent's violations of ORS 659A.142(4).

1 the complainant \$25,000 in damages for emotional distress. Complainant’s emotional
2 and mental distress in this case is greater because of the events that occurred after
3 Respondent’s discriminatory actions that aggravated Complainant’s emotional and
4 mental distress. The forum concludes that \$60,000 is an appropriate award to
5 compensate Complainant for her physical, emotional, and mental suffering.

6 **AGENCY EXCEPTIONS**

7 The Agency filed three exceptions. The first two sought to have language added
8 to the Opinion to make “it clear that the events occurring on [April 18 and April 19] were
9 a violation of ORS 659A.142(4). The forum GRANTS these exceptions and has added
10 the requested clarifying language.

11 The Agency’s third exception requests an additional Conclusion of Law and that
12 appropriate language be added to the Opinion to “make it clear that it was a violation of
13 ORS 659A.142(2) [sic] for Respondent to ‘allow’ Complainant to shop at DSM ‘so long
14 as she was accompanied by only one dog.’” The Agency’s third exception is
15 OVERRULED. Having concluded that Respondent engaged in an unlawful practice on
16 April 17, April 18, and April 19, 2013, by refusing to allow Complainant to enter DSM
17 with any service dog, the forum finds it unnecessary to determine whether
18 Respondent’s April 22 refusal to allow Complainant to enter DSM with multiple service
19 dogs is a violation of ORS 659A.142(4) and declines to consider that issue.

20 **RESPONDENT’S EXCEPTIONS**

21 Respondent filed voluminous exceptions to the Proposed Order, most of them
22 aimed at the ALJ’s failure to rely on ORS chapter 346 in interpreting and applying the
23 law. The forum first addresses Respondent’s exceptions to the Proposed Findings of
24 Fact.

1 **A. Exceptions to Proposed Findings of Fact**

2 Respondent argues that the Findings of Fact should be amended to “correct and
3 include” ten specific “facts,” numbered “a” through “j.” The forum finds that “a,” “c,” “d,”
4 “e,” “f,” “h,” and “j” are either irrelevant, inaccurate, or contradicted by more credible
5 evidence in the record. Finding of Fact #23 has been revised in response to “b.”
6 Finding of Fact #49 has been revised in response to “i.” Exception “g” is already
7 implicitly incorporated in Findings of Fact ##33 and 36.

8 Respondent also objects to the ALJ’s findings that Joy St. Peter was
9 Respondent’s only credible witness. The forum finds that the ALJ’s credibility findings
10 are supported by substantial evidence in the record and declines to revise them.

11 **B. Exceptions to Proposed Conclusions of Law**

12 Respondent excepts to the forum’s conclusions of law that that Respondent
13 violated ORS 659A.142(4) on April 17, 18, and 19, 2013. Respondent’s exceptions are
14 based on the argument that the ALJ should have applied ORS 346.680 and 346.685
15 instead of the ADA to determine whether Contessa and Panda were service animals
16 and whether Complainant was entitled to have them accompany her in DSM.
17 Respondent argues that, had the ALJ applied those laws, as a matter of law the ALJ
18 could not have concluded that violated ORS 659A.142(4). These exceptions are
19 OVERRULED for reasons stated in the forum’s following analysis of Respondent’s
20 exceptions to the Proposed Opinion.

21 **C. Exceptions to the Proposed Opinion**

22 Respondent’s exceptions to the Proposed Opinion fall in three categories: (1)
23 The ALJ’s reasoning that Contessa and Panda were “service animals” and that
24 Complainant was entitled to have one or both accompany her in DSM is flawed because
25 it relies on the ADA, not ORS 346.680 and 346.685; (2) Respondent “acted in strict

1 compliance with the law and did not harm Complainant”; and (3) Complainant is not
2 entitled to any damages. Exception (2) is OVERRULED and requires no further
3 discussion because Respondent’s arguments are not supported by the law or the facts
4 for reasons already set out in this Final Order. Exception (3) is OVERRULED because
5 the Agency proved, by a preponderance of the evidence, that Complainant is entitled to
6 the damages awarded in the Proposed Order.³⁸ Exception (1) requires the additional
7 discussion and is OVERRULED for the reasons stated below.

