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

In the Matter of:

Case Nos. **44-14 & 45-14**

**MELISSA ELAINE KLEIN, dba
SWEETCAKES BY MELISSA,**

and

**AARON WAYNE KLEIN, dba
SWEETCAKES BY MELISSA, and, in
the alternative, individually as an
aider and abettor under ORS
659A.406,**

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

Respondents.

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SYNOPSIS

The Agency's Formal Charges alleged that Respondents refused to make a wedding cake for two Complainants based on their sexual orientation and that Respondents published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. In addition, the Formal Charges alleged that Aaron Klein aided and abetted Melissa Klein in the commission of those violations. The forum concluded that: (1) A. Klein, acting on behalf of Sweetcakes by Melissa, refused to make a wedding cake for Complainants based on their sexual orientation, thereby violating ORS 659A.403; (2) Melissa Klein did not violate ORS 659A.403; (3) Neither Aaron nor Melissa Klein violated ORS 659.409; (4) Aaron Klein did not aid and abet Melissa Klein in violation of ORS 659A.406; and (5) As partners, Aaron Klein and Melissa Klein were jointly and severally liable for Aaron Klein's ORS 659A.403 violation. The forum awarded Complainants \$75,000 and \$60,000, respectively, in damages for emotional and mental suffering resulting from the cake denial.

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 at the Office of Administrative Hearings, located at 7995 S. W. Mohawk Street, Entrance B,

1 Tualatin, Oregon. The evidentiary part of the hearing was conducted on March 10-13,
2 and 17, 2015, and closing arguments were made on March 18, 2015.

3 The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by
4 BOLI's chief prosecutor, Jenn Gaddis, and Cristin Casey, administrative prosecutor,
5 both employees of the Agency. Paul Thompson, Complainants' attorney, was present
6 throughout the hearing. Complainants Rachel Bowman-Cryer and Laurel Bowman-
7 Cryer were both present throughout the hearing. Respondents Melissa Klein and Aaron
8 Wayne Klein were both present throughout the hearing and were represented by
9 Herbert Grey, Tyler Smith, and Anna Harmon, attorneys at law.

10 The Agency called the following witnesses: Rachel Bowman-Cryer, Laurel
11 Bowman-Cryer, Cheryl McPherson, Aaron Cryer, Jessica Ponaman, Candice Ericksen,
12 Laura Widener, Aaron Klein, and Melissa Klein.

13 Respondent called the following witnesses: Aaron Klein, Melissa Klein, and
14 Rachel Bowman-Cryer.

15 At hearing, the forum received into evidence:

16 a) Administrative exhibits X1 through X95.

17 b) Agency exhibits A1 through A12, A23 (pp. 1-4), A25, and A27 through A29
18 were received. Exhibit A30 was offered but not received.

19 c) Respondents' exhibits R2 (selected "posts" on pp. 3 and 9), R2 through
20 R5, R6 (pp. 1-2), R7 through R12, R13 (pp. 7-18), R15, R16, R18 through R24, R26,
21 R27, R28 (pp. 1-3, part of p. 4, pp. 14-28), R29, R30, R32, R33 (pp. 5-8), and R34
22 through R41 were received. Exhibits R1, R14, and R17 were offered but not received.

23 Having fully considered the entire record in this matter, the Administrative Law
24 Judge hereby makes the following Proposed Findings of Fact (Procedural and on the
25

1 Merits), Proposed Ultimate Findings of Fact,¹ Proposed Conclusions of Law, Proposed
2 Opinion, and Proposed Order.

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4 **PROPOSED FINDINGS OF FACT – PROCEDURAL**

5 1) On August 8, 2013, R. Bowman-Cryer (“RBC”) filed a verified complaint
6 with the Agency’s Civil Rights Division (“CRD”) alleging that Aaron Klein and Melissa
7 Klein, dba Sweetcakes by Melissa, refused to make her a wedding cake based on her
8 sexual orientation and published and displayed a communication to that effect, in
9 violation of ORS 659A.403 and ORS 659A.409. RBC’s complaint was subsequently
10 amended to name both Kleins as aiders and abettors under ORS 659A.406. (Ex. A-27)

11 2) On November 7, 2013, L. Bowman-Cryer (“LBC”) filed a verified complaint
12 with the Agency’s Civil Rights Division (“CRD”) alleging that Aaron Klein (“AK”) and
13 Melissa Klein (“MK”), dba Sweetcakes by Melissa, refused to make her a wedding cake
14 based on her sexual orientation and published and displayed a communication to that
15 effect, in violation of ORS 659A.403 and ORS 659A.409. LBC’s complaint was
16 subsequently amended to name AK and MK as aiders and abettors under ORS
17 659A.406. (Ex. A-28)

18 3) On January 15, 2014, after investigating RBC’s and LBC’s complaints, the
19 CRD issued a Notice of Substantial Evidence Determination in each case in which the
20 CRD found substantial evidence of unlawful discrimination in public accommodation
21 against Respondents in violation of ORS 659A.403, ORS 659A.406, and ORS
22 659A.409 (Ex. A29)

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

1 4) On June 4, 2014, the Agency issued two sets of Formal Charges, one
2 alleging unlawful discrimination against RBC (case no. 44-14) and the other alleging
3 unlawful discrimination against LBC (case no. 45-14) that alleged the following:

4
5 (a) At all times material, Sweetcakes by Melissa ("Sweetcakes") was an
6 assumed business name of Respondent MK doing business in Gresham,
7 Oregon, that offered goods and services to the public, including wedding cakes;

8 (b) At all times material, AK was registered with the Oregon Sec. of State
9 Business Registry as the authorized representative of MK, dba Sweetcakes by
10 Melissa;

11 (c) On January 17, 2013, RBC and her mother went to Sweetcakes for a cake
12 tasting related to RBC's wedding ceremony to LBC;

13 (d) AK conducted the tasting and asked for the names of a bride and groom.
14 RBC said there would be two brides for her ceremony and gave her name and
15 LBC's name. AK told RBC that Sweetcakes did not do "same-sex couples"
16 because it "goes against our religion";

17 (e) Complainants were injured by Respondents' refusal to provide them with a
18 wedding cake;

19 (f) MK discriminated against Complainants based on their sexual orientation,
20 in violation of ORS 659A.403(3) and ORS 659.409;

21 (g) AK aided or abetted MK as the owner of Sweetcakes in MK's violation of
22 ORS 659A.403(3) and ORS 659.409; thereby violating ORS 659A.406;

23 (h) Complainants are each entitled to damages for emotional, mental, and
24 physical suffering in the amount of "at least \$75,000" and out-of-pocket expenses
25 "to be proven at hearing."

 (i) Respondents published or issued a communication, notice that its
accommodation, advantages would be refused, withheld from or denied to, or
that discrimination would be made against, a person on account of his or her
sexual orientation, in violation of ORS 659A.409

21 On the same day, BOLI's Contested Case Coordinator issued Notices of Hearing in
22 both cases stating the time and place of the hearing as August 5, 2014, beginning at
23 9:00 a.m., at BOLI's Portland, Oregon office. (Exs. X2, X4)

24 4) On June 6, 2014, Respondents filed a motion to postpone the hearing
25 because Respondent's attorney Herbert Grey had "pre-paid non-refundable vacation

1 plans" during the time scheduled for hearing. The forum granted Respondents' motion.
2 (Ex. X5)

3 5) On June 18, 2014, Respondents, through attorneys Grey, Tyler Smith,
4 and Anna Adams, filed an "Election to Remove to Circuit Court (ORS 659A.870(4)(b))"
5 and "Alternative Motion to Disqualify BOLI Commissioner Brad Avakian" from deciding
6 issues in these cases. Respondents requested oral argument on both issues. On June
7 25, 2014, the Agency filed objections to Respondents' motions. On June 26, 2014, the
8 ALJ denied Respondents' request for oral argument. (Exs. X8, X11)

9 6) On June 19, 2014, the ALJ held a prehearing conference and rescheduled
10 the hearing to start on October 6, 2014. The ALJ also consolidated the cases for
11 hearing. (Ex. X7)

12 7) On June 24, 2014, Respondents timely filed an answer and response to
13 both sets of Formal Charges. Respondent admitted that AK had declined RBC's
14 request to design and provide a cake for Complainants' same-sex ceremony but denied
15 that any unlawful discrimination occurred. Respondents raised numerous affirmative
16 defenses, including:

- 17 • The Formal Charges fail to state ultimate facts sufficient to constitute a claim.
- 18 • Because the Oregon Constitution did not provide for or recognize same-sex
19 unions in January 2013 and the state of Oregon did not issue marriage licenses
20 to same-sex couples at that time, BOLI lacks "any legitimate authority to compel
21 Respondents to engage in creative expression or otherwise participate in same-
sex ceremonies not recognized by the state of Oregon contrary to their
fundamental rights, consciences and convictions."
- 22 • BOLI is estopped from compelling Respondents to engage in free expression or
23 otherwise participate in same-sex ceremonies not recognized by the state of
Oregon contrary to their fundamental rights, consciences and convictions.
- 24 • The statutes underlying the Formal Charges are unconstitutional as applied to
25 Respondents to the extent they do not protect the fundamental rights of
Respondents and persons similarly situated arising under the First and

1 Fourteenth Amendments to the United States Constitution, as applied to the state
2 of Oregon under the Fourteenth Amendment, in one or more of the following
3 particulars, by unlawfully: (a) infringing on Respondents' right of conscience; (b)
4 infringing on Respondents' right to free exercise of religion; (c) infringing on
5 Respondents' right to free speech; (d) compelling Respondents to engage in
6 expression of a message they do not want to express; (e) denying Respondents'
7 right to due process; and (f) denying Respondents the equal protection of the
8 laws.

- 9 • The statutes underlying the Formal Charges, as applied, violate Respondents
10 fundamental rights arising under the Oregon Constitution in one or more of the
11 following particulars, by unlawfully: (a) violating Respondents' freedom of worship
12 and conscience under Article I, §2; (b) violating Respondents' freedom of
13 religious opinion under Article I, §3; (c) violating Respondents' freedom of speech
14 under Article I, §8; (d) compelling Respondents to engage in expression of a
15 message they did not want to express; (e) violating Respondents' privileges and
16 immunities under Article I, §20; and (f) violating Article XV, §3.
- 17 • The statutes underlying the Formal Charges are facially unconstitutional in that
18 they violate Respondents' fundamental rights arising under the Oregon
19 Constitution to the extent there is no religious exemption to protect or
20 acknowledge the fundamental rights of Respondents and persons similarly
21 situated.

22 Respondents also raised four Counterclaims, including:

- 23 • Respondents are entitled to costs and attorney fees if they are determined to be
24 the prevailing party.
- 25 • The State of Oregon, acting by and through BOLI, has knowingly and selectively
acted under color of state law to deprive Respondents of their fundamental
constitutional and statutory rights in the basis of religion without taking similar
action against county clerks and other state of Oregon officials similarly denying
same-sex couples goods and services related to same-sex unions, disparately
impacting Respondents, causing economic damages to Respondents in an
amount not less than \$100,000. BOLI has knowingly and selectively acted under
color of state law to deprive Respondents of their fundamental constitutional and
statutory rights in the basis of religion without taking similar action against county
clerks and other state of Oregon officials similarly denying same-sex couples
goods and services related to same-sex unions, disparately impacting
Respondents and causing economic damages to Respondents in an amount not
less than \$100,000.
- During the period from February 5, 2013 to the present, BOLI's Commissioner
published, circulated, issued, displayed, or cause to be published, circulated,
issued, displayed, communications on Facebook and in print media to the effect

1 that its accommodations, advantages, facilities, services or privileges would be
2 refused, withheld from or denied to, or that discrimination would be made against
3 Respondents and other persons similarly situated on the basis of religion in
4 violation of ORS 659A.409.

- 5 • Under 42 USC § 1983, BOLI is liable to Respondents for depriving Respondents
6 of their rights and protections guaranteed by the United States Constitution
7 "under color of any statute, ordinance, regulation, custom or usage of any State."

8 (Ex. X10)

9 8) On July 2, 2014, the ALJ issued an interim order ruling on Respondents'
10 June 18, 2014, motions. That order is reprinted below in pertinent part.²

11 **"Respondents' Putative Election to Circuit Court**

12 "Respondents assert that they have a 'unqualified right to have these
13 matters removed to the circuit court of either Clackamas, Marion or Multnomah
14 Counties pursuant to ORS 659A.870(4)(b).' ORS 659A.870(4)(b) provides, in
15 pertinent part:

16 '(b) A respondent or complainant named in a complaint filed under ORS
17 659A.820 or 659A.825 alleging an unlawful practice under ORS 659A.145
18 or 659A.421 or discrimination under federal housing law may elect to have
19 the matter heard in circuit court under ORS 659A.885. The election must
20 be made in writing and received by the commissioner within 20 days after
21 service of formal charges under ORS 659A.845. If the respondent or the
22 complainant makes the election, the commissioner shall pursue the matter
23 in court on behalf of the complainant at no cost to the complainant.'

24 "To establish jurisdiction, the Agency's Formal Charges each allege: (1)
25 both cases originated as verified complaints filed by Complainants Rachel Cryer
and Laurel Bowman-Cryer; (2) both Complainants were authorized to file their
complaints under the provisions of ORS 659A.820; and (3) that the Agency
issued a Notice of Substantial Evidence Determination in both cases.
Respondents deny that they engaged in discrimination based on sexual
orientation or any other grounds set forth in ORS chapter 659A but do not
dispute these jurisdictional allegations. Accordingly, the forum concludes that
respondents were named in a complaint filed under ORS 659A.820. Under ORS
659A.870(4)(b), if the Formal Charges allege an unlawful practice under ORS
659A.145 or 659A.421 or discrimination under federal housing law, Respondents

² Footnotes from this interim order and other interim orders quoted at length in the Proposed Findings of Fact – Procedural that are not critical to an understanding of the order have been deleted. The deletions are indicated by a "A" symbol.

1 are entitled to elect to have the matter heard in circuit court under ORS
2 659A.885, subject to the requirement that such election must be made in writing
3 within 20 days of service of the Formal Charges.

4 "ORS 659A.145 is titled '**Discrimination against individual with**
5 **disability in real property transactions prohibited; advertising**
6 **discriminatory preference prohibited; allowance for reasonable**
7 **modification; assisting discriminatory practices prohibited.'** As indicated by
8 its title, the provisions of ORS 659A.145 are exclusively limited to real property
9 transactions involving people with disabilities. ORS 659A.421 is titled
10 '**Discrimination in selling, renting or leasing real property prohibited**' and
11 prohibits discrimination in real property transactions based on the race, color,
12 religion, sex, sexual orientation, national origin, marital status, familial status or
13 source of income of any person.

14 "In contrast, these cases allege violations of ORS 659A.403(3), ORS
15 659A.406, and ORS 659A.409. All three of these statutes appear in a section of
16 ORS chapter 659A titled '**ACCESS TO PUBLIC ACCOMMODATIONS**' that
17 includes ORS 659A.400 to ORS 659A.415. Neither of the Formal Charges
18 contains any allegations related to discrimination under federal housing law or
19 discrimination based on real property transactions. Rather, the Formal Charges
20 both identify Respondent Melissa Klein's business as a 'place of public
21 accommodation' and allege that Respondent Melissa Klein's business, as a
22 public accommodation, discriminated against Complainants based on their
23 sexual orientation.

24 "Since the Formal Charges do not allege an unlawful practice under ORS
25 659A.145 or 659A.421 or discrimination under federal housing law, they are not
subject to the provisions of ORS 659A.870(4)(b) and Respondents have no
statutory right to elect to have the matter heard in circuit court.

"MOTION TO DISQUALIFY BOLI COMMISSIONER AVAKIAN BASED ON AVAKIAN'S ACTUAL BIAS

19 "Respondents ask that Commissioner Avakian be disqualified from
20 deciding the issues presented in the Formal Charges because he has 'publicly
21 demonstrated actual bias against Respondents and others similarly situated,
22 both as a candidate for re-election and as Commissioner.' Based on that alleged
23 actual bias, Respondents contend that the Commissioner's fulfillment of his
24 statutory role by deciding and issuing a Final Order in these cases will deprive
25 Respondents of due process and other constitutional rights. Respondents
concede that BOLI administrative rules OAR 839-050-000 *et seq* contain no
provision related to the disqualification of a BOLI Commissioner deciding and
issuing a Final Order. However, both Respondents and the Agency
acknowledge that procedural due process requires a decision maker free of
actual bias[^] and that Respondents have the burden of showing that bias. See
Teledyne Wah Chang v. Energy Facility Siting Council, 298 Or 240, 262 (1985),

1 ruled Oregon's ban on same-sex marriage unconstitutional under the United
2 States Constitution. This is an important moment in our state's history. The
3 ruling also reflects what so many others have felt all along -- that Oregonians
4 always eventually open their hearts to equality and freedom. The victory is a
5 testament to the strength and energy of so many who dedicated themselves to
6 making our laws match our highest ideals. Thank you. The win comes after
7 news earlier this month that the Oregon Family Council has abandoned its
8 campaign for a ballot measure to allow corporations to discriminate against
9 loving same-sex couples. As a result, Oregon's law will continue to say that no
10 corporation can deny service, housing or employment based on sexual
11 orientation or gender identity. And as always, I will continue to hold those
12 responsible that violate the rights of Oregonians and enthusiastically support
13 those that go the extra mile for fairness. Here's to two significant victories that
14 expand freedom for Oregonians – and the incredible efforts by friends and
15 neighbors that made today possible. It's been a remarkable journey.'

