

VAL HOYLE
COMMISSIONER



DUKE SHEPARD
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:

MOHO ENTERPRISES LLC DBA
ST. JOHNS GROCERY OUTLET,

Respondent.

Case No. 32-21

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

The forum concluded that Respondent Moho Enterprises LLC ("Moho") made a distinction, discrimination or restriction in a place of public accommodation based on Complainant's race in violation of ORS 659A.403(1) and (3). The forum awarded Complainant \$20,000 in damages for mental and emotional suffering.

The above-entitled case was assigned to Caroline A. Holien, designated as Administrative Law Judge ("ALJ") by, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 25, 2022, via video conference.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor, Rachel Diamond-Cuneo, an employee of the Agency. Respondent Moho Enterprises, LLC ("Moho"), was represented by Chris Morgan, Attorney at Law. Owner Robert Mode ("Mode") was present throughout the hearing.

The Agency called Complainant AiKeda Boyd ("Boyd"), Britney Boggs ("Boggs"), Senior Civil Rights Investigator, and Shirley Baker ("Baker"), store patron, as witnesses. Charles Warren, the Agency's witness, was not available when contacted to testify. Moho called Mode as its only witness.

The forum received into evidence: (a) Administrative exhibits X1 through X11; (b) Agency exhibits A1 through A12; and (c) Moho exhibits R1 through R10.

Having fully considered the entire record in this matter, I, Val Hoyle, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and Order.¹

FINDINGS OF FACT – PROCEDURAL

1) On November 6, 2019, Boyd filed a complaint with the Agency's Civil Rights Division alleging Moho unlawfully made a distinction, discrimination or restriction in a place of public accommodation based on her race. (Ex. A1)

2) On June 30, 2021, the Agency issued a Notice of Substantial Evidence Determination in which the Agency found substantial evidence of an unlawful practice based on race in that Moho made a distinction, discrimination, or restriction based on Boyd's race. (Ex. A12)

3) On April 9, 2021, a timely Request for Hearing was filed. (Ex. X1)

4) On April 13, 2021, the forum issued a Notice of Hearing to Respondent, the Agency and the Complainant stating the time and place for hearing as August 17, 2021, beginning at 9:30 a.m., at the Offices of the Bureau of Labor & Industries, W.W. Gregg Hearings Room (10th Floor), 1045 State Office Building, 800 NE Oregon Street,

¹ The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

1 Portland, Oregon 97232. Together with the Notice of Hearing, the forum sent a copy of
2 the Agency's Formal Charges, a document entitled "Summary of Contested Case Rights
3 and Procedures" containing the information required by ORS 183.413, a document
4 entitled "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice
5 explaining the significance of the Notice of Hearing, and a copy of the forum's contested
6 case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

7 5) The Formal Charges alleged Moho denied Boyd full and equal
8 accommodations, advantages, facilities, and privileges based on her race in violation of
9 ORS 659A.403(1) and (3). The Formal Charges sought "[d]amages for physical, mental
10 and emotional distress in an amount estimated to be at least \$60,000, to be determined
11 at hearing." (Ex. X2b)

12 6) On May 3, 2021, Moho, by and through its attorney, filed Respondent's
13 Answer to Notice of Hearing and Formal Charges in which it denied the allegation set
14 forth in the Formal Charges and identified its affirmative defenses. (Ex. X3)

15 7) On May 5, 2021, the forum issued an Interim Order Re Temporary
16 Procedures and Requiring Case Summaries setting August 3, 2021, as the deadline for
17 filing Case Summaries. The interim order also noted that the parties had "indicated by
18 email that they consent[ed] to accept filings by email." (Ex. X4)

19 8) On July 27, 2021, the forum issued an Interim Order Re New Hearing
20 Date and Case Deadlines setting October 12, 2021, as the deadline for filing Case
21 Summaries and setting the hearing to begin October 26, 2021. (Ex. X5)

22 9) On September 30, 2021, the forum issued an Interim Order Setting Video
23 Hearing that included the instructions for attending the hearing via Zoom. (Ex. X6)

24 10) On October 12, 2021, the parties filed their respective Case Summaries.
25 (Exs. X7, X8)

11) On October 19, 2021, the Agency filed its Unopposed Motion for Postponement of Hearing due to the unavailability of Boyd. The Agency's motion was granted in the forum's Interim Order Postponing Hearing issued on October 19, 2021. (Exs. X9, X10)

12) On October 26, 2021, the forum issued an Interim Order Re New Hearing Date setting the matter for hearing on January 25, 2022. (Ex. X11)

13) At the start of hearing, pursuant to ORS 183.417(5), the ALJ orally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Hearing Record)

14) On March 24, 2022, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance.