8 In its motion for summary judgment, Respondent argued that ORS 659A.143 and
9 OAR 839-006-0345(1), not the ADA, were applicable to this case. The ALJ denied
10 Respondent’s motion, concluding that ORS 659A.143 and OAR 839-006-0345(1) were
11 inapplicable because they had not been enacted at the time of the alleged
12 discrimination and there is no language in either the statute or rule to show that they
13 were intended to be applied retroactively.³⁹ In her exception, Respondent now argues
14 that the forum should rely on the provisions of *former* ORS 346.680 and 346.685
15 containing specific definitions of “assistance animal” and “assistance animal trainee,”
16 not the ADA, to determine whether Complainant was entitled by law to be accompanied
17 by Contessa and Panda in DSM. Respondent contends that *former* ORS 346.680 and
18 346.685, if applied to this case, would require reversal of the Proposed Order. For the
19 following reasons, the forum rejects Respondent’s argument that *former* ORS 346.680
20 and 346.685 should be applied in this case.

21
22
23 ³⁸ Respondent argues vigorously that the forum’s conclusions about the extent of Complainant’s
24 emotional and mental distress are overblown and inaccurate and that there is no credible evidence to
25 support Complainant’s testimony that Respondent engaged in “stalking” activity. The forum notes once
more that Respondent’s counsel had ample opportunity to elicit rebuttal testimony responding to both
issues, but elected to offer no rebuttal testimony or explanation regarding the “stalking” activity and did
not cross examine Complainant about her physical, mental, or emotional distress.

³⁹ See Finding of Fact #8 – Procedural.

1 First, *former* ORS 346.680 and 346.685 are part of a different statutory scheme
2 enacted in 1989 that established the right of “a person with a physical impairment to
3 have an assistance animal with the person * * * in any place of public accommodation”
4 but did not give such person any legal recourse. Both were repealed when ORS
5 659A.143 went into effect on June 26, 2013,

6 Second, ORS 659A.139 was amended in 2009 to require deference to the ADA
7 in disability discrimination cases involving public accommodation (ORS 659A.142) and
8 real property (ORS 659A.144 and ORS 659A.144).⁴⁰ Prior to 2009, ORS 659A.139 only
9 required deference to “similar provisions” of the ADA (“ADA deference”) in employment
10 disability discrimination cases, but not in public accommodation cases. At the time of
11 the amendment, *former* ORS 346.680 and 346.685 had been in existence for 20 years,
12 with the pertinent definitions in ORS 346.680 and rights and restrictions in ORS
13 346.685(1) being substantively unchanged since at least 1999.⁴¹ The legislature is
14 presumed to be aware of existing law, yet in amending ORS 659A.139 it chose to
15 specifically defer to the ADA in future constructions of ORS 659A.142(4) instead of
16 *then-existing* ORS 346.680 and 346.685. This deliberate legislative choice is reflected
17
18

19 ⁴⁰ The amended language is printed below as it appears in Oregon Laws 2009, c. 508 §13:

20
21 “659A.139. (1) [ORS 659A.112 to 659A.139] **ORS 659A.103 to 659A.145** shall be construed to
22 the extent possible in a manner that is consistent with any similar provisions of the federal
23 Americans with Disabilities Act of 1990, as amended **by the federal ADA Amendments Act of**
24 **2008 and as otherwise amended.**

25 “(2) **The determination of whether an individual has a disability as provided in section 2 (1)**
26 **of this 2009 Act shall be construed in favor of broad coverage of individuals under ORS**
27 **659A.100 to 659A.145, to the maximum extent permitted by the terms of ORS 659A.100 to**
28 **659A.145.”**

29 ⁴¹ The forum did not research versions of these laws in existence prior to 1999. In 2007, both statutes
30 were amended to change “physically impaired person” to “person with a physical impairment.”

1 in the forum's decision to rely on the ADA definition of "service animal" and the ADA's
2 requirements in 28 C.F.R. §36.302(c).

3 **ORDER**

4 A. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate
5 the effects of violations of ORS 659A.142(4) by **Respondent Kara Johnson** and as
6 payment of the damages awarded, the Commissioner of the Bureau of Labor and
7 Industries hereby orders **Respondent Kara Johnson** to deliver to the Administrative
8 Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800
9 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the
10 Bureau of Labor and Industries in trust for Complainant **Michel Hilt-Hayden** in the
11 amount of:

12 1) SIXTY THOUSAND DOLLARS (\$60,000), representing
13 compensatory damages for emotional, mental, and physical suffering
14 experienced by Michel Hilt-Hayden as a result of Respondent's unlawful
15 practices found herein,

16 *plus,*

17 2) Interest at the legal rate on the sum of \$60,000 from the date of
18 issuance of the Final Order until Respondent complies with the requirements of
19 the Order herein.