9 "Independent Media

- 10 • "August 14, 2013, Oregonian article written by Maxine Bernstein entitled 'Lesbian
11 couple refused wedding cake files state discrimination complaint' that contains
12 quotes by Complainant Cryer, Respondent Melissa Klein, and Commissioner
13 Avakian. Commissioner Avakian was quoted as follows:
 - 14 ➤ 'We are committed to a fair and thorough investigation to determine whether
15 there is substantial evidence of unlawful discrimination,' said Labor
16 Commissioner Brad Avakian.
 - 17 ➤ 'Everybody's entitled to their own beliefs, but that doesn't mean that folks
18 have the right to discriminate,' Avakian said, speaking generally.
 - 19 ➤ 'The goal is never to shut down a business. The goal is to rehabilitate,'
20 Avakian said. 'For those who do violate the law, we want them to learn from
21 that experience and have a good, successful business in Oregon.'

18 "Facebook Posts on Commissioner Avakian's Facebook Page

- 19 • "April 26, 2012: 'Today, Basic Rights Oregon honored me with the 2012 Equality
20 Advocate Award. I appreciate this recognition, but I am far more appreciative of
21 all the efforts and accomplishments that BRO has made for Oregon's LGBT
22 community. Thank you for including me in the incredible work that you do.'
- 23 • "February 15, 2013, with the same text included in February 16, 2013, e-mail to
24 Herb Grey.
- 25 • "February 5, 2013, with a link to 'Ace of Cakes offers free wedding cake for Ore.
gay couple www.kgw.com:' 'Everyone has a right to their religious beliefs, but
that doesn't mean they can disobey laws already in place. Having one set of
rules for everybody assures that people are treated fairly as they go about their
daily lives. The Oregon Department of Justice is looking into a complaint that a
Gresham bakery refused to make a wedding cake for a same-sex marriage. It

1 started when a mother and daughter showed up at Sweet Cakes by Melissa
2 looking for a wedding cake.'

- 3 • "March 13, 2013: 'Tomorrow morning, I'll be testifying before the U.S. Senate
4 about Oregon Lt. Col. Linda Campbell; she made history when she was the first
5 person to ever get approval to bury her same-sex spouse in a national
6 cemetery...'
- 7 • "March 22, 2013, with a link to 'Speakers announced for marriage equality rally in
8 D.C.-Breaking News-Wisconsin Gazette – Lesbian www.wisconsingazette.com:'
9 'Thrilled to see Lt. Col. Linda Campbell among the headliners for next week's
10 rally in front of the U.S. Supreme Court. LIKE this status if you support marriage
11 equality for all loving, caring couples.'
- 12 • "March 26, 2013: 'Our country is on a journey of understanding. As more and
13 more people talk to gay and lesbian friends and family about why marriage
14 matters, they're coming to realize that this is not a political issue. This is about
15 love, commitment and family. I'll be joining Oregon United for Marriage for a rally
16 at the Mark O. Hatfield Courthouse in downtown Portland at 5pm. Join us!'
- 17 • "June 8, 2013: 'Proud to support Sen. Jeff Merkley's fight for the Non-
18 Discrimination Act in Congress. All Americans deserve a fair shot at a good job
19 and the opportunity for a better life. – at Q Center.'
- 20 • "June 26, 2013: 'Huge day for equality across America! In a few minutes, I'm
21 heading to a celebration rally with Oregon United for Marriage at Terry Schunk
22 Plaza in downtown Portland – see you there?'
- 23 • "March 27, 2013: Link to Commissioner Avakian speaking 'on the importance of
24 people gathering in front of the Hatfield Courthouse on the day the Supreme
25 Court heard arguments on Prop. 8.' and statement 'I just got off the phone with
Lt. Col. Linda Campbell, who said that the crowd in front of the Supreme Court
was awesome and absolutely electric.'
- "May 9, 2013, with a link to 'Victory! Discrimination measure Withdrawn – Oregon
United for Marriage:' 'Really great news. It's also a tribute to the fact that
Oregonians are fundamentally fair and have little stomach for such a needlessly
divisive fight.'
- "March 12, 2014, shared link: 'Conservative Christian group's call for Labor
Commissioner Brad Avakian's ouster falls flat. www.oregonlive.com. Oregon
Labor Commissioner Brad Avakian, despite criticism of his enforcement action
against a Gresham bakery that refused to serve a lesbian wedding, wound up
with no opponent in this year's election.'
- "May 19, 2014: 'Today's victory is a testament to the strength and energy of so
many who dedicated themselves to making our laws match our highest ideals. If
you've talk to your neighbors, collected signatures, or attended a marriage rally,
you've played an important role in Oregon's story. Thank you -- and
congratulations!'

24 "Summarized, these exhibits fall into two categories: (1) the Commissioner's
25 e-mails and Facebook posts generally opposing discrimination against gays and
lesbians and advocating the legality of same-sex marriage in Oregon and not
addressed to these cases; and (2) remarks specific to the present cases. The

1 vast majority of exhibits fall into the first category. Only two exhibits fall into the
2 second category -- the Commissioner's February 5, 2013, Facebook post and the
3 August 14, 2013, Oregonian article.

4 "ORS chapter 659A contains Oregon's anti-discrimination laws related to
5 employment, public accommodations, and real property transactions and
6 delegates the enforcement of those laws to BOLI's Commissioner. The
7 Legislature's purpose in adopting the provisions of ORS chapter 659A is set out
8 in ORS 659A.003. In pertinent part, ORS 659A.003 provides that:

9 'The purpose of this chapter is * * * to ensure the human dignity of all
10 people within this state and protect their health, safety and morals from
11 the consequences of intergroup hostility, tensions and practices of
12 unlawful discrimination of any kind based on race, color, religion, sex,
13 sexual orientation, national origin, marital status, age, disability or familial
14 status.'

15 "ORS 651.030(1) provides that '[t]he Bureau of Labor and Industries shall be
16 under the control of the Commissioner of the Bureau of Labor and Industries * *
17 *.' As such, BOLI's Commissioner has the duty to see that the stated purpose of
18 ORS chapter 659A is carried out. In addition to enforcing the various statutes
19 contained in that chapter through the administrative process created by the
20 Legislature,³ the Commissioner's duties include, among other things, initiating
21 programs of 'public education calculated to eliminate attitudes upon which
22 practices of unlawful discrimination because of * * * sexual orientation * * * are
23 based.'⁴ In short, the Commissioner has been instructed by the Legislature itself
24 to raise public awareness about practices that the Legislature has declared to be
25 unlawful discrimination in ORS chapter 659A. The forum finds that all of the
Commissioner's remarks contained in the first category – remarks *generally*
opposing discrimination against gays and lesbians and advocating the legality of
same-sex marriage in Oregon – fall within the scope of this particular job duty.
As more articulately stated by the Agency in its objections, '[n]one of this material
is inconsistent with the exercise of the commissioner's statutory obligations as an
elected official.'

"The forum next examines the two exhibits that fall within the second category
that contain remarks specific to the present cases – the Commissioner's
February 5, 2013, Facebook post and the August 14, 2013, Oregonian article.
The Commissioner's February 5, 2013, Facebook post contains the following
content, consisting of a link to 'Ace of Cakes offers free wedding cake for Ore.
gay couple www.kgw.com' and the following remark by the Commissioner that
Respondents contend shows actual bias:

³ See footnote 2.

1 'Everyone has a right to their religious beliefs, but that doesn't mean they can
2 disobey laws already in place. Having one set of rules for everybody assures
3 that people are treated fairly as they go about their daily lives. The Oregon
4 Department of Justice is looking into a complaint that a Gresham bakery
refused to make a wedding cake for a same-sex marriage. It started when a
mother and daughter showed up at Sweet Cakes by Melissa looking for a
wedding cake.'

5 "The Oregonian article, printed six days after the two Complainants filed their
6 complaints with BOLI's CRD, contains two remarks attributed to the
7 Commissioner that Respondents contend demonstrate his actual bias against
Respondents. Those remarks are:

- 8 • "Everyone is entitled to their own beliefs, but that doesn't mean that folks
have the right to discriminate," Avakian said, speaking generally.'
- 9 • "The goal is never to shut down a business. The goal is to rehabilitate,"
10 Avakian said. "For those who do violate the law, we want them to learn
from that experience and have a good, successful business in Oregon."

11 "In *Samuel v. Board of Chiropractic Examiners*, 77 Or App 53, 712 P2d
12 132 (1985), Samuel, a chiropractor, had his chiropractor's license suspended
13 and his right to perform minor surgery permanently revoked by the Board of
14 Chiropractic Examiners after he performed a vasectomy on a patient. The issue
15 before the Board was whether Samuels had exceeded the scope of his license
16 by performing 'major' surgery, whereas chiropractors are only allowed to perform
17 'minor' surgery. In their decision, the Oregon Court of Appeals, after determining
18 that a vasectomy was 'major' surgery, considered whether the Board's decision
19 should be overturned based on the alleged bias of two members of the Board,
20 Bolin and Camerer, who participated in the disciplinary hearing and resulting
21 decision to suspend Samuels. Prior to Samuels's hearing, Bolin opined that a
vasectomy was not minor surgery. The Court, citing *Trade Comm'n v. Cement
Institute*, 333 U.S. 683 (1948), held that Bolin's expression of opinion, which the
Court characterized as 'a preconceived point of view concerning an issue of law'
-- was 'not an independent basis for disqualification' of Bolin. Camerer, in
contrast, met with four chiropractors at a restaurant, brought the Board's file on
Samuels, and allowed the other chiropractors to examine it. Prior to the Board's
suspension decision, Samuels sought censure against Camerer and sued
Camerer for disclosing the contents of the file. The Court held:

22 'As a defendant in the lawsuit which arose out of the very matter pending
23 before the Board, Camerer may have harbored some animosity towards
24 [Samuels]. The possibility of personal animosity and the appearance of a
25 substantial basis for bias is sufficient that, under the circumstances, he
should have disqualified himself.'

1 "To show that the Commissioner has prejudged the cases before the
2 Forum, Respondents quote the Commissioner's two 'second category'
3 statements as follows: 'Respondents are "disobey[ing] laws" and need to be
4 "rehabilitated."' However, this 'quote' combines selected portions of remarks
5 made at two different times and misquotes the latter. Respondents seek to
6 create an inference of bias that cannot reasonably be drawn from Respondents'
7 exhibits as a whole. The Forum finds that the accurately quoted 'second
8 category' remarks, while made in the context of Respondents' alleged
9 discriminatory actions and the Complainants' complaints, are remarks reflecting
10 the Commissioner's attitude generally about enforcing Oregon's anti-
11 discrimination laws and, at most, show 'a preconceived point of view concerning
12 an issue of law' that, under *Samuels*, is not a basis for disqualification due to
13 bias.

8 "RESPONDENTS' ADDITIONAL ARGUMENTS

9 "In addition to their 'actual bias' argument, Respondents contend that the
10 Commissioner should be disqualified for two other reasons: (1) The
11 Commissioner's participation as a decision maker in these cases would violate
12 the policy expressed in ORS 244.010 regarding ethical standards for public
13 officials because of his conflict of interest; and (2) His participation as a decision
14 maker in these cases would violate Oregon Rules of Professional Conduct
15 (ORPC) 3.6 related to lawyers making public statements about matters in
16 litigation⁴ and Oregon's Code of Judicial Ethics.[^]

14 **"Ethical Standards for Public Officials – ORS chapter 244 & Conflict of 15 Interest**

16 "Respondents contend that the Commissioner's actual bias and conflict of
17 interest demonstrate a partiality towards these cases that requires the
18 Commissioner to disqualify himself from this case. As noted earlier,
19 Respondents have not demonstrated actual bias on the Commissioner's part.
20 Respondents assert that, under ORS chapter 244, 'the state of Oregon and its
21 respective agencies, including BOLI, cannot ethically sit in judgment of
22 Respondents for conduct of which it may be legally culpable,' and cite the
23 following 'multiple conflicts of interest on the part of the Commissioner and BOLI
24 as grounds for disqualification:

21 '(1) [T]he Oregon Constitution and ORS 659A.003, *et seq*, not to mention
22 the U.S. Constitution, require BOLI to respect and protect Respondents'
23 constitutionally-protected religion, conscience and speech rights to an
24 even greater degree than it does complainants' statutory rights; and

25 ⁴ Commissioner Avakian is an attorney and a member of the Oregon State Bar.

1 (2) [T]he State of Oregon, including BOLI itself, has potential legal
2 liability as a place of public accommodation under ORS 659A.400(1)(b)
3 and (c) because, at the time of the original defense and the filing of
4 complaints by complainants, the state of Oregon itself refused to
5 recognize same sex marriage relationships, just as Respondents have
6 chosen not to participate in complainants' same-sex ceremony.'

7 "Conflict of interest" is defined under ORS chapter 244 in ORS 244.020:

8 '(1) "Actual conflict of interest" means any action or any decision or
9 recommendation by a person acting in a capacity as a public official, the
10 effect of which would be to the private pecuniary benefit or detriment of
11 the person or the person's relative or any business with which the person
12 or a relative of the person is associated unless the pecuniary benefit or
13 detriment arises out of circumstances described in subsection (12) of this
14 section.

15 * * * * *

16 '(12) "Potential conflict of interest" means any action or any decision or
17 recommendation by a person acting in a capacity as a public official, the
18 effect of which could be to the private pecuniary benefit or detriment of the
19 person or the person's relative, or a business with which the person or the
20 person's relative is associated[.]'

21 "Respondents identify no conflict of interest by the Commissioner based on a
22 pecuniary benefit or detriment that fits within these definitions. As noted by the
23 Agency in its response, the Oregon Government Ethics Commission, not the
24 Administrative Law Judge, is responsible for determining the Commissioner's
25 ethical obligations under ORS chapter 244. ORS 244.250 *et seq.*

26 "ORPC & Canons of Judicial Ethics

27 "The Administrative Law Judge does not have the authority to enforce the
28 ORPC or Code of Judicial Ethics. However, I note that Respondents have not
29 shown that any of Commissioner Avakian's remarks contained in Respondents'
30 exhibits 'will have a substantial likelihood of materially prejudicing' this contested
31 case proceeding. ORPC 3.6. The Code of Judicial Ethics does not apply to the
32 Commissioner because he is not 'an officer of a judicial system performing
33 judicial functions.'⁵

34 ⁵ See ORS 1.210 – "Judicial officer defined. A judicial officer is a person authorized to act as a judge in a
35 court of justice." BOLI does not operate a "court of justice," but is an administrative agency whose
contested case proceedings are regulated by the Administrative Procedures Act, ORS 183.411 to ORS
183.470.

1 **"Conclusion**

2 "Respondents' motion to disqualify Commissioner Avakian from deciding
3 the issues presented in the Formal Charges and issuing a Final Order is
4 **DENIED.**"

5 (Ex. X12)

6 9) On August 13, 2014, the ALJ issued an interim order that reset the
7 hearing to begin on October 6, 2013, noting that the Agency and Respondents had both
8 stated in an earlier prehearing conference it might take up to a week to complete the
9 hearing. The same day, the ALJ issued an interim order requiring case summaries and
10 setting a filing deadline of September 22, 2014. (Ex. X14)

11 10) On August 25, 2014, Respondents moved to postpone the hearing based
12 on Respondents' prescheduled plans to be out of town on October 6, 2014. The
13 Agency did not object and the ALJ reset the hearing to begin on October 7, 2014. (Ex.
14 X17, X18)

15 11) On September 4, 2014, Respondents filed motions to depose
16 Complainants and Cheryl McPherson and for a discovery order related to the Agency's
17 objections to Respondents' informal discovery request for admissions, interrogatory
18 responses, and documents. The Agency filed timely objections to both motions. (Exs.
19 X20 through X24)

20 12) On September 11, 2014, the Agency moved for a discovery order for the
21 production of four types of documents. (Ex. X25)

22 13) On September 15, 2014, Respondents filed a motion for summary
23 judgment "on each or all of the claims asserted against them." (Ex. X26)

24 14) On September 16, 2014, the Agency moved for a Protective Order
25 regarding Complainants' medical records both informally requested by Respondents

1 and in Respondents' motion for a discovery order. The Agency attached five pages of
2 medical records related to LBC and asked that the forum conduct an *in camera*
3 inspection "to determine what, if any, of the information contained within these records
4 is relevant or calculated to lead to the discovery of admissible evidence and must be
5 turned over to Respondents." After conducting an *in camera* review, the ALJ made
6 minor redactions unrelated to LBC's medical diagnosis and released the records to
7 Respondents, accompanied by a Protective Order. (Exs. X27, X44)

8 15) The ALJ held a prehearing conference on September 18, 2014. After the
9 conference, the ALJ issued an interim order summarizing his oral rulings, including his
10 decision to postpone the hearing to give him time to rule on Respondents' motion for
11 summary judgment before the hearing began. (Ex. X32)

12 16) On September 24, 2014, the Agency filed Amended Formal Charges in
13 both cases. (Ex. X38)

14 17) On September 25, 2014, the ALJ issued an interim order ruling on
15 Respondents' motion for a discovery order for documents, interrogatory responses, and
16 admissions. In pertinent part, the ruling read:

17 "As an initial matter, the Agency argues that Complainants are not subject
18 to discovery rules under OAR 839-050-0020 because they are not 'parties' and
19 therefore are not 'participants' under OAR 839-050-0200(1). In numerous prior
20 cases with the forum * * * a respondent has been allowed to request a discovery
21 order to obtain documents and information from a complainant through the
22 Agency that are discoverable under OAR 839-050-0020(7). *See In the Matter of*
23 *Toltec*, 8 BOLI at 152 (noting that although the complainant was not a party,
24 complainant still was 'a compellable witness' and the Agency was ordered to
25 produce evidence over which it had power or authority). *See also In the Matter*
of Columbia Components, Inc., 32 BOLI 257, 259-61 (2013)(requiring
complainant to verify that the interrogatory responses were true, and that
complainant respond to a specific interrogatory request to which the Agency had
objected); *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 100 (2012)
(requiring the Agency to produce any documents responsive to respondents'
requests that appeared reasonably likely to produce information generally
relevant to the case, including complainant's tax returns for relevant years).