15) On March 24, 2022, the forum issued an Interim Order Re Motion for Extension of Time to File Exceptions to Proposed Order granting the Agency's unopposed motion to extend the deadline for filing exceptions to April 18, 2022.

16) The parties timely filed their exceptions on April 18, 2022. The parties' exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material, Moho was a domestic limited liability company that owned and operated St. Johns Grocery Outlet ("SJGO") located in Portland, Oregon. (Ex. A2)

2) SJGO "specializes in the purchase and resale of surplus and discontinued product * * * that is guaranteed to be fresh and wholesome by the owners and quality standards are the same as those found in other grocery stores." A large percentage of its customers are on a fixed income and food stamps. (Ex. R2)

1 3) Boyd was a frequent SJGO customer based, in part, on her transportation
2 needs. Boyd took the bus to SJGO, which required a walk of approximately 30 minutes
3 to get to the bus stop. Boyd often used her hoverboard to shorten the trip if the weather
4 was nice. Boyd rode her hoverboard to SJGO four or five times prior to June 18, 2019.
5 (Testimony of Boyd)

6 4) A hoverboard allows the rider to stand on the hoverboard as it levitates
7 and propels forward. It is a handsfree vehicle used for personal transportation that is
8 quite heavy to carry. A hoverboard without a rider can propel itself forward causing a
9 risk of harm to others in the area. (Testimony of Boyd)

10 5) The store has nothing posted advising customers that the use of
11 hoverboards, skateboards or similar items is prohibited. (Testimony of Baker)

12 ***Boyd's Interaction with SJGO's Employees***

13 6) On or about June 18, 2019, Boyd went to SJGO riding on her hoverboard.
14 Before entering the store, Boyd spent several minutes on her hoverboard outside of the
15 front door looking at gardening supplies. Boyd entered the store while still on her
16 hoverboard and remained on her hoverboard while inside of the store. (Testimony of
17 Boyd)

18 7) Boyd intended to purchase both dog and cat food, which is kept by the
19 front checkouts near the exit. Boyd grabbed the dog and cat food and put the food on
20 her shoulder before moving to another aisle to look at something. As Boyd turned
21 around to head to the checkouts, Supervisor Courtney Madoche ("Madoche")
22 approached her and directed her to get off the hoverboard or leave the store.
23 (Testimony of Boyd; Ex. R2, p. 8 (Affidavit of Madoche))

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1 8) Boyd resisted getting off the hoverboard out of concern that it could
2 potentially move forward rapidly once she stepped off thereby endangering the safety of
3 herself and others. (Testimony of Boyd)

4 9) Boyd continued moving toward a checkout lane after being confronted by
5 Madoche. Boyd was intending to lay her items down on the checkout lane when
6 Madoche told her again to get off her hoverboard or leave the store. Madoche repeated
7 her directive a third time after Boyd put her items down at the checkout. (Testimony of
8 Boyd; Ex. R2, p. 8 (Affidavit of Madoche))

9 10) Boyd was struggling to maintain her balance on the hoverboard when
10 Manager Michelle Robbins ("Robbins") approached and asked Supervisor Jennifer
11 Runyan ("Runyan") to open a checkout lane to wait on Boyd. Robbins told Boyd that
12 riding a hoverboard inside the store was not allowed due to the potential liability for the
13 store if someone got hurt. The situation escalated to the point that Robbins directed
14 Runyan to close the checkout lane and told Boyd that she was "86'd," or banned from
15 the store. (Testimony of Boyd; Ex. R2, p. 8 (Affidavit of Madoche))

16 11) Boyd felt threatened and was embarrassed by the employees' conduct
17 toward her in front of other customers. Madoche spoke loudly enough for others in the
18 area to hear her telling Boyd to get off the hoverboard or leave the store. Boyd also felt
19 threatened and embarrassed by having three employees surround her at the store.
20 (Testimony of Boyd)

21 12) Boyd asked to call the police, and was told that she was on private
22 property and the store would not call the police. Boyd then attempted to record the
23 confrontation on her phone before saying, "Fuck it. I won't spend my money here," and
24 leaving the store. (Testimony of Boyd)

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1 13) Boyd walked out of the store carrying her hoverboard. Boyd walked to a
2 sidewalk near the store's entrance where she stopped to look at the bus schedule on
3 her phone. Madoche stood at the door of the store while Robbins approached Boyd
4 outside of the store and told her to leave the area. Robbins repeatedly told Boyd to "get
5 out of here" and told her "to do better with her life." (Testimony of Boyd)