20 B. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate
21 the effects of violations of ORS 659A.142(4) by **Respondent Kara Johnson**, the
22 Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Kara
23 Johnson** to:

24 1) At Respondent's expense, undergo training, along with her
25 employees, on the correct interpretation and application of Oregon laws
pertaining to disability and service animals in places of public accommodation,
with the training to be conducted by the Technical Assistance Unit of the Bureau
of Labor and Industries or another trainer agreeable to the Agency.

1 2) To create and implement a public accommodation policy that
2 accurately reflects Oregon law, to be approved by the Bureau of Labor and
Industries, Civil Rights Division.

3 3) Cease and desist from violating laws pertaining to unlawful discrimination
4 against persons with disabilities in the scope of the operation of Duck Stop Market.

5
6 DATED this 6 day of November, 2014.

7
8 
9 _____
10 Brad Avakian, Commissioner
11 Bureau of Labor and Industries

12 Issued ON: 11/6/14

1 **JUDICIAL REVIEW NOTICE**

2 Pursuant to ORS 183.482, you are entitled to judicial review of this Final Order.

3 To obtain judicial review, you must file a Petition for Judicial Review with the Court of
4 Appeals in Salem, Oregon, within **sixty (60)** days of the service of this Order.

5 If you file a Petition for Judicial Review, YOU MUST ALSO SERVE A COPY OF
6 THE PETITION ON the BUREAU OF LABOR AND INDUSTRIES and THE
7 DEPARTMENT OF JUSTICE - APPELLATE DIVISION

8 AT THE FOLLOWING ADDRESSES:

9 BUREAU OF LABOR AND INDUSTRIES
10 CONTESTED CASE COORDINATOR
11 1045 STATE OFFICE BUILDING
12 800 NE OREGON STREET
13 PORTLAND, OREGON 97232-2180

DEPARTMENT OF JUSTICE
APPELLATE DIVISION
1162 COURT STREET NE
SALEM, OREGON 97301-4096

14 If you file a Petition for Judicial Review and if you wish to stay the enforcement of this
15 final order pending judicial review, **you must file a request with the Bureau of Labor**
16 **and Industries**, at the address above. Your request must contain the information
described in ORS 183.482(3) and OAR 137-003-0090 to OAR 137-003-0092.

17
18 CERTIFIED TO BE A TRUE AND
19 CORRECT COPY OF THE ORIGINAL
AND OF A WHOLE THEREOF.



20
21
22
23 FO-CRD/Duck Stop Market, #30-14.doc

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I SERVED A COPY OF THE ATTACHED

FINAL ORDER

In the Matter of

KARA JOHNSON DBA DUCK STOP MARKET

Case #30-14

BY HAND DELIVERING OR PLACING IT IN INTERNAL STATE MAIL SERVICES TO EACH PERSON AT THE ADDRESS LISTED BELOW:

Cristin Casey,
Administrative Prosecutor
Bureau of Labor and Industries
1045 State Office Building
800 NE Oregon Street
Portland, OR 97232

Amy Klare, Civil Rights Division
Administrator
Bureau of Labor and Industries
1045 State Office Building
800 NE Oregon Street
Portland, OR 97232

AND BY PREPARING AND PLACING IT IN THE OUTGOING BUREAU OF LABOR AND INDUSTRIES MAIL TO EACH PERSON OR ENTITY AT THE ADDRESSES LISTED BELOW:

Michel A. Hilt-Hayden via Regular Mail	Jill Featherstonhaugh Business Law Centre, 1158 High St., Suite 101 Eugene, OR 97401 via Certified Mail CM # 7013 2630 0001 9261 2939	Kara Johnson dba Duck Stop Market PO Box 7764 Eugene, OR 97401 via Certified Mail CM # 7013 2630 0001 9261 2946
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On Thursday, November 06, 2014


Rebekah Taylor-Failor, Contested Case Coordinator, Bureau of Labor and Industries