1 **A. “Interrogatories”**

2 “Respondents requested an order requiring the Agency to fully respond to
3 four separate interrogatories. To the extent this order requires Complainants,
4 through the Agency, to respond to the interrogatories, Complainants must sign
5 them under oath as required by OAR 839-050-0200(6).

6 ***“Interrogatory No. 7”***

7 “Respondents requested that the Agency explain in detail the nature of the
8 physical harm Complainants allege in the Formal Charges (‘Charges’). The
9 Agency responded that both Complainants experienced ‘varying physical
10 manifestations of stress’ and that ‘[a]ny further medical information will be
11 provided pursuant to a protective order.’ I agree that Respondents are entitled to
12 know more specifically what physical damages have been allegedly sustained. I
13 order the Agency to have Complainants, through the Agency, respond to this
14 interrogatory.

15 ***“Interrogatory No. 8”***

16 “Respondents requested an explanation ‘in detail [of] the nature of the
17 mental harm Complainants alleged resulted from the events alleged in the
18 Complaint.’ The Agency objected on the grounds that the request was redundant
19 and vague, as it was unclear how the interrogatory differed from the interrogatory
20 asking for information as to emotional harm allegedly suffered by Complainants.
21 In its response to the motion, the Agency ‘stipulates’ that ‘emotional, mental’
22 suffering is any suffering not attributed to physical suffering, and that information
23 was provided in response to Interrogatory No. 6. Based on the Agency’s
24 stipulation that ‘emotional [and] mental’ suffering are the same, the response to
25 this Interrogatory appears to be sufficient and, therefore, I DENY Respondents’
request for additional information in response to this interrogatory.

“Interrogatory No. 11”

 “**This interrogatory also relates to damages. With this interrogatory,**
Respondents requested an explanation as to the actions taken by Complainants
to remove their public social media profiles after a complaint was filed with the
Department of Justice on January 18, 2013. The Agency objected on the basis
of relevancy. Respondents assert that this request is relevant because ‘[m]uch, if
not all of the damage Complainants have alleged to this point revolve around the
media attention they received as a result of Complainant Laurel Bowman-Cryer’s
filing a Complaint with the Department of Justice.’ Respondents further assert
that Complainants have told Respondents they had to travel out of town because
of attention and publicity. Respondents claim that the removal of social media

1 profiles is relevant to the assessment of damages or mitigation of damages. In
2 its response to the motion, the Agency reiterates its objection on the basis of
3 relevance, but does not directly address the arguments made in Respondents'
4 motion as to damages allegedly caused by publicity and media attention. On
5 September 22, 2014, the Agency timely filed a statement addressing this issue.
6 In pertinent part, the Agency stated:

7 "Respondents caused substantial harm to Complainants, in part, through
8 their intentional posting of the Department of Justice complaint on their
9 social media website, which included Complainants' home address. This
10 affected Complainants by exposing them to unwanted and, sometimes,
11 unnerving contact from the public. * * * Complainants have had little to no
12 contact with media, except through their attorney Mr. Paul Thompson. * * *
13 The agency's position is that Complainants' damages were a direct result
14 of Respondents intentionally posting the DOJ complaint on the Internet."

15 Based on the information and representations before me, I am unable to
16 determine at this time if Interrogatory No. 11 is 'reasonably likely to produce
17 information that is generally relevant to the case.' Therefore, the Agency is not
18 required to respond to this interrogatory. If Respondents establish the relevance
19 of this interrogatory in their depositions of Complainants, Respondents may
20 renew their motion for a discovery order regarding this interrogatory.

21 ***"Interrogatory No. 12***

22 "Respondents have requested an explanation 'in detail [of] any
23 involvement or communication Complainants had with any group involved in
24 boycotting Respondents' business.' The Agency objected on the basis of
25 relevance, over breadth, and because the requested information is outside the
possession or control of the agency. As to relevancy, I view this request as
similar to Interrogatory No. 11. Based on the information and representations
before me, I am unable to determine at this time if Interrogatory No. 12 is
reasonably likely to produce information that is generally relevant to the case.
Therefore, the Agency is not required to respond to this interrogatory. If
Respondents establish the relevance of this interrogatory in their depositions of
Complainants, Respondents may renew their motion for a discovery order
regarding this interrogatory.

21 **"B. Production of Documents**

22 * * * * *

23 ***"Request No. 2***

24 "Respondents requested a copy of records 'in the Agency's possession'
25 as to the state policy in January of 2013 for issuing marriage licenses to same

1 sex couples. The Agency objected on the basis of relevance and also states that
2 such documents are not within the possession or control of the Agency.
3 Respondents claim such documents are relevant to show whether the "Agency is
4 aware" that same sex marriage was not recognized in Oregon at the time of the
5 acts in question in this case. I deny Respondents' motion because (1) the
6 Agency's awareness of the status of same sex marriage in Oregon is not likely to
7 lead to relevant evidence[^]; (2) the same sex marriage laws in Oregon are a
8 matter of public record; and (3) the Agency has indicated it has no such
9 documents in its possession.

10 ***"Request No. 7***

11 "This request seeks medical records for any medical visits relating to
12 Complainants' request for emotional, mental or physical damages.
13 Respondents' motion is GRANTED. * * *

14 ***"Request No. 9***

15 "Each of these requests for production seeks documentation and
16 photographs of the actual wedding cake served at Complainants' wedding
17 ceremony. The Agency objected to these requests on the basis of relevancy.
18 The fact that a cake was purchased from another cake baker is likely relevant
19 and, thus, I grant this motion only as to a receipt or invoice for showing the
20 purchase of the cake and one photograph of the cake. Any other requested
21 information is overly broad. Furthermore, for the reasons set forth below
22 regarding Request for Production No. 10, the Agency need not produce
23 photographs of Complainants, their families, and the actual wedding ceremony.

24 ***"Request No. 10***

25 "In this request, Respondents have asked for photos, videos, or audio
recordings of Complainants' wedding ceremony. The Agency has objected on
the grounds that the requested documents are irrelevant. The Agency further
explains that Complainants are wary of turning over these materials to
Respondents because Respondents previously posted Complainants' home
address on a social media site. Unless the Agency is intending to offer photos,
videos or audio recordings as evidence at the hearing, then I agree with the
Agency's objections and DENY the motion as to these documents. If the Agency
intends to offer them as evidence at hearing, then the Agency must turn them
over to Respondents.

1 ***"Request No. 11***

2 "Request No. 11 seeks communications made by Complainants to the
3 media or on social media sites 'relating to Respondents and the events leading to
4 the filing of Formal Charges against Respondents.' I find that this request is
5 reasonably likely to produce information that is generally relevant to the case. * *

6 * Respondents' request is GRANTED.

7 ***"Request No. 12***

8 "Request No. 12 seeks '[a]ny social media posts, blog posts, emails, text
9 messages, or other record or communication showing Complainant's
10 involvement with a boycott of Respondents or their business.' Based on the
11 information and representations currently before me, I am unable to determine at
12 this time if this request is reasonably likely to produce information that is
13 generally relevant to the case. Therefore, Respondents' request is DENIED. If
14 Respondents establish the relevance of this request in their depositions of
15 Complainants, Respondents may renew their motion for a discovery order
16 regarding this request.

17 ***"Request No. 16***

18 "Request No. 16 seeks the "names and addresses of any person, media
19 outlet, or other entity with whom Complainants or Cheryl McPherson spoke
20 regarding the events leading to this Complaint or the Complaint filed with the
21 Department of Justice." I find that Respondents' request, with respect to
22 Complainants, is reasonably likely to produce information that is generally
23 relevant to the case, and is GRANTED. Respondents' request with regard to
24 Cheryl McPherson is DENIED.

25 ***"Request No. 17***

 "Request No. 17 seeks the production of '[a]ny receipt, invoice, contract,
 or other writing memorializing the purchase of the cake by Complainants from
 Respondent for Cheryl McPherson's wedding.' I find that Respondents' request
 is not reasonably likely to produce information that is generally relevant to the
 case. Respondents' request is DENIED.

"Request No. 18

 "Request No. 18 seeks the production of '[a]ny photos, videos, or other
 record of the cake Complainants purchased from Respondent for Cheryl
 McPherson's wedding.' I find that Respondents' request is not reasonably likely

1 to produce information that is generally relevant to the case. Respondents'
request is DENIED.

2 ***"Request No. 22***

3
4 "Request No. 22 seeks '[a]ll posting by Complainants or Cheryl
5 McPherson to any social media website, including but not limited to Facebook,
6 Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the
7 present.' I find that this request, with respect to Complainants, is reasonably
8 likely to produce information that is generally relevant to the case. * * *
However, Complainants are only required to provide postings that contain
9 comments about the facts of this case, comments about Respondents, or
10 comments that relate to their alleged damages. Respondents' request with
11 regard to Cheryl McPherson is DENIED.

9 ***"Request No. 23***

10 "Request No. 23 seeks '[a]ny recording or documents showing that
11 Complainants ever removed any public social media profiles or caused to be
12 hidden from public view.' Based on the information and representations currently
13 before me, I am unable to determine at this time if this request is reasonably
14 likely to produce information that is generally relevant to the case. Therefore,
15 Respondents' request is DENIED. If Respondents establish the relevance of this
16 request in their depositions of Complainants, Respondents may renew their
17 motion for a discovery order regarding this request.

15 **B. "Requests for Admissions**

16 * * * * *

17 ***"Request No. 4***

18 "Respondents ask the Agency to admit that the State of Oregon did not
19 recognize same sex marriage on or about January 17 and 18, 2013. The Agency
20 objected on the basis of relevancy. For the reasons set forth above in regards to
Request for Production No. 2, Respondents' request is DENIED.

21 ***"Requests Nos. 7 & 8***

22 "Respondents ask the Agency to admit that Complainants Laurel
23 Bowman-Cryer and Rachel Cryer 'did not at any time on or after January 17,
24 2013, delete or remove her public Facebook profile.' The Agency objects on the
25 basis of relevance. Based on the information and representations currently
before me, I am unable to determine at this time if this request is reasonably
likely to produce information that is generally relevant to the case. Therefore,
Respondents' request is DENIED. If Respondents establish the relevance of this

1 request in their depositions of Complainants, Respondents may renew their
2 motion for a discovery order regarding this request.

3 ***“Request No. 9***

4 “Respondents ask the Agency to admit that Complainants were not issued
5 a marriage license between January 17, 2013, and May 18, 2014. The Agency
6 objects for the same reasons it objected to *Request for Production No. 2*, which
7 sought similar information. This request is DENIED for the same reasons set out
8 in my denial to *Request for Production No. 2*.

9 (Ex. X41)

10 18) On September 25, 2014, the ALJ issued an interim order ruling on
11 Respondents’ motion for a discovery order for depositions. In pertinent part, the ruling
12 read:

13 **“Complainants Laurel Bowman-Cryer and Rachel Cryer**

14 “I agree with the Agency that, given the availability of other discovery
15 methods, the forum typically does not allow for depositions, as well as the fact
16 that the Agency typically produces an investigative file with detailed notes of
17 interviews of witnesses. However, this case poses two unique circumstances.
18 First, based on the information I have received to date from Respondents and the
19 Agency, I have been unable to determine whether or not information and
20 documents sought in response to Interrogatories Nos. 11 and 12 and Requests
21 for Production Nos. 12 and 23 are reasonably likely to produce information is
22 generally relevant to the case. If so, it may result in the production of evidence
23 that bears a significant relationship to Complainants’ alleged damages.
24 Respondents should be able to ascertain this in a deposition and, as stated in my
25 interim order related to those Interrogatories and Requests for the Production,
may renew their request for a discovery order if they can show that testimony
given during the depositions shows those requests are reasonably likely to
produce information is generally relevant to the case. I also note that there
appears to be a unique damages claim for reimbursement of expenses for out-of-
town trips to Seattle, Tacoma (two trips), and Lincoln City, with expenses for
lodging, gas, and food at a number of establishments. As Respondents point out
in their motion, they ‘would use all of their 25 interrogatories just trying to
determine exactly how one or two of these alleged expenses was at all related to
Respondents’ alleged unlawful conduct.’ I am persuaded by Respondents that
they have sought informal discovery on the issue of damages through other
methods and do not have adequate information as to damages.

“In this unusual set of circumstances, I find that Respondents should be
permitted to briefly depose Complainants, with the scope of the depositions

1 limited to Complainants' claim for damages. Unless unexpected circumstances
2 arise that require an ALJ's intervention, the depositions should take no longer
3 than 90 minutes per Complainant. After the scheduled September 29, 2014,
4 prehearing conference in this matter, the forum will issue a subsequent order
5 stating a deadline for when the depositions should be completed. The Agency
6 and Complainants' counsel are instructed to cooperate with Respondents so that
7 the depositions can be conducted by that deadline. Respondents are
8 responsible for any court reporter costs associated with the deposition, and
9 Respondents and the Agency must each pay for their own copy of transcripts if
10 transcripts are prepared.

11 **"Cheryl McPherson**

12 "Respondents argue that they are entitled to depose Cheryl McPherson, a
13 material witness in this case, because they:

14 "strongly dispute some of the factual claims made by the complainants,
15 Respondents need to know whether Cheryl McPherson will validate
16 complainant's (sic) testimony under oath before the hearing. * * * In this
17 case, multiple parties to the same conversations recall substantially
18 different events, and subtle differences in retelling will substantially affect
19 a credibility determination that Administrative Law Judge must make.
20 Without being able to compare such testimony prior to hearing, the
21 Respondents are substantially prejudiced."

22 "I do not find that Respondents have demonstrated the need to depose
23 witness Cheryl McPherson. I note that Respondents are typically provided with
24 notes from investigative interviews of witnesses. Neither the Agency nor
25 Respondents have provided information as to whether that occurred in this case.
However, unless Respondents did not receive the usual investigative notes of the
Agency's interview with Cheryl McPherson or no such notes exist because
McPherson was never interviewed, I deny Respondents' request to take her
deposition."

(Ex. X42)

19) On September 25, 2014, the ALJ issued a discovery order requiring
Respondents to produce documents in three of the four categories sought by the
Agency in its September 11, 2014, motion. (Ex. X43)

20) On September 29, 2014, the ALJ held a prehearing conference. During
the conference, mutually acceptable new hearing dates, discovery status and a possible

1 alternative to depositions, and filing deadlines were discussed and the ALJ made
2 several rulings, summarized in a September 30, 2014 interim order that stated:

3 “(1) Subject to the availability of Respondents and Complainants, the hearing
4 is reset to begin at 9:00 a.m. on Tuesday, March 10, 2015, at the Tualatin Office
5 of Administrative Hearings. If the hearing is not concluded by late afternoon on
6 Friday, March 13, the hearing will reconvene at 9:00 a.m. on Tuesday, March 17,
7 2015, at the same location. The Agency and Respondents’ counsel will let me
8 know this week of the availability of Respondents and Complainants on those
9 dates.

10 “(2) Respondents have until October 2, 2014, to file answers to the Amended
11 Formal Charges.

12 “(3) The Discovery ordered in my rulings on the Agency's and Respondents'
13 motions for Discovery Orders must be mailed or hand-delivered no later than
14 October 14, 2014. This does not include Complainants' depositions.

15 “(4) My order requiring Complainants to submit to depositions by Respondents
16 is 'on hold' for the present.

17 “(5) As a potential means for avoiding the necessity of depositions,
18 Respondents proposed that they be allowed to serve 30 additional interrogatories
19 to the Agency for Complainants' responses. The Agency objected to 30 but
20 agreed to 25. I agreed and ruled that Respondents could serve 25 additional
21 interrogatories to the Agency for Complainants' response, with the responses
22 due 14 days after the date of service. At the Agency's request, I also ruled that,
23 should they elect to do so, the Agency may also serve up to 25 interrogatories to
24 Respondents' counsel for Respondents' response, noting that the Agency is also
25 entitled to do that under the rules since they have issued no prior interrogatories.

“(6) Case Summaries must be filed no later than February 24, 2015.

“(7) We also discussed the most efficient means of procedure regarding
Respondents' motion for summary judgment and the Agency's pending
response, considering the fact that the Agency has filed Amended Formal
Charges since Respondents filed a motion for summary judgment. Respondents'
counsel stated their intention in filing the motion was to resolve both cases in
their entirety, if possible. After discussion, I ruled that the Agency did not need to
respond to Respondents' pending motion for summary judgment and I will not
rule on that motion. Rather, Respondents will file another motion for summary
judgment that will incorporate the matters raised in the Amended Formal
Charges so that all outstanding issues can be addressed in my ruling on
Respondents' motion. It was mutually agreed that Respondents could have until
October 24, 2014, to file an amended motion for summary judgment and that the

1 Agency would have until November 21, 2014, to file its written response.
2 Accordingly, I order that Respondents must file their amended motion for
3 summary judgment no later than October 24, 2014, and the Agency must file its
4 response no later than November 21, 2014. Respondents' counsel asked if oral
5 argument would be allowed on the motion and I ruled that it would not.

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“(8) The Agency stipulated that it is not seeking reimbursement for the out-of-
pocket expenses listed in response to Respondents' Interrogatory #16. In
response to my question, the Agency stated that it is not willing to stipulate that
those trips are not relevant to the issue of damages.”