6 14) Boyd told Robbins that she should not be discriminating against her.
7 Robbins responded by telling Boyd that she could not be racist because her husband is
8 Black. Boyd responded by asking Robbins, "Did you know slave owners had sex with
9 their slaves?" Boyd told Robbins the slave owners were still racists. (Testimony of
10 Boyd)

11 15) Boyd used expletives both inside the store and outside of the store due to
12 her frustration with the situation. Boyd's voice was loud enough for others to hear what
13 she was saying. (Testimony of Baker)

14 16) Boyd ultimately left the area in front of the store and went to the bus stop
15 that was located behind the store. Boyd was devastated and frustrated at the events
16 that had occurred. Boyd was particularly upset given that she was a frequent customer
17 at the store, which was easier for her to access than other stores in the area because it
18 was close to a bus route. Boyd was also upset because she felt she was being unfairly
19 punished for something that she did not do. (Testimony of Boyd)

20 17) Baker has been a longtime customer of SJGO and observed the
21 confrontation between Boyd and the SJGO employees inside the store. Baker was with
22 her husband, her daughter and her daughter's friend when she observed two SJGO's
23 employees "flank" Boyd and tell her to get off the board. (Testimony of Baker)

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1 18) Baker asked her husband to take her daughter, who is biracial, and her
2 friend out of the store so they did not have to observe the situation which she felt was
3 escalating quickly. (Testimony of Baker)

4 19) Baker found the employees' behavior to be "kind of aggressive" and
5 thought their "response was weird" since nothing offensive appeared to be happening.
6 Baker found Boyd's behavior normal and casual and observed she was "slowly rolling to
7 the checkouts" when she was flanked by the store employees. (Testimony of Baker)

8 20) Baker observed that Boyd was made to leave the store without completing
9 her purchase. Baker never heard Boyd refuse to get off of the hoverboard. (Testimony
10 of Baker)

11 21) Baker asked the cashier who was checking her out why the employees
12 were not helping Boyd after Boyd told the employees that she could not get off the
13 board with her hands full. Baker thought the employees were "badgering her" as they
14 forced Boyd to leave the store. Baker observed Boyd became more frustrated as the
15 situation continued to escalate, which Baker thought was as a result of the
16 unnecessarily aggressive behavior of the store employees. (Testimony of Baker)

17 22) As Baker left the store, she observed the employees had "kept at [Boyd]"
18 while she was outside of the store. Baker wondered why the employees kept
19 aggravating the situation and felt they were treating Boyd unfairly. Baker moved
20 between Boyd and the employees and gave Boyd her telephone number and told her to
21 call her if she needed to. (Testimony of Baker)

22 23) Baker called Mode that day or the next. Mode told Baker that he had
23 reviewed the situation and the employees had handled the situation according to policy.
24 Baker asked if he had viewed the video, because the employees were antagonistic and
25 failed to help Boyd. (Testimony of Baker)

1 24) Baker, who is white, has a 15-year-old son who had entered SJGO on
2 rollerblades in the past without comment by the employees. Baker's son is also white.
3 Baker's son had knocked over merchandise while on his rollerblades without the
4 employees reacting in the manner they did with Boyd. (Testimony of Baker)

5 25) The SJGO employees reported the situation to Mode, who believed they
6 had handled the situation appropriately. Mode understood the situation escalated as a
7 result of Boyd refusing to get off the hoverboard and calling the employees "racist
8 bitches" and later making the slave owner comment. (Testimony of Mode)

9 26) SJGO's employees are trained not to engage with disruptive customers.
10 SJGO frequently has customers that are inebriated or under the influence of drugs
11 come into the store and cause a disturbance. Employees are free to "86" a customer if
12 they believe the customer has acted in an offensive or disruptive manner. (Testimony
13 of Mode)

14 27) Boyd called Mode a day or two after the incident. Boyd denied calling the
15 employees "racist bitches" or using expletives during the exchange. Mode ended the
16 conversation after Boyd threatened a lawsuit and indicated he would be calling his lawyer.
17 (Testimony of Mode)

18 28) SJGO has security video that is kept on a "rolling loop." As a result, the
19 video of the confrontation between Boyd and the three store employees was not
20 preserved. Even if the video had been preserved, the video has no audio. (Testimony
21 of Mode)

22 ***Credibility of Witnesses***

23 29) The testimony of Boggs is considered credible in its entirety. (Testimony
24 of Boggs)

1 30) Respondent attempted to impeach Boyd's testimony by introducing
2 evidence of criminal convictions for crimes involving a false statement or dishonesty as
3 allowed for under ORS 40.355 (OEC 609). No documentary evidence was offered in
4 support of its effort, and Respondent relied entirely upon Boyd's admission of the
5 convictions. Boyd testified as to the circumstances surrounding the convictions and
6 indicated that the convictions had been expunged from her record and/or were more
7 than 15 years old. Given that no evidence was offered to disprove Boyd's testimony
8 that the convictions were expunged and/or were older than 15 years, Respondent failed
9 to impeach the credibility of Boyd's testimony. (ORS 40.355 (OEC 609(3) and (4));
10 Testimony of Boyd)