(Ex. X50)

21) On October 2, 2014, Respondents filed Answers to the Agency's
Amended Formal Charges. (Ex. X51)

22) On October 24, 2014, Respondents re-filed their motions for summary
judgment. (Ex. X53)

23) On November 21, 2014, the Agency filed a response to Respondents'
motion for summary judgment and a cross-motion for partial summary judgment “on the
same issues moved upon by Respondents.” (Ex. X54)

24) On December 8, 2014, the Agency filed a second motion for a discovery
order. On December 15, 2014, Respondents filed a response stating that they had
“now provided the Agency with all responsive documents * * * not subject to the
attorney-client privilege.” On December 18, 2014, the Agency withdrew its motion for a
discovery order, stating that Respondents had satisfied the Agency's request for
production. (Ex. X57)

25) On December 19, 2014, Respondents filed a response to the Agency's
cross-motion for summary judgment. (Ex. X61)

26) On January 15, 2015, the Agency moved for a Protective Order regarding
“additional medical documentation from Complainants that is subject to discovery.”
The Agency attached 13 pages of medical records, dated September 30, 2014, through
January 20, 2015, related to LBC and asked that the forum conduct an *in camera*

1 inspection "to determine what, if any, of the information contained within these records
2 is relevant or calculated to lead to the discovery of admissible evidence and must be
3 turned over to Respondents." Before ruling, the ALJ instructed the Agency to tell the
4 forum whether the Agency contended "that Bowman-Cryer continued to experience
5 "emotional, mental, and physical suffering" caused by Respondents' alleged unlawful
6 actions during the period of time covered by these records. (Ex. X64)

7 27) On January 15, 2014, Respondents renewed their motion to depose
8 Complainants, based on part on Complainant's alleged inadequate responses to
9 Respondents second set of interrogatories. On January 22, 2014, the Agency objected
10 to Respondents' motion. On January 29, 2014, the ALJ issued an interim order
11 instructing Respondents to provide a copy of the interrogatories and the Agency's
12 responses before the ALJ ruled on Respondents' motion. (Exs. X62, X63, X66)

13 28) On January 29, 2015, the ALJ issued an interim order ruling on
14 Respondents' re-filed motion for summary judgment and the Agency's cross-motion for
15 summary judgment. The interim order is reprinted verbatim below, pursuant to OAR
16 839-050-0150(4)(b):

17 **"Introduction**

18 "Respondents operate a bakery under the name of Sweetcakes by
19 Melissa.⁶ These cases arise from Respondents' refusal to provide a wedding
20 cake for Complainants Rachel Cryer ('Cryer') and Laurel Bowman-Cryer
21 ('Bowman-Cryer') after Respondents Aaron Klein ('A. Klein') and Melissa Klein
22 ('M. Klein') learned that the wedding would be a same-sex wedding.
23

24 ⁶ At the time of the alleged discrimination, Sweetcakes by Melissa was an inactive assumed business
25 name. On February 1, 2013, Sweetcakes by Melissa was re-registered as an assumed business name
with the Oregon Secretary of State Business Registry, with M. Klein listed as the registrant and A. Klein
listed as the authorized representative.

1 "As an initial matter, the forum notes Respondents' request for oral
2 argument with regard to their motion. Respondents' request for oral argument is
3 **DENIED.**

4 "Procedural History

5 "On June 4, 2014, the Civil Rights Division of the Oregon Bureau of Labor
6 and Industries ('Agency') issued two sets of Formal Charges alleging that M.
7 Klein violated ORS 659A.403(3) by refusing to provide Complainants a wedding
8 cake for their same-sex wedding based on their sexual orientation and that A.
9 Klein aided and abetted M. Klein, thereby violating ORS 659A.406. The Charges
10 further alleged that M. Klein and A. Klein, who was acting on behalf of M. Klein,
11 'published, circulated, issued or displayed or caused to be published, circulated,
12 issued or displayed, a communication, notice, advertisement or sign to the effect
13 that its accommodations, advantages, facilities, services or privileges would be
14 refused, withheld from or denied to, or that discrimination would be made
15 against, a person on account of his or her sexual orientation,' causing M. Klein to
16 violate ORS 659A.409 and A. Klein to violate ORS 659A.406 by aiding and
17 abetting M. Klein in her violation of ORS 659A.409. The Agency sought \$75,000
18 in damages for 'emotional, mental, and physical suffering' for each Complainant,
19 plus 'out of pocket expenses to be proven at hearing.' On June 19, 2014, the
20 ALJ consolidated the two cases for hearing.

21 "Respondents, through joint counsel Herbert Grey, Tyler Smith, and Anna
22 Adams (now Anna Harmon), timely filed Answers to both sets of Formal
23 Charges, raising numerous affirmative defenses and four counterclaims.

24 "On September 15, 2014, Respondents filed a motion for summary
25 judgment with respect to both sets of Charges, based primarily on legal argument
supporting the constitutional affirmative defenses raised in their Answers. On
September 16, 2014, the Agency moved for an extension of time to respond to
Respondents' motion until September 26, 2014. On September 17, 2014, the
ALJ granted the Agency's motion. On September 17, 2014, the ALJ held a
prehearing conference in which it became apparent that he had ruled on the
Agency's motion before Respondents had seen the motion. Accordingly, the ALJ
gave Respondents an opportunity to file objections. On September 18, 2014,
Respondents filed objections to Agency's motion for extension. On September
22, 2014, the ALJ issued an interim order that sustained his September 17, 2014,
order.

"On September 24, 2014, the Agency amended both sets of Charges to
allege that M. Klein and A. Klein both violated ORS 659A.403(3) and that A.
Klein, 'in the alternative,' aided and abetted M. Klein in her violation of ORS
659A.403(3), thereby violating ORS 659A.406. Additionally, the Agency alleged

1 that, 'in the alternative,' A. Klein aided and abetted M. Klein's violation of ORS
2 659A.409.⁷

3 "On September 29, 2014, the ALJ held a prehearing conference. During
4 the conference, the participants discussed the most efficient means of
5 proceeding regarding Respondents' motion for summary judgment and the
6 Agency's pending response, considering the fact that the Agency had filed
7 Amended Formal Charges ('Charges') since Respondents filed their motion for
8 summary judgment. After discussion, it was agreed that, instead of the Agency
9 filing a response to Respondents' original motion, it would be more efficient for
Respondents to file an amended motion for summary judgment that would
incorporate the matters raised in the Charges so that all outstanding issues could
be addressed in the ALJ's ruling on Respondents' motion. It was mutually
agreed that Respondents could have until October 24, 2014, to file an amended
motion for summary judgment and that the Agency would have until November
21, 2014, to file its response.

10 "On October 2, 2014, Respondents filed Amended Answers ('Answers') to
11 the Charges. On October 24, 2014, Respondents timely filed an amended motion
12 for summary judgment. On November 21, 2014, the Agency timely filed a
13 response and cross motion asking that Respondents' motion be denied in its
14 entirety and that the Agency be granted partial summary judgment as to the
15 issues on which Respondents sought summary judgment. On November 25,
2014, the forum granted Respondents' unopposed motion for an extension of
time until December 19, 2014, to respond to the Agency's cross motion.
Respondents filed a response on December 19, 2014.

16 "Summary Judgment Standard

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

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

⁷ The Agency's amended Charges did not allege that A. Klein violated ORS 659A.409.

1 The 'record' considered by the forum consists of: (1) the amended Formal
2 Charges and Respondents' amended Answers to those Charges; (2)
3 Respondents' motion, with attached exhibits; (3) the Agency's response and
4 cross-motion to Respondents' motion, with an attached exhibit; and (4)
5 Respondents' response to the Agency's motion.

6 "Analysis

7 **A. Facts of the Case**

8 "The undisputed material facts of this case relevant to show whether
9 Respondents violated ORS chapter 659A as alleged in the Charges are set out
10 below.

11 **Findings of Fact**

- 12 1) "Complainants Cryer and Bowman-Cryer are both female persons.⁸ (Formal
13 Charges)
- 14 2) "In January 2013, Sweetcakes by Melissa ('Sweetcakes') was a business
15 owned and operated as an unregistered assumed business name by
16 Respondents M. Klein and A. Klein. At all material times, Sweetcakes was a
17 place or service that offered custom designed wedding cakes for sale to the
18 public. (Respondents' Admission; Affidavits of A. Klein, M. Klein)
- 19 3) "Before and throughout the operation of Sweetcakes, Respondents M. Klein
20 and A. Klein have been jointly committed to live their lives and operate their
21 business according to their Christian religious convictions. Based on specific
22 passages from the Bible, they have a sincerely held belief that that God
23 'uniquely and purposefully designed the institution of marriage exclusively as
24 the union of one man and one woman' and that 'the Bible forbids us from
25 proclaiming messages or participating in activities contrary to Biblical
principles, including celebrations or ceremonies for uniting same-sex
couples.' (Affidavits of A. Klein, M. Klein)
- 4) "In the operation of Sweetcakes, A. Klein bakes the cakes, cuts the layers,
adds filling, and applies a base layer of frosting. M. Klein then does the
design and decorating. A. Klein delivers the cake to the wedding or reception
site in a vehicle that has 'Sweet Cakes by Melissa' written in large pink letters
on the side and assembles the cake as necessary. A. Klein also sets up the
cake and finalizes any remaining decorations after final assembly and
placement. In that capacity, he often interacts with the couple or other family

⁸ The Charges do not identify either Complainant as a female, but the forum infers from their names and the Agency's reference to each Complainant as "her" that Complainants are both female.

1 members and often places cards showing that Sweetcakes created the cake.
2 (Affidavits of A. Klein, M. Klein)

3 5) "In or around November 2010, Respondents designed, created, and
4 decorated a wedding cake for Cryer's mother, Cheryl McPherson, for which
5 Cryer paid. (Affidavit of M. Klein)

6 6) "On January 17, 2013, Cryer and McPherson visited Sweetcakes for a
7 previously scheduled cake tasting appointment, intending to order a cake for
8 Cryer's wedding ceremony to Bowman-Cryer. (Respondents' Admission;
9 Affidavit of A. Klein)

10 7) "A. Klein conducted the cake tasting at Sweetcakes' bakery shop located in
11 Gresham, Oregon. M. Klein was not present during the tasting. During the
12 tasting, A. Klein asked for the names of the bride and groom, and Cryer told
13 him there would be two brides and their names were 'Rachel and Laurel.'
14 (Respondents' Admission; Affidavit of A. Klein)

15 8) "A. Klein told Cryer that Sweetcakes did not make wedding cakes for same-
16 sex ceremonies because of A. and M. Klein's religious convictions. In
17 response, Cryer and McPherson walked out of Sweetcakes. (Respondents'
18 Admission; Affidavit of A. Klein)

19 9) "Before driving off, McPherson re-entered Sweetcakes by herself to talk to A.
20 Klein. During their subsequent conversation, McPherson told A. Klein that
21 she used to think like him, but her 'truth had changed' as a result of having
22 'two gay children.' A. Klein quoted Leviticus 18:22 to McPherson, saying 'You
23 shall not lie with a male as one lies with a female; it is an abomination.'
24 McPherson then left Sweetcakes. (Affidavit of A. Klein)

25 10) "On February 1, 2013, Sweetcakes by Melissa was registered as an assumed
business name with the Oregon Secretary of State, with the
'Registrant/Owner' listed as Melissa Elaine Klein and the 'Authorized
Representative' listed as Aaron Wayne Klein. (Exhibit A1, p. 2, Agency
Response to Motion for Summary Judgment and Cross-Motion for Summary
Judgment)

11) "On August 8, 2013, both Complainants filed verified written complaints with
BOLI's Civil Rights Division ('CRD') alleging unlawful discrimination by
Respondents on the basis of sexual orientation. After investigation, the CRD
issued a Notice of Substantial Evidence Determination on January 15, 2014,
in both cases, and sent copies to Respondents. (Respondents' Admission)

12) "At some time prior to September 2, 2013, A. Klein and M. Klein took part in a
video interview with Christian Broadcast Network (CBN) in which A. Klein
explained the reasons for declining to provide a wedding cake for

1 Complainants. On September 2, 2013, CBN broadcast a one minute, five
2 seconds long presentation about Complainants' complaints. The broadcast
3 begins and ends with a CBN announcer describing the complaints filed by
4 Cryer and Bowman-Cryer against Respondents while pictures of the bakery
5 are broadcast. A. and M. Klein appear midway in the broadcast, standing
6 together outdoors, and make the following statements:^{9 10}

7 **A. Klein:** 'I didn't want to be a part of her marriage, which I think is wrong.'

8 **M. Klein:** 'I am who I am and I want to live my life the way I want to live
9 my life and, you know, I choose to serve God.'¹¹

10 **A. Klein:** 'It's one of those things where you never want to see something
11 you've put so much work into go belly up, but on the other hand, um, I
12 have faith in the Lord and he's taken care of us up to this point and I'm
13 sure he will in the future.'

14 (Exhibit 1-I, Respondents' Motion for Summary Judgment)

15 13) "In September 2013, M. and A. Klein closed their bakery shop in Gresham and
16 moved their business to their home, where they continued to offer custom
17 designed wedding cakes for sale to the public. (Affidavits of A. Klein, M. Klein)

18 14) "On February 13, 2014, A. Klein was interviewed live on a radio show by Tony
19 Perkins called 'Washington Watch.' Perkins's show lasted approximately 15
20 minutes. In pertinent part, the interview included the following exchange that
21 occurred, starting at four minutes, 30 seconds into the interview and ending at six
22 minutes, twenty-two seconds into the interview:¹²

23 **Perkins:** '* * * Tell us how this unfolded and your reaction to that.'

24 **Klein:** 'Well, as far as how it unfolded, it was just, you know, business as
25 usual. We had a bride come in. She wanted to try some wedding cake.
Return customer. Came in, sat down. I simply asked the bride and groom's
first name and date of the wedding. She kind of giggled and informed me it
was two brides. At that point, I apologized. I said "I'm very sorry, I feel like

26 ⁹ There is nothing in the video to show whether these statements were made in response to a question or
27 if it was part of a longer interview.

28 ¹⁰ This transcript was made by the ALJ from a DVD provided to the forum by Respondents. The DVD
29 includes the September 2, 2013, CBN video, and an mp4 recording of a February 13, 2014, interview with
30 Tony Perkins.

31 ¹¹ M. Klein's statement is only included to provide context, as the Agency did not allege that her statement
32 was a violation of Oregon law.

33 ¹² See footnote 10.

1 you may have wasted your time. You know we don't do same-sex marriage,
2 same-sex wedding cakes." And she got upset, noticeably, and I understand
3 that. Got up, walked out, and you know, that was, I figured the end of it.'

4 **Perkins:** 'Aaron, let me stop you for a moment. Had you and your wife, had
5 you talked about this before; is this something that you had discussed? Did
6 you think, you know, this might occur and had you thought through how you
7 might respond or did this kind of catch you off guard?'

8 **Klein:** 'You know, it was something I had a feeling was going to become an
9 issue and I discussed it with my wife when the state of Washington, which is
10 right across the river from us, legalized same-sex marriage and we watched
11 Masterpiece Bakery going through the same issue that we ended up going
12 through. But, you know, it was one of those situations where we said "well I
13 can see it is going to become an issue but we have to stand firm. It's our
14 belief and we have a right to it, you know." I could totally understand the
15 backlash from the gay and lesbian community. I could see that; what I don't
16 understand is the government sponsorship of religious persecution. That is
17 something that just kind of boggles my mind as to how a government that is
18 under the jurisdiction of the Constitution can decide, you know, that these
19 people's rights overtake these people's rights or even opinion, that this
20 person's opinion is more valid than this person's; it kind of blows my mind.'

21 (Exhibit 1-I, Respondents' Motion for Summary Judgment)

22 **"B. Analysis of Complainants' Claims on the Merits**

23 "The forum first analyzes whether Respondents' actions violated the
24 applicable public accommodation statutes. If so, the forum moves on to a
25 determination of whether Respondents have established one or more of their
affirmative defenses that rely on the Oregon and U. S. Constitution. See *Tanner*
v. OHSU, 157 Or App 502, 513 (1998), *rev den* 329 Or 528, citing *Planned*
Parenthood Assn. v. Dept. of Human Resources, 297 Or 562, 564, 687 P2d 785
(1984); *Young v. Alongi*, 123 Or App 74, 77-78, 858 P2d 1339 (1993). See also
Meltebeke v. Bureau of Labor and Industries, 322 Or 132, 138-39 (1995)(before
considering constitutional issues, court must first consider pertinent
subconstitutional issues).

"In its Charges, the Agency alleged that Respondents operated
Sweetcakes, a place of public accommodation under ORS 659A.400, and
violated ORS 659A.403, 659A.406, and 659A.409 by refusing to provide
Complainants a wedding cake based on their sexual orientation, by aiding and
abetting that refusal, and by communicating their intent to discriminate based on
sexual orientation.

1 "Although Respondents' affirmative defenses apply to the forum's ultimate
2 disposition of each alleged statutory violation, the forum is able to draw several
3 legal conclusions from the undisputed material facts relevant to the Agency's
4 allegations that are unaffected by those affirmative defenses.

5 "First, at all times material, A. Klein and M. Klein owned and operated
6 Sweetcakes as a partnership. ORS 67.055 provides, in pertinent part:

7 '(1) Except as otherwise provided in subsection (3) of this section, the
8 association of two or more persons to carry on as co-owners a business
9 for profit creates a partnership, whether or not the persons intend to create
10 a partnership.

11 * * * * *

12 '(d) It is a rebuttable presumption that a person who receives a share of
13 the profits of a business is a partner in the business * * *.'

14 In affidavits dated October 23, 2014, signed by M. Klein and A. Klein and
15 submitted in support of Respondent's motion for summary judgment, they both
16 aver: 'Together we have operated Sweetcakes by Melissa as a business since
17 we opened in 2007. * * * Until recent months, we both worked actively in the
18 business, primarily derived our family income from the operation of the business,
19 and jointly shared the profits of the business.' The Agency does not dispute the
20 factual accuracy of these statements. Accordingly, the forum concludes that M.
21 Klein and A. Klein were joint owners of Sweetcakes and operated it as a
22 partnership and unregistered assumed business name in January 2013, and as a
23 registered assumed business name since February 1, 2013. As such, they are
24 jointly and severally liable for any violations of ORS chapter 659A related to
25 Sweetcakes.

"Second, ORS 659A.403, 659A.406, and 659A.409 all require that
discrimination must be made by a 'person' acting on behalf of a 'place of public
'accommodation.' 'Person' includes '[o]ne or more individuals.' ORS
659A.001(9)(a). The undisputed facts establish that A. Klein and M. Klein are
'individual[s]' and 'person[s].' A 'place of public accommodation' is defined in
ORS 659A.400 as '(a) Any place or service offering to the public
accommodations, advantages, facilities or privileges whether in the nature of
goods, services, lodgings, amusements, transportation or otherwise.' The
undisputed facts show that, at all material times, Sweetcakes was a place or
service offering goods and services – wedding cakes and the design of those
cakes – to the public. Accordingly, the forum concludes that Sweetcakes, at all
material times, was a 'place of public accommodation.'

"Third, as germane to this case, ORS 659A.403 and 659A.406 prohibit
any 'distinction, discrimination or restriction' based on Complainants' 'sexual
orientation.' This requires the forum to determine Complainants' actual or

1 perceived sexual orientation. As used in ORS chapter 659A, 'sexual orientation'
2 is defined as 'an individual's actual or perceived heterosexuality, homosexuality,
3 bisexuality, or gender identity, regardless of whether the individual's gender
4 identity, appearance, expression or behavior differs from that traditionally
5 associated with the individual's assigned sex at birth.' OAR 839-005-0003(16).
6 The forum infers¹³ that Complainants' sexual orientation is homosexual and that
7 A. Klein perceived they were homosexual from four undisputed facts: (a)
8 Complainants were planning to have a same-sex marriage; (b) A. Klein told Cryer
9 and McPherson that Respondents do not make wedding cakes for same-sex
10 ceremonies; (c) McPherson told A. Klein that she had 'two gay children'; and (d)
11 In response to McPherson's statement, A. Klein quoted a reference from
12 Leviticus related to male homosexual behavior.

13 "Fourth, A. Klein's verbal statements made in the CBN and Tony Perkins
14 interviews that were publicly broadcast constitute a 'communication' that was
15 'published' under ORS 659A.409.

16 **"C. Failure to State Ultimate Facts Sufficient to Constitute a Claim"**

17 "Before determining the merits of the Agency's ORS 659A.403(3)
18 allegations, the forum first evaluates Respondents' pleading -- 'fail[ure] to state
19 ultimate facts sufficient to constitute a claim' -- that Respondents categorize as
20 their first 'affirmative defense.' As a procedural matter, the forum views this
21 defense as a straightforward denial of the allegations in the pleadings rather than
22 as an affirmative defense.¹⁴ As argued by Respondents in their motion for
23 summary judgment, this defense goes to two issues. First, whether Bowman-
24 Cryer's absence when A. Klein made his alleged discriminatory statement on
25 January 13, 2013, deprives her of a cause of action under ORS 659A.403 and
659A.406. Second, whether Respondents' refusal to provide a wedding cake for
Complainants was on account of their sexual orientation.

26 ¹³ Evidence includes inferences. There may be more than one inference to be drawn from the basic fact
27 found; it is the forum's task to decide which inference to draw. See, e.g., *In the Matter of Income Property*
28 *Management*, 31 BOLI 18, 39 (2010).

29 ¹⁴ In general, an affirmative defense is a defense setting up new matter that provides a defense against
30 the Agency's case, assuming all the facts in the complaint to be true. See, e.g. *Pacificorp v. Union Pacific*
31 *Railroad*, 118 Or App 712, 717, 848 P2d 1249 (1993). A few examples of affirmative defenses previously
32 recognized by this forum include statute of limitations, claim and issue preclusion, bona fide occupational
33 requirement, undue hardship, laches, and unclean hands. Some other affirmative defenses recognized
34 by Oregon courts include discharge in bankruptcy, duress, fraud, payment, release, statute of frauds,
35 unconstitutionality, and waiver. *ORCP 19B*. In contrast, a defense that admits or denies facts
constituting elements of the Agency's prima facie case that are alleged in the Agency's charging
document is not an affirmative defense.

1 ***"Bowman-Cryer's absence on January 13, 2013 does not deprive her of***
2 ***standing***

3 "It is undisputed is the fact that Complainants sought a wedding cake from
4 Sweetcakes based on Cryer's previous experience in purchasing a wedding cake
5 from Sweetcakes for McPherson's wedding. It is also undisputed that Bowman-
6 Cryer was not present at Sweetcakes on January 13, 2013, when A. Klein told
7 Cryer and McPherson that Sweetcakes would not make a wedding cake for a
8 same-sex wedding.

9 "Respondents argue as follows:

10 'Additionally, if as it appears on the face of the pleadings, one or more of
11 the complainants were not actually potential customers requesting a
12 wedding cake issue, and they were also not the ones denied services, and
13 their claims must fail as a matter of law. In particular, the record is Laurel
14 Bowman-Cryer was not present for the cake tasting and was never denied
15 services. Therefore, either Rachel Cryer or Cheryl McPherson was the
16 only person who was denied services according to Complainants['] own
17 record. Claims made by anyone else must fail.'

18 The forum rejects this argument, as it relies on the false premise that a person
19 cannot be discriminated against unless they are physically present to witness an
20 alleged act of discrimination perpetrated against them. In this case, the 'full and
21 equal accommodation' sought by both Complainants was a wedding cake to
22 celebrate their same-sex wedding, an occasion in which they would be joint
23 celebrants. The forum takes judicial notice that a wedding cake has long been
24 considered a customary and important tradition in weddings in the United States.
25 Respondents themselves acknowledge the special significance of wedding cakes
in their affidavits, in which A. Klein and M. Klein each aver:

'The process of designing, creating and decorating a cake for a wedding
goes far beyond the basics of baking a cake and putting frosting on it. Our
customary practice involves meeting with customers to determine who
they are, what their personalities are, how they are planning a wedding,
finding out what their wishes and expectations concerning size, number of
layers, colors, style and other decorative detail, which often includes
looking at a variety of design alternatives before conceiving, sketching,
and custom crafting a variety of decorating suggestions and ultimately
finalizing the design. Our clients expect, and we intend, that each cake
will be uniquely crafted to be a statement of each customer's personality,
physical tastes, theme and desires, as well as their palate so it is a special
part of their holy union.'

Because the wedding cake was intended to equally benefit both Cryer and
Bowman-Cryer, the forum finds that Bowman-Cryer has the same cause of

1 action against Respondents under ORS 659A.403 and .406 as Cryer.
2 *Macedonia Church v. Lancaster Hotel Ltd.*, 498 F. Supp 2d 494 (2007), though
3 not binding on this forum, illustrates this point. In *Macedonia*, a group of
4 individuals associated with Macedonia Church, a predominantly African-
5 American congregation, alleged that they were denied accommodations because
6 of their race. Defendants moved to dismiss the complaint as to all but four
7 plaintiffs on the grounds that the only plaintiffs who had standing to pursue the
8 complaint were the four who actually visited defendants' facility. As stated by the
9 court, 'the defendants' argument appears to assume that unless each plaintiff
10 had a first-hand contact with the defendants, he or she could not [have] suffered
11 any "personal and individual" injury.' The court denied defendants' motion,
12 holding:

13
14 'Whether there was first-hand contact between the individual plaintiffs and
15 the defendants is not material to the question of whether the individual
16 plaintiffs suffered a personal and individual injury. Each of the Non-
17 organizer Plaintiffs alleges that he or she was denied accommodations on
18 the basis of race or color. The fact that the defendants informed the
19 plaintiffs that their refusal to provide them with accommodations by
20 communicating with the Organizers instead of with each of the Non-
21 organizer plaintiffs does not alter the fact that those plaintiffs were denied
22 accommodations. Nor is it material that the plaintiffs were unaware of the
23 discrimination until sometime after it occurred.'

24 ***"Nexus between Complainants' sexual orientation and Respondents'
25 refusal to provide a wedding cake for their same-sex wedding***

26 "Respondents argue that there is no evidence of any connection between
27 Complainants' sexual orientation and Respondents' alleged discriminatory action.
28 Respondents' argument is two-pronged. First, Respondents argue that their prior
29 sale of a wedding cake to Cryer for her mother's wedding proves Respondents'
30 lack of animus towards Complainant's sexual orientation. Second, Respondents
31 attempt to isolate Complainants' sexual orientation from their proposed¹⁵
32 wedding, arguing that their decision was not on account of Complainants' sexual
33 orientation, but on Respondents' objection to participation in the event for which
34 the cake would be prepared.

35 "Respondents' first argument fails for the reason that there is no evidence
36 in the record that A. Klein, the person who refused to make a cake for
37 Complainants while acting on Sweetcakes' behalf, had any knowledge of
38 Complainants' sexual orientation in November 2010 when Cryer purchased a

39 ¹⁵ The forum uses the term "proposed" because there is no evidence in the record to show whether
40 Complainants were actually ever married. [NOTE: At hearing, evidence was presented that
41 Complainant's were legally married in 2014, a few days after Oregon's ban on same-sex marriage was
42 struck down in federal court. See Proposed Finding of Fact #45 -- The Merits, *infra*.

1 cake for her mother's wedding. Even if A. Klein was aware of Cryer's sexual
2 orientation in November 2010, not discriminating on one occasion does not
inevitably lead to the conclusion that A. Klein did not discriminate on a
subsequent occasion.

3 "Respondents rely on *Tanner v. OHSU* to support their second argument.
4 In *Tanner*, OHSU, in accordance with State Employees' Benefits Board (SEBB)
5 eligibility criteria, permitted employees to purchase insurance coverage for 'family
6 members.' Under the SEBB criteria, unmarried domestic partners of employees
7 were not 'family members' who were entitled to insurance coverage. Plaintiffs,
8 three lesbian nursing professionals with domestic partners, applied for insurance
9 coverage and were denied on the ground that the domestic partners did not meet
10 the SEBB eligibility criteria. Plaintiffs sued, alleging disparate impact sex
11 discrimination in violation of *then* ORS 659.030(1)(b) in that OHSU's policy had
12 the effect of discriminating against homosexual couples because, unlike
13 heterosexual couples, they could not marry and become eligible for insurance
14 benefits. Significant to this case, the court stated that plaintiffs were a member of
15 a protected class under ORS 659.030 and that they made out a disparate impact
16 claim because 'OHSU's practice of denying insurance benefits to unmarried
17 domestic partners, while facially neutral as to homosexual couples, effectively
18 screens out 100 percent of them from obtaining full coverage for both partners.
19 That is because, under Oregon law, homosexual couples may not marry.' *Id.* at
20 516. The court then held that OHSU did not violate *then* ORS 659.030(1)(b)
21 because plaintiffs did not prove that OHSU engaged 'in a subterfuge to evade the
22 purposes of this chapter' under *then* ORS 659.028. *Id.* at 517-19. The language
23 that Respondents quote to support their argument is not the holding of the case,
24 but merely a bridge between the court's evaluation of plaintiffs' case based on
25 different treatment and disparate impact theories. Accordingly, *Tanner* does not
assist Respondents. Also significant to this case, plaintiffs alleged a violation of
Article I, section 20, of the Oregon Constitution. The court found that plaintiffs,
as homosexual couples, were members of a 'true class,' and also members of a
'suspect class' based on their sexual orientation. *Id.* at 524.

19 "Respondents' attempt to divorce their refusal to provide a cake for
20 Complainants' same-sex wedding from Complainants' sexual orientation is
21 neither novel nor supported by case law. As the Agency argues in support of its
22 cross-motion, '[t]here is simply no reason to distinguish between services for a
wedding ceremony between two persons of the same sex and the sexual
orientation of that couple. The conduct, a marriage ceremony, is inextricably
linked to a person's sexual orientation.'

23 "The U. S. Supreme Court has rejected similar attempts to distinguish
24 between a protected status and conduct closely correlated with that status. In
25 *Christian Legal Society Chapter of the University of California, Hastings College
of the Law v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971 (2010), students at
Hastings College of the Law formed a chapter of the Christian Legal Society

1 ('CLS') and sought formal recognition from the school. The CLS required its
2 members to affirm their belief in the divinity of Jesus Christ and to refrain from
3 'unrepentant homosexual conduct.' *Id.* at 2980. Hastings refused to recognize
4 the organization on the ground that it violated Hastings' nondiscrimination policy,
5 which prohibited exclusion based on religion or sexual orientation. The CLS
6 argued that 'it does not exclude individuals because of sexual orientation, but
7 rather "on the basis of a conjunction of conduct and the belief that the conduct is
8 not wrong.'" *Id.* at 2990. The Court rejected this argument, stating:

9 'Our decisions have declined to distinguish between status and conduct in
10 this context. See *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S Ct 2472,
11 156 L.Ed.2d 508 (2003) ("When homosexual *conduct* is made criminal by
12 the law of the State; that declaration in and of itself is an invitation to
13 subject homosexual *persons* to discrimination." (emphasis added)); *id.*, at
14 583, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment) ("While it is
15 true that the law applies only to conduct, the conduct targeted by this law
16 is conduct that is closely correlated with being homosexual. Under such
17 circumstances, [the] law is targeted at more than conduct. It is instead
18 directed toward gay persons as a class."); cf. *Bray v. Alexandria Women's*
19 *Health Clinic*, 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993)
20 ("A tax on wearing yarmulkes is a tax on Jews.")'

21 In conclusion, the forum holds that when a law prohibits discrimination on the
22 basis of sexual orientation, that law similarly protects conduct that is inextricably
23 tied to sexual orientation. See *Elane Photography, LLC v. Willock*, 309 P3d 53,
24 62 (2013), *cert den* 134 S. Ct. 1787 (2014). Applied to this case, the forum finds
25 that Respondents' refusal to provide a wedding cake for Complainants because it
was for their same-sex wedding was synonymous with refusing to provide a cake
because of Complainants' sexual orientation.

17 **"D. Respondent A. Klein violated 659A.403**

18 With regard to its ORS 659A.403 claims, the Agency alleges the following
19 in paragraph III.12 in both sets of Charges:

20 '12. Respondents discriminated against Complainant because of her sexual
orientation.

21 a. Melissa Elaine Klein denied full and equal accommodations, advantages,
22 facilities and privileges of her business to [Complainant] based on her
sexual orientation, in violation of ORS 659A.403(3).

23 b. **Respondent Aaron Wayne Klein, dba Sweetcakes by Melissa denied**
24 **full and equal accommodations, advantages, facilities and privileges**
25 **of her [sic] business to [Complainant] based on her sexual**
orientation, in violation of ORS 659A.403(3).

1 c. **In the alternative**, Respondent Aaron Wayne Klein aided or abetted
2 Melissa Elaine Klein in violating ORS 659A.403(3), in violation of ORS
3 659A.406.'

4 (emphasis bolded by Agency in its Amended Formal Charges to show
5 amendments to original Formal Charges)

6 ORS 659A.403 provides, in pertinent part:

7 '(1) Except as provided in subsection (2) of this section, all persons within
8 the jurisdiction of this state are entitled to the full and equal
9 accommodations, advantages, facilities and privileges of any place of
10 public accommodation, without any distinction, discrimination or restriction
11 on account of race, color, religion, sex, sexual orientation, national origin,
12 marital status or age if the individual is 18 years of age or older.

13 '(2) Subsection (1) of this section does not prohibit:

14 "(a) The enforcement of laws governing the consumption of
15 alcoholic beverages by minors and the frequenting by minors of
16 places of public accommodation where alcoholic beverages are
17 served; or

18 "(b) The offering of special rates or services to persons 50 years of
19 age or older.

20 '(3) It is an unlawful practice for any person to deny full and equal
21 accommodations, advantages, facilities and privileges of any place of
22 public accommodation in violation of this section.'

23 "The prima facie elements of the Agency's 659A.403 case are: 1)
24 Complainants were a homosexual couple and were perceived as such by A.
25 Klein and M. Klein; 2) Sweetcakes was a place of public accommodation; 3a) A.
Klein, a person acting on behalf of Sweetcakes, denied full and equal
accommodations to Complainants; 3b) M. Klein, a person acting on behalf of
Sweetcakes, denied full and equal accommodations to Complainants; and 4) the
denials were on account of Complainants' sexual orientation. Elements 1, 2, 3a
are established by undisputed facts. Element 4 is established in the preceding
section's discussion of 'Nexus.' Accordingly, the forum concludes that A. Klein
violated ORS 659A.403 and that the Agency is entitled to summary judgment on
the merits as to Cryer's and Bowman-Cryer's 659A.403 claims against A. Klein.
Since there is no evidence that M. Klein took any action to deny the full and
equal accommodations, advantages, facilities and privileges of Sweetcakes to
Complainants, the forum concludes that M. Klein did not violate ORS 659A.403.
However, M. Klein, as a joint owner of Sweetcakes with A. Klein, is jointly and

1 severally liable for any damages awarded to Complainants stemming from A.
2 Klein's violation.