11 31) Boyd and Baker were the only witnesses who had firsthand knowledge of
12 the events that occurred at SJGO on or about June 18, 2019. Boyd and Baker have no
13 personal relationship and were unknown to one another at the time of the incident.
14 (Testimony of Boyd and Baker)

15 32) Baker's testimony was clear and direct. Baker showed no animus toward
16 the Respondent during her testimony, and no evidence was offered showing why the
17 forum should not rely upon her testimony. Baker's testimony is considered credible in
18 its entirety. (Testimony of Baker)

19 33) Boyd's testimony was often meandering and appeared exaggerated at
20 times. However, Boyd's testimony regarding the events leading to her being banned
21 from SJGO was consistent with Baker's testimony. Therefore, Boyd's testimony is
22 considered credible to the extent it is consistent with the substantial and credible
23 evidence on the record. (Testimony of Boyd and Baker)

34) Mode's testimony regarding the events that occurred on or about June 18, 2019, was based almost entirely upon information provided to him by individuals who did not testify at hearing. (Ex. R2)

35) Mode's testimony regarding store procedures and what steps he took after receiving notice of the incident is considered credible to the extent it is consistent with the substantial and credible evidence on the record. (Testimony of Mode)

36) As to the events that occurred on or about June 18, 2019, the testimony of Boyd and Baker is considered more credible than Mode's testimony for the reasons described above. (Testimony of Boyd, Baker and Mode)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Moho owned and operated SJGO, a grocery outlet in Portland, Oregon.

2) At all times material herein, SJGO was a "place of public accommodation" as defined in ORS 659A.400(1)

3) Boyd is a Black woman who resides in Portland, Oregon.

4) Moho denied the full and equal accommodations, advantages, facilities and privileges of SJGO to Boyd based on her race, thereby violating ORS 659A.403(1) and (3).

5) Boyd suffered emotional and mental suffering as a result of Moho's violation of ORS 659A.403(1) and (3).

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

7) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order. The sum of money awarded

1 to Complainant and order to cease and desist violating ORS 659A.403 is an appropriate
2 exercise of that authority.

OPINION

4 The Agency alleges in its Formal Charges that Moho violated ORS 659A.403(1)
5 and (3) by denying Boyd "full and equal accommodations, advantages, facilities and
6 privileges" in a place of public accommodation on the basis of race. The Agency seeks
7 damages "for physical, mental and emotional distress in an amount estimated to be at
8 least \$60,000, to be proven at hearing." (Ex. X2b). Moho denies the allegations and
9 contends its employees applied Moho's policies without consideration of Boyd's race.

To prevail in this matter, the Agency must prove the following by a preponderance of the evidence: (1) Respondent is a place of public accommodation as defined in ORS 659A.400; (2) Complainant is a member of a protected class; (3) Respondent made a distinction, discrimination or restriction against Complainant because she is a member of a protected class; and (4) Complainant was harmed by Respondent's conduct. *In the Matter of Kara Johnson dba Duck Stop Market*, 34 BOLI 2, 30 (2014).

18 The parties stipulated that SJGO is a “place of public accommodation” as defined
19 under ORS 659A.400(1). The only remaining issue is whether Moho denied Boyd full
20 and equal accommodations, advantages, facilities, and privileges in a place of public
21 accommodation on account of her race.

22 Boyd and Baker were the only witnesses who had firsthand information regarding
23 the events that occurred at SJGO on or about June 18, 2019. Moho offered written
24 statements from the employees involved in the situation. (Ex. R2) However, those
25

1 individuals were not subject to cross examination, and the forum was denied the
2 opportunity to assess the credibility of each individual. As such, the sworn testimony of
3 Boyd and Baker carries greater evidentiary weight than the written statements
4 submitted by Moho.