3
4 **"E. ORS 659A.406 -- Aiding and Abetting a Violation of ORS 659A.403(3)**

5 "The Agency seeks to hold A. Klein liable as an aider and abettor under
6 ORS 659A.406 for M. Klein's alleged violation of ORS 659A.403(3).
7 Respondents assert that A. Klein cannot be held liable as an aider and abettor
8 under ORS 659A.406 because he is a co-owner of Sweetcakes and, as a matter
9 of law, cannot aid and abet himself. The Agency argues to the contrary, based
10 on the 'plain text' of the statute.

11 "ORS 659A.406 provides, in pertinent part:

12 "Except as otherwise authorized by ORS 659A.403, it is an unlawful
13 practice for any person to aid or abet any place of public accommodation,
14 as defined in ORS 659A.400, or any employee or person acting on behalf
15 of the place of public accommodation to make any distinction,
16 discrimination or restriction on account of race, color, religion, sex, sexual
17 orientation, national origin, marital status or age if the individual is 18
18 years of age or older."

19 In the previous section, the forum concluded that that M. Klein did not violate
20 ORS 659A.403(3) as alleged in paragraph III.12.a and that A. Klein, the joint
21 owner of Sweetcakes, violated ORS 659A.403(3) as alleged in paragraph II.12.b.
22 Since M. Klein did not violate ORS 659A.403, A. Klein cannot be held liable to
23 have aided and abetted her violation.¹⁶

24 **"F. Notice that Discrimination will be made in Place of Public
25 Accommodation – ORS 659A.409**

"In section IV of its Charges,¹⁷ the Agency alleges: (a) Respondent M.
Klein 'published, issued * * * a communication, notice * * * that its
accommodation, advantages * * * would be refused, withheld from or denied to,
or that discrimination would be made against, a person on account of his or her
sexual orientation, in violation of ORS 659A.409'; (b) Respondent A. Klein, 'dba
Sweetcakes by Melissa, denied full and equal accommodations, advantages,
facilities and privileges of her business to [Complainant] based on her sexual

22
23 ¹⁶ As pointed out in the previous section, there is a difference between committing a violation and being
24 liable for the consequences of that violation. In this case, M. Klein's liability stems from her partnership
25 status, not from any violation that she committed.

¹⁷ Section IV is prefaced by the caption "UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION,
CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR
SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR
PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION."

1 orientation, in violation of ORS 659A.403(3)'; and (c) In the alternative,
2 Respondent A. Klein 'aided or abetted M. Klein in violating ORS 659A.409, in
violation of ORS 659A.406.'

3 "In its Charges, the Agency alleges in paragraphs II.8 & 9 that A. Klein
4 made statements that were broadcast on television on September 2, 2013, and
5 on the radio on February 13, 2014, that communicate an intent to discriminate
6 based on sexual orientation. The full text of the relevant part of those broadcasts
is set out in Findings of Fact ##12 and 14, *supra*. The Agency's cross-motion for
summary judgment singles out the statements made on those two occasions as
proof that Respondents violated ORS 659A.409.¹⁸

7 "ORS 659A.409 provides, in pertinent part:

8 * * * it is an unlawful practice for any person acting on behalf of any place
9 of public accommodation as defined in ORS 659A.400 to publish,
10 circulate, issue or display, or cause to be published, circulated, issued or
11 displayed, any communication, notice, advertisement or sign of any kind to
the effect that any of the accommodations, advantages, facilities, services
12 or privileges of the place of public accommodation will be refused,
withheld from or denied to, or that any discrimination will be made against,
any person on account of * * * sexual orientation * * *.'

13 The alleged unlawful statements made by A. Klein were:

14 'I didn't want to be a part of her marriage, which I think is wrong.'
15 (*September 2, 2013 CBN interview*)

16 'I said "I'm very sorry, I feel like you may have wasted your time. You
17 know we don't do same-sex marriage, same-sex wedding cakes." * * * You
18 know, it was something I had a feeling was going to become an issue and
I discussed it with my wife when the state of Washington, which is right
19 across the river from us, legalized same-sex marriage and we watched
Masterpiece Bakery going through the same issue that we ended up going
20 through. But, you know, it was one of those situations where we said "well
I can see it is going to become an issue but we have to stand firm. It's our
21 belief and we have a right to it, you know.'" (*February 13, 2014, Tony
Perkins interview*)

22 In their motion for summary judgment, Respondents argue that 'ORS 659A.409
23 by its terms requires a statement of *future intention* that is entirely absent in this
instance.' Respondents further argue that:

24 _____
25 ¹⁸ The Agency's cross-motion also discusses the sign on Sweetcakes' door after it closed for business,
but since the Agency did not allege the existence or contents of the sign as a violation, the forum does
not consider it.

1 'A review of the videotape record of the CBN broadcast * * * clearly shows
2 that Aaron Klein spoke only of the reason why he and his wife declined to
3 participate in complainants' ceremony. The same is true of the Perkins
radio broadcast. * * * A statement of future intention in either media event
is conspicuously absent.'

4 The Agency does not dispute the correctness of Respondents' argument that
5 ORS 659A.409 is directed towards communications relating a prospective intent
6 to discriminate, but argues that A. Klein's statements are a prospective
communication:

7 'Reviewed in context, Respondents communicated quite clearly that
8 same-sex couples would not be provided wedding cake services at their
bakery. These are not descriptions of past events as alleged by
9 Respondents. Respondents stated their position in these communications
and notify the public that they "don't do same sex weddings," they "stand
10 firm," are "still in business" and will "continue to stay strong."

11 Whatever Respondents' post-January 2013 intentions may have been or may still
12 be with regard to providing wedding cake services for same-sex weddings, the
forum finds that A. Klein's above-quoted statements, evaluated both for text and
13 context, are properly construed as the recounting of past events that led to the
present Charges being filed. In other words, these statements described what
14 occurred on January 17, 2013, and thoughts and discussions the Kleins had
before January 2013, not what the Kleins intended to do in the future.¹⁹ To arrive
15 at the conclusion sought by the Agency requires drawing an inference of future
intent from the Kleins's statements of religious belief that the forum is not willing
16 to draw. Accordingly, the forum concludes that A. Klein's communication did not
violate ORS 659A.409.²⁰

17 "In addition, the forum notes that M. Klein cannot be held to have violated
18 ORS 659A.409 because she made no communication. Therefore, the forum

19
20 ¹⁹ In contrast, had A. Klein told Perkins "I said 'I'm very sorry * * * You know we don't do same-sex
marriage, same-sex wedding cakes' and we take the same stand today," the forum's ruling would be
21 different, assuming the Agency had plead a violation of ORS 659A.409 by A. Klein.

22 ²⁰ Compare *In the Matter of Blachana, LLC*, 32 BOLI 220 (2013), *appeal pending* (Respondent found to
have violated ORS 659A.409 when member of the LLC left a telephone message with the organizer of a
23 group of transgender individuals who had visited the LLC's nightclub regularly on Friday nights during the
previous 18 months asking "not to come back on Friday nights."); *In the Matter of The Pub*, 6 BOLI 270,
24 282-83 (1987)(Respondent found to have violated ORS 659.037, the predecessor of ORS 659A.409, by
posting a on front door of pub, immediately under another sign that said "VIVA APARTHEID," a sign that
25 said "NO SHOES, SHIRTS, SERVICE, NIGGERS," and a sign inside the pub, with chain and spikes
attached at each end, that read "Discrimination. Webster – to use good judgment" on the front and
"Authentic South African Apartheid Nigger 'Black' Handcuffs Directions Drive Through Wrists and Bend
Over Tips" on the back).

1 finds that A. Klein did not aid or abet M. Klein to commit a violation of that statute
2 and Respondents are entitled to summary judgment on this issue.

3 "G. Respondents' Counterclaims

4 "Before addressing Respondents' affirmative defenses, the forum
5 addresses Respondents' counterclaims. First, Respondents allege that BOLI,
6 through its actions in prosecuting this case, has 'knowingly and selectively acted
7 under color of state law to deprive Respondents of their fundamental
8 constitutional and statutory rights on the basis of religion' in violation of ORS
9 659A.403 and 'deprive[d] the Respondents of fundamental rights and protections
10 guaranteed by the First and Fourteenth amendments to the United States
11 Constitution,' thereby generating liability under 42 USC § 1983. Second,
12 Respondents allege that the BOLI's Commissioner violated ORS 659A.409 by
13 publishing, circulating, issuing, or displaying communications on Facebook and in
14 print media 'to the effect that its accommodations, advantages, facilities, services
15 or privileges would be refused, withheld from or denied to, or the discrimination
16 would be made against Respondents and other persons similarly situated on the
17 basis of religion in violation of ORS 659A.409.' Respondents seek damages in
18 the amount of \$100,000 for economic damages, \$100,000 for non-economic
19 damages, court costs, and reasonable attorney fees.

20 "The authority of state agencies is limited to that granted to them by the
21 legislature. See *SAIF Corp. v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998)
22 ('an agency has only those powers that the legislature grants and cannot
23 exercise authority that it does not have'). ORS 659A.850(4) gives the
24 Commissioner the authority to award compensatory damages to complainants as
25 an element of a cease and desist order within a contested case proceeding.
There is no corresponding statute that authorizes the Commissioner to award the
damages sought by Respondents in their counterclaims. With regard to attorney
fees or court costs, the legislature has only granted authority to the
Commissioner to award these in contested case proceedings to interveners in a
real property case brought under ORS 659A.145 or ORS 659A.421.²¹

"In conclusion, the forum lacks jurisdiction to adjudicate Respondents'
counterclaims and may neither grant nor deny them. The only relief available to
Respondents through this forum is dismissal of any Charges not proven by the
Agency under ORS 659A.850(3).²²

²¹ See ORS 659A.850(1)(b)(B).

²² See, e.g., *Wallace v. PERB*, 245 Or App 16, 30, 263 P3d 1010 (2011) (when plaintiff sought compensatory damages in an APA contested case proceeding based on alleged financial loss after PERS placed a limit on how often he could transfer funds he had invested in the Oregon Savings Growth Plan, the court held that, since it had no authority under ORS 183.486(1)(b) to award compensatory damages to plaintiff, plaintiff was also unable to recover those damages in the contested case proceeding).

1 **“H. Respondents’ Affirmative Defenses**

2 “Respondents’ affirmative defenses include estoppel and the
3 unconstitutionality of ORS 659A.403, .406, and .409, both facially and as applied.
4 As an initial matter, the forum notes that the Oregon Court of Appeals has held
5 that an Agency has the authority to decide the constitutionality of statutes. See
6 *Eppler v. Board of Tax Service Examiners*, 189 Or App 216, 75 P3d 900 (2003),
7 citing *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 362-65, 723 P.2d 298
8 (1986) and *Nutbrown v. Munn*, 311 Or. 328, 346, 811 P.2d 131 (1991). In BOLI
9 contested cases, the Commissioner has delegated to the ALJ the authority to
 rule on motions for summary judgment, with the decision ‘set forth in the
 Proposed Order’ and subject to ratification by the Commissioner in the Final
 Order. OAR 839-050-0150(4). Accordingly, the ALJ has the initial authority to
 rule on the constitutional issues raised by Respondents in their motion for
 summary judgment.²³

10 **“Estoppel**

11 “In their answers, Respondents phrase their estoppel defense as follows:

12 “The state of Oregon, including the Bureau of Labor and Industries[,] is
13 estopped from compelling Respondents to engage in creative expression
14 or otherwise participate in same-sex ceremonies not recognized by the
 state of Oregon contrary to their fundamental rights, consciences and
 convictions.”

15 Estoppel is a legal doctrine whereby one party is foreclosed from proceeding
16 against another when one party has made ‘a false representation, (1) of which
17 the other party was ignorant, (2) made with the knowledge of the facts, (3) made
18 with the intention that it would induce action by the other party, and (4) that
19 induced the other party to act upon it.’ *State ex rel. State Offices for Services to*
20 *Children and Families v. Dennis*, 173 Or App 604, 611, 25 P3d 341 (2001), *citing*
21 *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P.2d 1084
 (1999). In order to establish estoppel against a state agency, a party must have
 relied on the agency's representations and the party's reliance must have been
 reasonable. *Id.*, *citing Dept. of Transportation v. Hewett Professional Group*, 321
 Or 118, 126, 895 P2d 755 (1995).²⁴

22 ²³ *Eppler*, *Cooper*, and *Nutbrown* impliedly overruled the forum’s holding in the case of *In the Matter of*
23 *Doyle’s Shoes*, 1 BOLI 295 (1980), a Final Order issued before the *Eppler*, *Cooper*, and *Nutbrown*
 decisions in which the forum held that it was beyond the Commissioner’s discretion to determine the
 constitutionality of legislative enactments. The forum now explicitly overrules that holding.

24 ²⁴ See also *In the Matter of Sunnyside Inn*, 11 BOLI 151, 162 (1993) (Equitable estoppel may exist when
25 one party (1) has made a false representation; (2) the false representation is made with knowledge of the
 facts; (3) the other party is ignorant of the truth; (4) the false representation is made with the intention that
 it should be relied upon by the other party; and (5) the other party is induced to act upon it to that party’s

1 "Here, Respondents do not identify any false representation made by
2 BOLI or any other state agency upon which Respondents relied in refusing to
3 provide a wedding cake to Complainants. Although it is undisputed that the
4 Oregon Constitution did not recognize same-sex marriages in January 2013, the
5 affidavits of A. Klein and M. Klein establish that the refusal was because of
6 Respondents' religious convictions stemming from Biblical authority, not on their
7 reliance on Oregon's Constitutional provision rejecting same-sex marriage or
8 their attempt to enforce that provision.²⁵

9 "In conclusion, Respondents present no facts, articulate no legal theory,
10 and cite no case law to support their argument that BOLI should be estopped
11 from litigating this case based on the doctrine of estoppel. The Agency is entitled
12 to summary judgment on this issue.

13 "Respondents' Constitutional Defenses – Introduction

14 "Due to the number and complexity of Respondents' constitutional defenses,
15 the forum summarizes them, as plead in Respondents' answers, before
16 analyzing them. They include the following:

- 17 • "The statutes underlying the Charges are unconstitutional as applied in that
18 they violate Respondents' fundamental rights arising under the Oregon
19 Constitution by: (a) unlawfully violating Respondents' freedom of worship and
20 conscience under Article I, §2; (b) unlawfully violating Respondents' freedom
21 of religious opinion under Article I, §3; (c) unlawfully violating Respondents'
22 freedom of speech under Article I, §8; (d) unlawfully compelling Respondents
23 to engage expression of a message they did not want to express; (e)
24 unlawfully violating Respondents' privileges and immunities under Article I,
25 §20; and (f) violating Article XV, §5a.
- "The statutes underlying the Charges are facially unconstitutional under the
Oregon Constitution in that they violate Respondents' fundamental rights
arising under the Oregon Constitution to the extent there is no religious
exemption to protect or acknowledge the fundamental rights of Respondents
and persons similarly situated.

detriment); *In the Matter of Portland Electric & Plumbing Company*, 4 BOLI 82, 98-99 (1983) (estoppel only protects those who materially change their position in reliance on another's acts or representations).

²⁵ In A. Klein's affidavit, he states that, after Cryer told him "something to the effect 'Well, there are two brides, and their names are Rachel and Laurel,'" he "indicated we did not create wedding cakes for same-sex ceremonies because of our religious convictions, and they left the shop." In the same paragraph, he states "I believed that I was acting within the bounds of the Oregon Constitution and the laws of the State of Oregon which, at that time, explicitly defined marriage as the union of one man and prohibited recognition of any other type of union as marriage."

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- “The statutes underlying the Charges are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the State of Oregon under the Fourteenth Amendment, by: (a) unlawfully infringing on Respondents' right of conscience, right to free exercise of religion, and right to free speech; (b) unlawfully compelling Respondents to engage expression of a message they did not want to express; and (c) unlawfully denying Respondents' right to due process and equal protection of the laws.
 - “The statutes underlying the Charges are facially unconstitutional to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the State of Oregon under the Fourteenth Amendment.

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When both state and federal constitutional claims are raised, Oregon courts first evaluate the state claim. *Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981). The forum does likewise. For continuity's sake, the forum follows the analysis of each state claim with an analysis of the parallel federal claim. The forum only addresses the constitutionality of ORS 659A.403, since the forum has already concluded, on a subconstitutional level, that Respondents did not violate ORS 659A.406 and 659A.409.

15

“Oregon Constitution

16

“Article I, Sections 2 and 3: Freedom of worship and conscience; Freedom of religious opinion

17

18

“The forum addresses these interrelated defenses together. Article I, Sections 2 and 3 of the Oregon Constitution provide:

19

20

‘Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.’

21

22

‘Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religious [sic] opinions, or interfere with the rights of conscience.’

23

24

25

Respondents, who are Christians, have a sincerely held belief that the Bible ‘forbids us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples.’ They argue that Article I, sections 2 and 3 gave them the unfettered

1 right to refuse to provide a cake for Complainants' same-sex wedding ceremony
2 because doing so would have compelled them to act contrary to their sincerely
3 held religious beliefs.

4 "The forum first analyzes a series of Oregon Supreme Court cases
5 interpreting Article I, sections 2 and 3, then applies them to ORS 659A.403.
6 Beginning with *City of Portland v. Thornton*, 174 Or 508, 149 P2d 972 (1944), the
7 Oregon Supreme Court applied U.S. Supreme Court precedents under the First
8 Amendment to the U.S. Constitution when interpreting Article I, Sections 2 and 3
9 of the Oregon Constitution. In *Salem College & Academy, Inc. v. Emp. Div.*, 298
10 Or 471, 486-87, 695 P2d 25 (1985), an inter-denominational Christian school
11 argued that the state's requirement that it pay unemployment tax violated Article
12 I, sections 2 and 3. The court held that 'the state had not infringed upon the
13 school's right to religious freedom when all similarly situated employers in the
14 state were subject to [unemployment tax].' Significant to this case, the *Salem*
15 court interpreted Article I, sections 2 and 3 in light of the text and historical
16 context in which they arose, without reference to U.S. Supreme Court decisions
17 and without reference to its own prior decisions that had relied on federal First
18 Amendment precedent. *Id.* at 484.

19 "In 1986, in the next case involving the application of Article I, sections 2-
20 7, the Oregon Supreme Court made explicit what was implicit in *Salem College*.
21 In *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 369-70, 723 P2d 298, 306-
22 07 (1986), the court stated:

23 'This court sometimes has treated these guarantees and the First
24 Amendment's ban on laws prohibiting the free exercise of religion
25 (footnote omitted) as "identical in meaning," *City of Portland v. Thornton*,
174 Or. 508, 512, 149 P.2d 972 (1942); but identity of 'meaning' or even of
text does not imply that the state's laws will not be tested against the
state's own constitutional guarantees before reaching the federal
constraints imposed by the Fourteenth [sic] Amendment, or that verbal
formulas developed by the United States Supreme Court in applying the
federal text also govern application of the state's comparable clauses.'
(footnote omitted).

Since *Cooper*, the Oregon Supreme Court has decided a trio of cases
interpreting Article I, sections 2 and 3 that are relevant to the present case.

"In *Smith v. Employment Div., Dept. of Human Resources*, 301 Or 209,
721 P2d 445 (1986), *vacated on other grounds sub nom., Employment Div. v. Smith*,
485 US 660 (1988), a drug counselor was fired for misconduct based on
his ingestion of peyote, a sacrament in the Native American Church, during a
Native American Church service and denied unemployment benefits. Smith
claimed that the denial of unemployment benefits placed 'a burden on his
freedom to worship according to the dictates of his conscience' under the Oregon
Constitution, Article I, sections 2 and 3. Citing *Salem College*, the court held that

1 there was no violation of Article I, sections 2 and 3 because the statute and rule
2 defining misconduct were 'completely neutral toward religious motivations for
3 misconduct' and '[claimant] was denied benefits through the operation of a
4 statute that is neutral both on its face and as applied.' *Id.* at 215-16.

5 "In *Employment Div., Department of Human Resources v. Rogue Valley*
6 *Youth for Christ*, 307 Or 490, 498-99, 770 P2d 588 (1989), the court rejected a
7 religious organization's claim that payment of unemployment tax would violate its
8 rights under Article I, sections 2 and 3. Relying on *United States v. Lee*, 455
9 U.S. 252, 256-57, 102 S.Ct. 1051, 1054-55, 71 L.Ed.2d 127, 132 (1982), the
10 court stated:

11 'When governmental action is challenged as a violation of the Free
12 Exercise Clause of the First Amendment it must first be shown that the
13 governmental action imposes a burden on the party's religion. Assuming
14 that imposing unemployment payroll taxes on all religious organizations
15 will burden at least some of those groups, (although not necessarily their
16 freedom of belief or worship), that assumption "is only the beginning,
17 however, and not the end of the inquiry. Not all burdens on religious liberty
18 are unconstitutional. * * * The state may justify a limitation on religion by
19 showing that it is essential to accomplish an overriding governmental
20 interest." In the present case the State of Oregon has two governmental
21 interests which, when taken together, are sufficiently important to support
22 the burden on religion represented by unemployment payroll taxes.

23 'There are few governmental tasks as important as providing for the
24 economic security of its citizens. A strong unemployment compensation
25 system plays a significant role in providing this security. * * * [A]ny state's
unemployment tax must, as a practical matter, comply with FUTA's
(Federal Unemployment Tax Act) requirements or the state's employers
would face a double tax. Such a double tax would, in turn, create a very
undesirable business climate in the state. This, combined with Oregon's
constitutional interest in treating all religious organizations equally, creates
an overriding state interest in applying the unemployment payroll taxes to
all religious organizations. Our construction of the coverage of Oregon's
unemployment compensation taxation scheme does not offend the First
Amendment's Free Exercise Clause or Article I, section 3 of the Oregon
Constitution.' (internal citations and footnotes omitted)

26 *Rogue Valley*, at 498-99.

27 "In *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 903 P2d 351
28 (1995), the court considered a constitutional challenge to BOLI's rule that 'verbal
29 or physical conduct of a religious nature' in the workplace was unlawful if it had
30 'the purpose or effect of unreasonably interfering with the subject's work
31 performance or creating an intimidating, hostile or offensive working

1 environment.' *Id.* at 139. As Respondents note, the court introduced its
2 discussion of Article I, sections 2 and 3, with this sweeping statement:

3 'These provisions are obviously worded more broadly than the federal
4 First Amendment, and are remarkable in the inclusiveness and adamancy
5 with which rights of conscience are to be protected from governmental
6 interference.'

7 *Id.* at 146. The court then launched into a brief history of governmental
8 intolerance towards religion enforced by criminal laws in England before
9 summarizing its *Salem College* decision and concluding:

10 'A general scheme prohibiting religious discrimination in employment,
11 including religious harassment, does not conflict with any of the
12 underpinnings of the Oregon constitutional guarantees of religious
13 freedom identified in *Salem College*: It does not infringe on the right of an
14 employer independently to develop or to practice his or her own religious
15 opinions or exercise his or her rights of conscience, short of the
16 employer's imposing them on employees holding other forms of belief or
17 nonbelief; it does not discourage the multiplicity of religious sects; and it
18 applies equally to all employers and thereby does not choose among
19 religions or beliefs.

20 'The law prohibiting religious discrimination, including religious
21 harassment, honors the constitutional commitment to religious pluralism
22 by ensuring that employees can earn a living regardless of *their* religious
23 beliefs. The statutory prohibition against religious discrimination in
24 employment and, in particular, the BOLI rule at issue, when properly
25 applied, will promote the '[n]atural right' of employees to 'be secure in'
their 'worship [of] Almighty God according to the dictates of their own
consciences,' Or. Const. Art. I, § 2, and will not be a law controlling
religious rights of conscience or their free exercise.'

26 *Meltebeke* at 148-49. The court then moved on to a review of *Smith*, stating that
27 *Smith* stood for the principle that '[a] law that is neutral toward religion or
28 nonreligion as such, that is neutral among religions, and that is part of a general
29 regulatory scheme having no purpose to control or interfere with rights of
30 conscience or with religious opinions does not violate the guarantees of religious
31 freedom in Article I, sections 2 and 3.' *Meltebeke* at 149. The court held as
32 follows:

33 'We conclude that, under established principles of state constitutional law
34 concerning freedom of religion, discussed above, BOLI's rule is
35 constitutional on its face. The law prohibiting employment discrimination,
including the regulatory prohibition against religious harassment, is a law
that is part of a general regulatory scheme, expressly neutral toward

1 religion as such and neutral among religions. Indeed, its purpose is to
2 support the values protected by Article I, sections 2 and 3, not to impede
3 them.'

4 *Id.* at 150-51.

5 "Next, the *Meltebeke* court analyzed whether the BOLI rule, *as applied*,
6 violated Article I, sections 2 and 3. Following *Smith*, the court stated:

7 'Because sections 2 and 3 of Article I are expressly designed to prevent
8 government-created homogeneity of religion, the government may not
9 constitutionally impose sanctions on an employer for engaging in a
10 **religious practice** without knowledge that the practice has a harmful
11 effect on the employees intended to be protected. If the rule were
12 otherwise, fear of unwarranted government punishment would stifle or
13 make insecure the employer's enjoyment and exercise of religion,
14 seriously eroding the very values that the constitution expressly exempts
15 from government control.' (emphasis added)

16 *Id.* at 153. Based on facts set out in BOLI's Final Order, the court found that the
17 employer's complained-of conduct constituted a 'religious practice,' that the
18 employer did not know his conduct created an intimidating, hostile, or offensive
19 working environment,²⁶ and that the employer had established an affirmative
20 defense under Article I, sections 2 and 3 because BOLI's rule did not require that
21 the employer 'knew in fact that his actions in exercise of his religious practice had
22 an effect forbidden by the rule.'²⁷ *Id.* In contrast, here Respondents' affidavits
23 establish that their refusal to make a wedding cake for Complainants was not a
24 religious practice, but *conduct* motivated by their religious beliefs.²⁸ Accordingly,
25 *Meltebeke* does not aid Respondents.

26 See *In the Matter of James Meltebeke*, 10 BOLI 102, 105-07 (1992) (BOLI Commissioner's Findings of Fact included detailed findings that employer believed he was commanded to preach his beliefs to others under "any and all circumstances" or "he would be lost").

27 In a footnote, the court distinguished "a religious practice" from "conduct that may be motivated by one's religious beliefs" in stating: "Conduct that may be motivated by one's religious beliefs is not the same as conduct that constitutes a religious practice. The knowledge standard is considered here only in relation to the latter category. In this case, no distinction between those categories is called into play, because a fair reading of BOLI's revised final order is that BOLI found that all of Employer's religious activity respecting Complainant is part of Employer's religious practice." *Meltebeke* at 153, fn. 19.

28 Cf. *State v. Beagley*, 257 Or App 220, 226, 305 P3d 147 (2013) ("First, we conclude that, regardless of where the line between religious practice and religiously motivated conduct is drawn, there are some behaviors that fall clearly to one side or the other. A Catholic taking communion at mass is clearly and unambiguously engaging in a religious practice; on the other side of the line, allowing a child to die for lack of life-saving medical care is clearly and unambiguously—and, as a matter of law—conduct that may be motivated by one's religious beliefs.")

1 "The general principle that emerges from these cases is that a law that is
2 part of a general regulatory scheme, expressly neutral and neutral among
3 religions, is constitutional under Article I, sections 2 and 3. ORS 659A.403 is
4 such a law. Additionally, there is also "an overriding governmental interest"
5 present, explicitly expressed by Oregon's legislature in ORS 659A.003 in the
6 following words:

7 'The purpose of this chapter is * * * to ensure the human dignity of all
8 people within this state and protect their health, safety and morals from
9 the consequences of intergroup hostility, tensions and practices of
10 unlawful discrimination of any kind based on * * * sexual orientation * * *.'

11 "Respondents further contend that 'the statutes underlying the Charges
12 are facially unconstitutional under the Oregon Constitution in that they violate
13 Respondents' fundamental rights arising under the Oregon Constitution to the
14 extent there is no religious exemption to protect or acknowledge the fundamental
15 rights of Respondents and persons similarly situated.' There is no requirement
16 under the Oregon Constitution for such an exemption.²⁹ The exclusions and
17 prohibitions in ORS 659A.400(2) and 659A.403(2) do not lead to the conclusion
18 that the law is not neutral. Respondents' reliance on *Hobby Lobby*³⁰ fails
19 because *Hobby Lobby* was not decided on constitutional grounds, but decided
20 under the Religious Freedom Restoration Act ("RFRA") of 1993 and because the
21 RFRA does not apply to the states. *City of Boerne v. Flores*, 521 US 507 (1997).

22 "Based on the above, the forum finds ORS 659A.403 to be constitutional
23 with respect to Article I, sections 2 and 3 of the Oregon Constitution. With
24 respect to whether ORS 659A.403 is constitutional 'as applied,' *Meltebeke* does
25 not aid Respondents for the reason that Respondents' refusal to make a wedding
cake for Complainants was not a 'religious practice,' but conduct motivated by
their 'religious beliefs.' *Meltebeke* at 153.

29 The legislature did choose to enact certain exemptions to civil rights laws. Actions by bona fide churches or other religious institutions regarding housing and use of facilities are not unlawful practices if based on a bona fide religious belief about sexual orientation. Actions by bona fide churches or other religious institutions regarding employment are not unlawful practices if based on a bona fide religious belief about sexual orientation if the actions fall under one of three specific circumstances. Preference for employment applicants of a particular religion is not an unlawful practice by a bona fide church or other religious institution if it passes a three part test. The housing, use of facilities and employment exemptions do not apply to commercial or business activities of the church or institution. See ORS 659A.006. The existence of this statute, last amended in 2007, does not support Respondents' argument that the public accommodation statutes are unconstitutional because they do not contain such exemptions. Rather, it supports the Agency. If the legislature intended such exemptions be applied to the public accommodation statutes it would have enacted them.

30 *Burwell v. Hobby Lobby*, 573 US ___, 134 Sct 2751 (June 30, 2014).

1 "United States Constitution

2 "First Amendment: Unlawfully infringing on Respondents' right of
3 conscience and right to free exercise of religion

4 "Respondents contend that the First Amendment to the U.S. Constitution,
5 as applied to the State of Oregon under the Fourteenth Amendment, prohibits
6 BOLI from enforcing the provisions of ORS 659A.403 against Respondents
7 because that statute, on its face and as applied, unlawfully infringes on
8 Respondents' right of conscience and right to free exercise of religion. In
9 pertinent part, the First Amendment provides: 'Congress shall make no law
10 respecting an establishment of religion, or prohibiting the free exercise thereof * *
11 *,'

12 "Respondents argue that the forum should apply the 'strict scrutiny' test
13 set out by the U.S. Supreme Court in *Sherbert v. Verneer*, 374 US 398 (1963),
14 claiming that *Sherbert* and the U.S. Supreme Court's subsequent decisions in
15 *Wisconsin v. Yoder*, 406 US 205 (1972), *Thomas v. Review Board*, 450 US 707
16 (1981), *Pacific Gas and Elec. Co. v. Public Utilities Commissioner.*, 475 US 1
17 (1986), *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520 (1993),
18 *Hosanna-Tabor Ev. Lutheran Church & School v. EEOC*, 132 Sct 694 (2012),
19 *Gonzalez v. O Centro*, 546 US 418 (2006), *Brown v. Entertainment Merchants*
20 *Assn.*, 131 Sct 2729 (2011), and *Wooley v. Maynard*, 430 US 705 (1977) compel
21 the application of that test.

22 "The forum begins its analysis by noting that *Wooley*, *Pacific Gas*,
23 *Hosanna-Tabor*, *Gonzalez*, and *Brown* are inapplicable to Respondents' free
24 exercise claim for the following reasons:

- 25 • "*Wooley* and *Pacific Gas* involved religion but were decided exclusively
upon free speech grounds.
- "*Hosanna-Tabor* was an employment discrimination suit brought by the
EEOC on behalf of a minister challenging the church's decision to fire her
as an ADA violation in which the court held only that 'the ministerial
exception bars such a suit.' *Hosanna-Tabor* at 710.
- "*Gonzalez*, like *Hobby Lobby*, is inapplicable to this case because it was
decided under the RFRA and because the RFRA does not apply to the
states.
- "*Brown* was a free speech case that did not involve a free exercise claim.

26 "In *Sherbert*, a Seventh Day Adventist ('appellant') was denied
27 unemployment benefits because she refused to work on Saturdays based on her
28 religious beliefs. She appealed on the grounds that South Carolina's law violated
29 the free exercise clause of the First Amendment. The court held that the law was
30 constitutionally invalid because it imposed a burden on appellant's free exercise

1 of her religion and there was no 'compelling state interest enforced in the
2 eligibility provisions of the South Carolina statute [that] justifies the substantial
3 infringement of appellant's First Amendment rights.' *Id.* at 404, 406-07.

4 "In *Wisconsin*, the Supreme Court held that the state of Wisconsin could
5 not compel Amish students to attend school beyond the eighth grade when that
6 requirement conflicted with Amish religious beliefs, stating:

7 "[I]n order for Wisconsin to compel school attendance beyond the eighth
8 grade against a claim that such attendance interferes with the practice of a
9 legitimate religious belief, it must appear either that the State does not
10 deny the free exercise of religious belief by its requirement, or that there is
11 a state interest of sufficient magnitude to override the interest claiming
12 protection under the Free Exercise Clause."

13 "Relying on *Sherbert* and *Wisconsin*, the *Thomas* court reversed the
14 denial of unemployment benefits to a Jehovah's Witnesses who quit his job
15 because his job duties changed from working with sheet metal to manufacturing
16 turrets for tanks, a war-related task that he opposed based on his religious
17 beliefs. In upholding appellant's claim, the court stated:

18 'The mere fact that the petitioner's religious practice is burdened by a
19 governmental program does not mean that an exemption accommodating
20 his practice must be granted. The state may justify an inroad on religious
21 liberty by showing that it is the least restrictive means of achieving some
22 compelling state interest.'

23 *Thomas*, at 718.

24 "In 1990, the *Smith* case, upon which both the Agency and Respondents
25 rely, came before the court on appeal from the Oregon Supreme Court. The
Oregon Supreme Court held that the state's denial of unemployment benefits
based on the prohibition of sacramental peyote use was valid under the Oregon
Constitution but invalid under the free exercise clause in the First Amendment of
the U. S. Constitution based on *Sherbert* and *Thomas*. The U.S. Supreme Court
characterized the issue before it as follows:

"This case requires us to decide whether the Free Exercise Clause of the
First Amendment permits the State of Oregon to include religiously
inspired peyote use within the reach of its general criminal prohibition on
use of that drug, and thus permits the State to deny unemployment
benefits to persons dismissed from their jobs because of such religiously
inspired use."