5 There is no dispute that Boyd rode her hoverboard while inside the store and
6 remained on the hoverboard despite being told to get off or to leave the store by SJGO
7 employees. (Findings of Fact ## 5, 6, and 11) Boyd remained on the hoverboard out of
8 concern for the safety of others given the potential of the hoverboard propelling forward
9 without her being to control it. (Findings of Fact # 7) Boyd's frustration with the
10 situation was apparent as the SJGO employees flanked her and eventually forced her
11 out of the store without her being allowed to complete her purchase. Boyd used
12 expletives during the confrontation, but her behavior was as a result of the antagonistic
13 behavior of at least one of the SJGO employees. (Finding of Fact # 20)

14 The forum acknowledges that Moho has a right to enforce its policies, particularly
15 those that pertain to the health and safety of its employees and customers. The forum
16 further acknowledges that the initial contact by Madoche was most likely limited to
17 communicating the store's policy to Boyd. However, Baker's description of the
18 antagonistic nature of the confrontation between the SJGO employees and Boyd
19 suggests an animus that goes beyond that which was described in Mode's testimony
20 and the affidavits of those employees involved in the confrontation. (Findings of Fact
21 ## 20 and 21)

22 The forum finds it particularly troubling that at least one employee chose to follow
23 Boyd out of the store and into the parking lot, where she no longer posed a risk of

1 disturbing customers inside the store, and felt it necessary to inform Boyd that she
2 needed to go and she needed to do better with her life. (Finding of Fact # 12) Given
3 Baker's testimony that she, as a white woman, did not experience anything approaching
4 that level of aggression when her own son, who is also white, entered the store on roller
5 blades and knocked over merchandise shows that Boyd was treated differently than an
6 individual who was not in her protected class. Further, the confrontation was
7 concerning enough to Baker that she continued to monitor the situation even after Boyd
8 left the store. The Agency has showed by a preponderance of the evidence that Moho
9 denied Boyd "full and equal accommodations, advantages, facilities and privileges * * *
10 on account of race" in violation of ORS 659A.403(1) and (3).

12 **DAMAGES**

13 The Agency seeks damages on behalf of Boyd in the amount of at least \$60,000
14 for emotional, mental and physical suffering. Pursuant to ORS 659A.850, the
15 Commissioner of the Bureau of Labor and Industries has the authority to award money
16 damages for emotional, mental, and physical suffering sustained. *In the Matter of*
17 *Oregon Truck Painting, LLC*, 37 BOLI 87, 114-15 (2018). The commissioner has the
18 authority to fashion a remedy adequate to eliminate the effects of unlawful practices. *Id.*

19 In determining the appropriate amount of mental and physical suffering damages,
20 "this forum has long held that Respondents must take Complainants 'as they find
21 them.'" *In the Matter of Kara Johnson*, 34 BOLI at 37. A complainant's testimony, if
22

1 believed, is sufficient to support a claim for mental suffering damages². *In the Matter of*
2 *Oregon Truck Painting*, 37 BOLI at 114-15.

3 A review of past emotional distress damage awards is instructive when
4 determining an appropriate emotional distress damages award. The forum has made
5 the following emotional distress damages awards in past public accommodation
6 discrimination cases.

7 The forum determined that \$60,000 was an appropriate award for the
8 complainant's physical, emotional, and mental suffering that resulted from the
9 complainant being denied access to a convenience store because she was
10 accompanied by a service dog. *In the Matter of Kara Johnson*, 34 BOLI at 37.
11 Thereafter, "Respondent, or someone driving Respondent's vehicle, followed"
12 Complainant home to her apartment complex and complainant "received an eviction
13 notice" because "Respondent, or someone working in conjunction with Respondent,
14 drove to her apartment complex and took photographs of her neighbor's car and
15 Complainant's apartment)." *Id.* These incidents caused the complainant to feel invaded
16 upon and unsafe in her home.

18 In another public accommodation discrimination case, the forum examined the
19 damages that should be awarded to a bar patron with Parkinson's disease who was
20 accused of being drunk because of the way he walked and was told to leave the
21 respondent's club on two occasions. *In the Matter of C. C. Slaughter's, Ltd.*, 26 BOLI
22

23

24 ² Respondent argues the Agency sought \$60,000 in damages rather than \$15,000 as it had represented
25 during the course of its discussions with Respondent's counsel. Given the forum was not privy to those
conversations, and the Agency sought \$60,000 in damages for mental and emotional suffering in the
Formal Charges, the forum finds it sufficient to look to Complainant's testimony to determine the
appropriate amount of damages.

1 186, 196-97 (2005). The respondent's refusal to let complainant remain in its club
2 made complainant very apprehensive about shopping in new places, and particularly
3 about visiting new bars, in that he was afraid he would be stopped again and accused of
4 being drunk because of his disability. *Id.* In that matter, the commissioner awarded the
5 complainant \$25,000 in damages for emotional distress. *Id.*

6 Another public accommodation discrimination case involved a respondent who
7 denied access to a bar to 11 members of a social group for transgendered persons
8 based on the sexual orientation of the group's members. See *In the Matter of Blachana,*
9 *LLC*, 32 BOLI at 220. The forum awarded damages to each of the 11 complainants in
10 varying amounts ranging from \$20,000 to \$50,000 based on the evidence in the record
11 of the emotional harm each complainant suffered as a result of the denial of access. *Id.*
12 at 249-53. For example, one complainant was awarded \$20,000 when she had feelings
13 lasting for about a month that included "some upset and disappointment," and feeling
14 "unwelcome" and "mildly dismayed and discouraged." *Id.* at 251. By contrast, the
15 forum awarded \$50,000 to a complainant who had emotional distress lasting for around
16 three months. *Id.* at 251.

18 The forum also notes that following the issuance of the Proposed Order in this
19 matter, the Oregon Court of Appeals issued its decision in *Klein v. Oregon Bureau of*
20 *Labor and Industries*, 317 Or App, 138, 140-41, 506 P3d 1108 (2022) (*Klein III*), rev.
21 denied 369 Or 705, 509 P.3d 119 (2022), and the Commissioner issued an Amended
22 Final Order in *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*,
23 *amended final order on remand*, 38 BOLI _ (2022) (awarding two complainants \$20,000
24 and \$10,000, respectively, when respondents refused to make their wedding cake

1 because of their sexual orientation)(*Klein Amended Final Order*).

2 Boyd felt hurt and offended that she was treated as though she was a stereotype
3 by the store employees. Boyd was traumatized by the incident and continues to feel
4 hurt and frustrated as a result of the incident. (Findings of Fact ## 10, 14, and 15)
5 Boyd can no longer shop at the store closest to her home and is frequently reminded of
6 the incident, which causes her anger and upset. (Findings of Fact ## 10, 14, and 15)
7 The altercation has had a lasting impact on Boyd and has affected her daily life in that
8 she is no longer able to shop at a store that is close to a bus route. *Id.* Accordingly,
9 based on the record in this case, the forum finds that \$20,000 is an appropriate award
10 of emotional distress damages.

12 OTHER REQUESTED RELIEF

13 In its Formal Charges, the Agency asked that Respondents and Respondents'
14 managers and supervisors be trained, at Respondents' expense, "on discrimination in
15 places of public accommodation" by "the Bureau of Labor and Industries Technical
16 Assistance for Employers Unit or other trainer agreeable to and approved by the
17 Agency." (Ex. X2b)

18 BOLI's Commissioner is authorized to issue an appropriate cease and desist
19 order reasonably calculated to eliminate the effects of any unlawful practice found.
20 ORS 659A.850(4). Among other things, that may include requiring a respondent to:

21 "(a) Perform an act or series of acts designated in the order that are reasonably
22 calculated to:

23 "(A) Carry out the purposes of this chapter;

24 "(B) Eliminate the effects of the unlawful practice that the respondent is
25 found to have engaged in, including but not limited to paying an award of
actual damages suffered by the complainant and complying with injunctive
or other equitable relief; and

1 "(C) Protect the rights of the complainant and other persons similarly
2 situated[.]"

3 This statute gives the Commissioner the authority to require Respondents and
4 Respondents' managers and supervisors to undergo training of the type sought in the
5 Formal Charges. The forum finds that this requirement is appropriate in this case.

6 **EXCEPTIONS TO THE PROPOSED ORDER**

7 The Agency filed 19 exceptions that sought corrections to scrivener's errors. The
8 Agency's exceptions are well taken and GRANTED as reflected above. The
9 Respondent filed six exceptions, each of which are addressed below.

10 *Respondent's Exceptions*

11 Respondent's Exception 1

12 Respondent argues in its first exception that the ALJ erred in her statement of the
13 applicable legal standard in a claim involving discrimination in the provision of a public
14 accommodation. While the legal standard set forth in the Proposed Order referred to
15 discrimination on the basis of disability, the legal standard itself is correct. The legal
16 standard has been modified in this order to refer to "protected class." Therefore, the
17 Respondent's exception is DENIED.

18 Respondent's Exception 2

19 Respondent argues in its second exception that the forum improperly considered
20 Baker's testimony regarding her son as a comparator when considering Boyd's
21 testimony. Respondent argues that there was no evidence showing that anyone in the
22 store observed Baker's son or that the employees involved in the situation with Boyd
23 were involved in Baker's son's situation. Respondent argues that Baker's testimony is
24 not sufficient evidence to show Boyd was treated differently because of her race.

1 Contrary to Respondent's argument, Baker offered sufficient evidence in her
2 sworn testimony showing that her son, who is not African American, was in the store on
3 his rollerblades and knocked over a store display without any comment by store
4 personnel. In contrast, Boyd, who, by all accounts, was not disruptive before being
5 approached by store personnel or riding her hoverboard in a manner that caused
6 damage to store property, was subject to a lengthy confrontation by store personnel that
7 continued into the parking lot after she was ordered to leave the store. While the two
8 events may not have occurred on the same day, the measure of the reaction to the two
9 events raises an inference that the response to Boyd was motivated by her race. The
10 Agency rightly notes that the forum has long held that evidence includes inferences. *In*
11 *the Matter of Income Property Management*, 31 BOLI 18, 39 (2010)(evidence includes
12 inferences and it is up to the forum to decide which inference to draw). Therefore,
13 Respondent's Exception 2 is hereby DENIED.

Respondent's Exceptions 3a-3f

16 In Exceptions 3a and 3b, Respondent argues that the forum failed to properly
17 weigh Boyd's credibility and improperly excused her behavior at the store. Respondent
18 argues that there were inconsistencies in Boyd's version of events, including the initial
19 August 20, 2019, CRD Questionnaire; her October 14, 2019, intake interview; her
20 interviews on January 8, 2020, and May 18, 2020, and her testimony at hearing.
21 Respondent offers, as an example, Boyd's initial denial that she used profanity or
22 accused the store employees of being racist.
23

24 Boyd's testimony was credited to the extent that it was consistent with the
25 substantial and credible evidence of record. The forum found Baker's testimony

1 particularly credible given that she had no apparent interest in the outcome of the
2 proceeding and found the situation concerning enough that she took note of it at the
3 time she was in the store and testified as to the events she observed under oath. While
4 the forum concedes that Boyd's testimony was inconsistent and exaggerated at times,
5 her testimony was sufficiently consistent with the testimony offered by Baker to be
6 deemed credible. However, Boyd's testimony, when inconsistent with Baker's was not
7 given great evidentiary weight.

8 The evidence of record does not show that Boyd came into the store using
9 expletives or acting in an obnoxious or offensive manner. Rather, the evidence shows
10 that Boyd's behavior changed once she was flanked by store personnel in a store aisle
11 and followed to the front of the store as the matter continued escalating. The evidence
12 further shows that Boyd's use of expletives continued as she was followed out of the
13 store and into the parking lot with a store employee continuing to make comments to
14 Boyd that hurt and offended her. While Boyd could have taken a different approach, the
15 evidence shows that her behavior was in response to the behavior of store personnel.
16 Therefore, Respondent's Exceptions 3a and 3b are DENIED.

17 Respondent argues in its Exceptions 3c that the forum failed to properly credit
18 witness statements submitted by Respondent. OAR 839-050-0260(9) provides:
19

20 "Any declaration, affidavit, certificate, or document included with a case
21 summary or that a participant serves on the other participants at least ten
22 days before hearing may be offered and received into evidence unless
23 cross-examination is requested of the declarant, affiant, certificate
24 preparer, or other document preparer or custodian no later than five days
prior to hearing or, for good cause shown, by such other date as the
Administrative Law Judge may set. A declaration, affidavit, or certificate
may be offered and received with the same effect as oral testimony."

25 The forum considered the statements submitted by Mode, Runyan, and

1 Madoche. See Ex. R2, pp. 5-8. However, Mode's statement addressed events that
2 were reported to him by store personnel and what occurred following Boyd's expulsion
3 from the store. The statements of Runyan and Madoche addressed generally the
4 sequence of events that led to Boyd being "trespassed" from the store. Neither
5 statements was as specific as the testimony offered by Boyd and Baker, both of whom
6 appeared personally and testified under oath at hearing. To the extent that the
7 statements offered were consistent with the substantial and credible evidence of record,
8 they were credited. However, as noted above, Baker's testimony was credited in its
9 entirety. Therefore, to the extent the statements were inconsistent or lacking in
10 specifics, they were given less evidentiary weight.
11

12 Respondent argues the forum failed to give proper consideration to the testimony
13 of Mode and Respondent's interest in enforcing its policies in its Exceptions 3d and 3d.
14 The forum acknowledges that Mode testified Moho's policies are applicable to each
15 customer and multiple customers have been "trespassed" from the store for various
16 reasons. The forum is not indifferent to Mode's testimony as to Respondent's policies
17 or Respondent's interest in enforcing its policies. However, the forum is left with only
18 the witness statements submitted by Respondent and the sworn testimony of Boyd and
19 baker when considering what occurred on the day in question. Mode was not present
20 and learned of the events after the fact. Therefore, Respondent's Exception 3d is
21 DENIED.
22

23 In Respondent's Exception 3f, Respondent takes exception to the forum's finding
24 that the investigator's testimony was credible. The investigator's testimony was
25 unchallenged during cross-examination and there is no objective reason in the record

1 for the forum to find part or all of the testimony of the witness unbelievable. Therefore,
2 Respondent's Exception 3f is DENIED.

3 Respondent's Exception 4

4 Respondent argues the forum's conclusions as to why Boyd refused to get off the
5 hoverboard are unreasonable and not supported by logic. Boyd testified she initially
6 refused to get off the hoverboard because her hands were full and she was concerned
7 that it would propel forward without her being able to control it. Boyd testified she was
8 attempting to move to a location to put the things in her arms so she could safely get off
9 the hoverboard. The forum has no reason to disbelieve Boyd's testimony as to why
10 she delayed getting off the hoverboard. While store personnel may have had legitimate
11 reasons for direct Boyd to get off the hoverboard, the evidence shows that it continued
12 to escalate to the point that a store employee followed her out into the parking lot and
13 told her to "do better with her life." The situation inside and outside of the store was
14 sufficient to get Baker's attention, who testified the store employees "kept at" Boyd even
15 after she had left the store. While the act of asking a customer to remove themselves
16 from a hoverboard inside the store is not in and of itself a discriminatory act, the
17 surrounding circumstances suggest that the interaction between Boyd and the store
18 employees was motivated by discrimination and not by a commitment to enforcing
19 Moho's policies. Therefore, Respondent's Exception 4 is DENIED.

20
21 Respondent's Exception 5

22 Respondent argues in its Exception 5 that the forum failed to consider the entire
23 record. To the contrary, the forum reviewed and considered the entire record.
24 Therefore, Respondent's Exception 5 is DENIED.

1 Respondent's Exception 6

2 Respondent argues in its Exception 6 that the damages awarded in the Proposed
3 Order are inappropriate based upon issues arising prior to the case going to hearing
4 and actions by Boyd that Respondent contend derailed attempts to informally settle the
5 matter. Neither argument offered by Respondent is persuasive as to Boyd's entitlement
6 to emotional distress damages based upon the unlawful practices addressed above.
7

8 The forum is, however, persuaded that the award of \$60,000 is inappropriate
9 based upon the facts of this case and in light of the *Klein Amended Final Order*. The
10 evidence shows Boyd was embarrassed upset as a result of the confrontation with
11 SJGO staff and her being banned from the store. As a result of the banning, Boyd is
12 not able to shop at her preferred store, which has caused her some frustration based, in
13 part, on her transportation needs. While the Agency has sought and the forum
14 previously awarded \$60,000 in emotional distress damages, the forum finds that the
15 nature of Boyd's damages are similar to those experienced by the complainants in
16 *Blachana and Sweetcakes by Melissa*. Therefore, the previous award of \$60,000 in
17 emotional distress damages as set forth in the Proposed Order is hereby reduced to
18 \$20,000. Respondent's Exception 6 is GRANTED.
19

20 **ORDER**

21 NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4),
22 and to eliminate the effects of the violations of ORS 659A.403 by Respondent Moho
23 Enterprises LLC dba St. Johns Grocery Outlet, and as payment of damages awarded,
24 the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent**
25 **Moho Enterprises LLC dba St. Johns Grocery Outlet** to deliver to the Administrative
Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800

1 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the
2 Bureau of Labor and Industries in trust for AiKeda Boyd in the amount of:

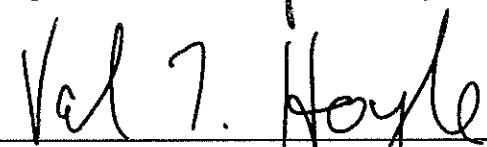
3 1) TWENTY THOUSAND DOLLARS (\$20,000.00), representing
4 damages for emotional and mental suffering AiKeda Boyd experienced as a
result of Respondent's violation of ORS 659A.403; plus,

5 2) Interest at the legal rate on the sum of TWENTY THOUSAND
DOLLARS (\$20,000) from the date the Final Order is issued until paid.

6 B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
7 659A.850(4), and to further eliminate the effect of the violations of ORS 659A.403, the
8 Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Moho**
9 **Enterprises LLC dba St. Johns Grocery Outlet** to cease and desist from denying the
10 full and equal accommodations, advantages, facilities and privileges of SJGO to any
11 person based on that person's race.

12 C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
13 659A.850(4), and to further eliminate the effects of Respondent's unlawful
14 discrimination found herein, the Commissioner of the Bureau of Labor and Industries
15 hereby orders **Respondent Moho Enterprises LLC dba St. Johns Grocery Outlet** to
16 train its management personnel on discrimination in places of public accommodation,
17 either through a training offered by the Bureau of Labor and Industries Technical
18 Assistance for Employers Unit or another trainer agreeable to the Agency.

19 DATED this 26 day of September.

20 
21 Val J. Hoyle
22 Val Hoyle, Commissioner
23 Bureau of Labor and Industries

24 Issued On: September 27, 2022