Smith at 874. *Smith* argued that 'prohibiting the free exercise [of religion]'
includes requiring any individual to observe a generally applicable law that
requires (or forbids) the performance of an act that his religious belief forbids (or

1 requires).' *Id.* at 878. The court rejected Smith's argument, holding that the
2 State of Oregon, 'consistent with the free exercise clause,' could deny Smith
3 unemployment benefits when Smith's dismissal resulted from the use of peyote,
4 a use that was constitutionally prohibited under Oregon law. *Id.* at 890. The
5 court specifically declined to apply *Sherbert's* 'compelling interest' test, stating:

6 'Although, as noted earlier, we have sometimes used the *Sherbert* test to
7 analyze free exercise challenges to * * * laws, we have never applied the
8 test to invalidate one. We conclude today that the sounder approach, and
9 the approach in accord with the vast majority of our precedents, is to hold
10 the test inapplicable to such challenges. The government's ability to
11 enforce generally applicable prohibitions of socially harmful conduct, like
12 its ability to carry out other aspects of public policy, "cannot depend on
13 measuring the effects of a governmental action on a religious objector's
14 spiritual development." To make an individual's obligation to obey such a
15 law contingent upon the law's coincidence with his religious beliefs, except
16 where the State's interest is compelling - permitting him, by virtue of his
17 beliefs, "to become a law unto himself," - contradicts both constitutional
18 tradition and common sense.' (internal citations omitted)

19 *Id.* at 884-85. The court concluded that the 'right of free exercise does not
20 relieve an individual of the obligation to comply with a "valid and neutral law of
21 general applicability on the ground that the law proscribes (or prescribes)
22 conduct that his religion prescribes (or proscribes)."' *Id.* at 879, citing *United*
23 *States v. Lee*, 455 U.S. 252, at 263, n. 3. Related to one of Respondents'
24 arguments here, the court also discussed the concept of 'hybrid' cases and
25 concluded that *Smith* was not a 'hybrid' case.³¹

31 With respect to "hybrid claims," the *Smith* court stated: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*, 310 U.S., at 304-307, 60 S.Ct., at 903-905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 3251-52, 82 L.Ed.2d 462 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State

1 "In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520
2 (1993), the Church of the Lukumi Babalu Aye, Inc. ('church') and its congregants
3 practiced the Santeria religion, a religion that employed animal sacrifice as one of
4 its principal forms of devotion. During that devotion, animals are killed by cutting
5 their carotid arteries, then cooked and eaten following Santeria rituals. After the
6 church leased land in Hialeah and announced plans to establish a house of
7 worship and other facilities there, the city council held an emergency public
8 session and passed a resolution which noted city residents' 'concern' over
9 religious practices inconsistent with public morals, peace, or safety, and adopted
10 three substantive ordinances addressing the issue of religious animal sacrifice.

11 Using the *Smith* test, the Supreme Court found that the ordinances were neither
12 neutral³² nor of general applicability³³ and held that 'a law burdening religious
13 practice that is not neutral or not of general application' can only survive if there
14 is a 'compelling' governmental interest and the law is 'narrowly tailored in pursuit
15 of those interests.' *Id.* at 546-47.

16 "Respondents argue that the *Smith* 'neutrality' test should not be applied
17 here for two reasons. First, this is a 'hybrid' case in which the law 'substantially
18 burden[s] multiple rights combining religion and speech' that the *Smith* court
19 distinguished from cases that only involve free exercise claims. This argument
20 fails because neither Respondents' free exercise nor free speech claims are
21 independently viable³⁴ and the two claims together are not greater than the sum

22 [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.")
23 (footnotes omitted)

24 ³² The court examined the history behind the ordinances before concluding:

25 "In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the
suppression of religion. The pattern we have recited discloses animosity to Santeria adherents
and their religious practices; the ordinances by their own terms target this religious exercise; the
texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but
to exclude almost all secular killings; and the ordinances suppress much more religious conduct
than is necessary in order to achieve the legitimate ends asserted in their defense. These
ordinances are not neutral, and the court below committed clear error in failing to reach this
conclusion." *Lukumi* at 542.

26 ³³ In concluding that Hialeah's ordinances were not of "general applicability," the court found that the
27 ordinances "were drafted with care to forbid few killings but those occasioned by religious sacrifice," that
28 they did not prohibit and approved many kinds of "animal deaths or kills for nonreligious reason," that the
29 city's purported concern for public health resulting from improper disposal of animal carcasses only
30 addressed religious sacrifice and not disposal by restaurants or hunters, that more rigorous standards of
31 inspection were imposed on animals killed for religious sacrifice and eaten than animals killed by hunters
32 or fishermen, and that small commercial slaughterhouses were not subject to similar requirements related
33 to the city's "professed desire to prevent cruelty to animals and preserve the public health." *Id.* at 543-45.

34 See discussion in "free speech" section, *infra*.

1 of their parts.³⁵ Second, Respondents argue that ORS 659A.403 is neither
2 'neutral' nor of 'general applicability.' Applying the *Smith* test, the forum finds
3 that ORS 659A.403 is a 'valid and neutral law of general applicability.' As such, it
4 is constitutional under the First Amendment's free exercise clause, both facially
5 and as applied.

6 **"Oregon Constitution"**

7 **"Article I, Section 8: freedom of speech"**

8 "Article I, Section 8 of the Oregon Constitution provides:

9 **'Section 8. Freedom of speech and press.** No laws shall be
10 passed restraining the free expression of opinion, or restricting the
11 right to speak, write, or print freely on any subject whatever; but
12 every person shall be responsible for the abuse of this right.'

13 ORS 659A.403 provides, in pertinent part:

14 '(1) Except as provided in subsection (2) of this section, all persons within
15 the jurisdiction of this state are entitled to the full and equal
16 accommodations, advantages, facilities and privileges of any place of
17 public accommodation, without any distinction, discrimination or restriction
18 on account of * * * sexual orientation * * *.

19 * * * * *

20 '(3) It is an unlawful practice for any person to deny full and equal
21 accommodations, advantages, facilities and privileges of any place of
22 public accommodation in violation of this section.'

23 The issues considered by the forum are:

24 (1) Is ORS 659A.403 facially unconstitutional?

25 (2) If ORS 659A.403 is facially constitutional, is it unconstitutional by
requiring Respondents to participate in 'compelled speech' by making and
providing a wedding cake for Complainants?

"*State v. Robertson*, 293 Or 402, 649 P.2d 569 (1982), is the seminal
Oregon case in this area. *Robertson* involved an Article I, Section 8 challenge to
ORS 163.275, a statute defining the crime of coercion, in which 'speech [was] a

³⁵ See *Elane Photography, LLC v. Willock*, 309 P3d 53 (2013), cert. den. ___ US ___, 134 Sct 1787 (2014).

1 statutory element in the definition of the offense.’ *Id.* at 415. In *Robertson*, the
2 Oregon Supreme Court established a basic framework, comprised of three
3 categories, for determining whether a law violates Article I, section 8. That
4 framework was most recently described in *State v. Babson*, 355 Or 383, 391, 326
5 P3d 559, 566 (2014).

6 ‘Under the first category, the court begins by determining whether a law is
7 “written in terms directed to the substance of any ‘opinion’ or any ‘subject’
8 of communication.” If it is, then the law is unconstitutional, unless the
9 scope of the restraint is “wholly confined within some historical exception
10 that was well established when the first American guarantees of freedom
11 of expression were adopted and that the guarantees then or in 1859
12 demonstrably were not intended to reach.” If the law survives that inquiry,
13 then the court determines whether the law focuses on forbidden effects
14 and “the proscribed means [of causing those effects] include speech or
15 writing,” or whether it is “directed only against causing the forbidden
16 effects.” If the law focuses on forbidden effects, and the proscribed
17 means of causing those effects include expression, then the law is
18 analyzed under the second *Robertson* category. Under that category, the
19 court determines whether the law is overbroad, and, if so, whether it is
20 capable of being narrowed. If, on the other hand, the law focuses only on
21 forbidden effects, then the law is in the third *Robertson* category, and an
22 individual can challenge the law as applied to that individual’s
23 circumstances.’ (internal citations omitted)

24 **“Robertson Category One**

25 “In analyzing a law under *Robertson’s* first category, Oregon courts have
looked to the text of the law to see whether it expressly regulates expression.
Babson at 395. In *Babson*, the issue was the constitutionality of a guideline
adopted by the Legislation Administration Committee (‘LAC’) that prohibited all
overnight use of the capitol steps, including protests like defendants’ vigil.
Defendants and the LAC agreed that a person could violate the guideline without
engaging in expressive activities, if, for example, a person used the steps as a
shortcut while crossing the capitol grounds after 11:00 p.m. when there were no
hearings or floor sessions taking place. *Id.* at 396-97. The court held that the
guideline was not unconstitutional under *Robertson’s* first category because it
was not ‘written in terms directed to the substance of any “opinion” or any
“subject” of communication.’ *Id.* ORS 659A.403, like the LAC guideline in
Babson, is not “written in terms directed to the substance of any ‘opinion’ or any
“subject” of communication.” Rather, it is a law focused on proscribing the
pursuit or accomplishment of a forbidden result – in this case, discrimination by
places of public accommodations against individuals belonging to specifically
enumerated protected classes. As such, it is not susceptible to a *Robertson*
category one facial challenge.

1 "Respondents argue that ORS 659A.403 expressly regulates expression
2 because the word 'deny' in section (3) shows that, when properly interpreted, 'the
3 statute prohibits *communication* that services are being denied for a prohibited
4 reason, which implicates both speech and opinion.' (emphasis in original).
Under Respondents' expansive interpretation, all laws implicating any form of
communication whatsoever would be facially unconstitutional under Article I,
Section 8. This is not what the court held in *Robertson and Babson*.³⁶

5 "Based on the above, the forum concludes that ORS 659A.403 is not
6 subject to a *Robertson* category one Article I, Section 8 facial challenge.

7 "*Robertson Category Two*

8 "A law falls under the second category of *Robertson* if it is 'directed in
9 terms against the pursuit of a forbidden effect' and 'the proscribed means [of
10 causing that effect] include speech or writing.' *Babson* at 397, quoting *Robertson*
11 at 417-18. Oregon courts examine a statute in the second category for
12 'overbreadth' to determine if 'the terms of [the] law exceed constitutional
boundaries, purporting to reach conduct protected by guarantees such as * * *
13 [A]rticle I, section 8. * * * If a statute is overbroad, the court then must determine
14 whether it can be interpreted to avoid such overbreadth.' *Id.* at 397-98, quoting
15 *Robertson* at 410, 412.

16 "In *State v. Illig Renn*, 341 Or 228 (2006), the defendant challenged as
17 overbroad a statute that made it a crime to '[r]efuse[] to obey a lawful order by
18 [a] peace officer' if the person knew that the person giving the order was a peace
19 officer. In addressing the state's argument that the statute was not subject to an

20 ³⁶ See *State v. Robertson*, 293 Or 402, 416-417, 649 P.2d 569 (1982) ("As stated above, article I, section
21 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either
22 because that content itself is deemed socially undesirable or offensive, or because it is thought to have
23 adverse consequences. * * * It means that laws must focus on proscribing the pursuit or accomplishment
24 of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a
25 means to some other legislative end.") See also *State v. Garcias*, 296 Or 688, 697, 679 P.2d 1354, 1359
(1984) (menacing statute held constitutional under *Robertson* category one analysis even though it
prohibited threatening words because "[t]he fact that the harm may be brought about by use of words,
even by words unaccompanied by a physical act, does not alter the focus of the statute, which remains
directed against attempts to cause an identified harm, rather than prohibiting the use of words as such");
State v. Moyle, 299 Or 691, 701, 705 P.2d 740 (1985)(statute criminalizing telephonic or written threats
held constitutional under *Robertson* category one analysis because "the effect that it proscribes, causing
fear of injury to persons or property, merely mirrors a prohibition of words themselves"); *City of Eugene v.*
Miller, 318 Or 480, 489, 871 P.2d 454 (1994)(defendant, who sold joke books on the city sidewalk, was
convicted of violating an ordinance prohibiting vendors from selling merchandise on city sidewalks;
ordinance held valid under first category of *Robertson* because it banned the sale of all expressive
material on the sidewalk and therefore was content neutral); *State v. Illig-Renn*, 341 Or 228, 237, 142 P.3d
62 (2006)("the fact that persons seek to convey a message by their conduct, that words accompany
their conduct, or that the very reason for their conduct is expressive, does not transform prohibited
conduct into protected expression or assembly").

1 overbreadth challenge because it did not 'expressly' restrict expression, the court
2 stated that a statute is subject to a facial challenge under the first or second
3 category of *Robertson* if it 'expressly or obviously proscribes expression,' leaving
4 statutes with '[m]arginal and unforeseen applications to speech and expression'
5 to as-applied challenges under the third category.³⁷ *Illig-Renn*, at 234. The
6 court went on to state that facial challenges generally would not be permitted 'if
7 the statute's application to protected speech [was] not traceable to the statute's
8 express terms.' *Id.* at 236. Based on that interpretation of Article I, section 8, the
9 court concluded that the defendant could challenge the statute that prohibited
10 interfering with a peace officer only as applied, under the third category of
11 *Robertson*, and not on its face, under the other two categories. *Id.* at 237.

12
13 "Respondents' argument resembles defendants' argument in *Babson*,
14 which the court characterized in the following words:

15 'Defendants instead argue that, even if the [law] targets some harm—
16 rather than targeting expression—the [law] has an "obvious and
17 foreseeable" application to speech, and it is overbroad. That is,
18 defendants argue that the text of the statute does not have to refer to
19 expression or include expression as an element to fall under category two,
20 as long as it has an obvious application to expression.'

21
22 *Babson* at 398. The *Babson* court rejected this argument, stating:

23 'We agree with the state that the statement in *Robertson* on which
24 defendants rely does not extend Article I, section 8, overbreadth analysis
25 to every law that the legislature enacts. When expression is a proscribed
means of causing the harm prohibited in a statute, it is apparent that the
law will restrict expression in some way because expression is an element
of the law. For that type of law, the legislature must narrow the law to
eliminate apparent applications to *protected* expression. *See Robertson*,
293 Or. at 417–18, 649 P2d 569 (noting that when a law focused on
harmful effects includes expression as a proscribed means of causing
those effects, the court must determine whether the law "appears to reach
privileged communication" (emphasis added)). However, if expression is
not a proscribed means of causing harm, and is not described in the terms
of the statute, the possible or plausible application of the statute to
protected expression is less apparent. That is, in the former situation,
every time the statute is enforced, expression will be implicated, leading to
the possibility that the law will be considered overbroad; in the latter
situation, the statute may never be enforced in a way that implicates
expression, even if it is possible, or even apparent, that it *could* be applied
to reach protected expression. When a law does not expressly or

³⁷ The court referred to this type of statute as a "speech-neutral" statute, one that "doe[s] not by its terms forbid particular forms of expression." *Illig-Renn* at 233-34.

1 obviously refer to expression, the legislature is not required to consider all
2 apparent applications of that law to protected expression and narrow the
3 law to eliminate them. The court's statement in *Robertson*, on which
4 defendants rely, does not extend the second category overbreadth
5 analysis to statutes that do not, by their terms, expressly or obviously refer
6 to protected expression.'

7 *Id.* at 400. The *Babson* court went on to explain that 'obviously,' as used in the
8 last sentence of the above-quoted statement, did not 'extend Article I, section 8,
9 scrutiny [under the first two *Robertson* categories] to any statute that could have
10 an apparent application to speech; rather, the [*Robertson*] court used the word
11 'obviously' to make it clear that creative wording that does not refer directly to
12 expression, but which could *only* be applied to expression, would be scrutinized
13 under the first two categories of *Robertson*.' *Id.* at 403. The *Babson* court
14 concluded its *Robertson* category two analysis by stating:

15 'Similarly, here, although the guideline does not directly refer to speech,
16 the guideline does have apparent applications to speech, as defendants
17 contend. A restriction on use of the capitol steps will prevent people like
18 defendants from protesting or otherwise engaging in expressive activities
19 on the capitol steps overnight. That fact alone, however, does not subject
20 the guideline to Article I, section 8, scrutiny under the second category of
21 *Robertson*. The guideline is not simply a mirror of a prohibition on words.
22 The guideline also bars skateboarding, sitting, sleeping, walking, storing
23 equipment, and all other possible uses of the capitol steps during certain
24 hours. Thus, because the guideline does not expressly refer to expression
25 as a means of causing some harm, and it does not "obviously" prohibit
expression within the meaning of *Moyle*, it is not subject to an overbreadth
challenge under the second category of *Robertson*.'

Babson at 403-04. This case, like *Babson* and *Illig-Renn*, does not involve a
statute that 'obviously' prohibits expression. Rather, it is a 'speech-neutral'
statute as described in *Illig-Renn*.³⁸ Furthermore, the legislature's use of the
challenged word 'deny' in ORS 659A.403 is contextually similar to the challenged
word 'refuse' in *Illig-Renn*, as both terms prohibit specific actions that may involve
expression without specifying a particular form of expression. In conclusion, the
forum finds that ORS 659A.403 is not subject to Article I, section 8 overbreadth
scrutiny as set out in *Robertson*, category two.

³⁸ Cf. *State v. Babson*, 355 Or 383, 405, 326 P3d 559, 566 (2014), quoting *Miller* at 489-90 (*Robertson* category two analysis did not apply because contested ordinance "was directed at a harm – street and sidewalk congestion – that the city legitimately could seek to prevent, and did not, 'by [its] terms, purport to proscribe speech or writing as a means to avoid a forbidden effect.'")

1 ***“Robertson Category Three Does Not Apply to Respondents’ claim of***
2 ***‘compelled speech.’***

3 “Respondents contend that their Article I, section 8, rights were violated by
4 the Agency’s application of ORS 659A.403 because that application, in requiring
5 them to provide a wedding cake to Complainants, ‘unlawfully compel[s]
6 Respondents to engage in expression of a message they did not want to
7 express.’ The *Robertson* framework was developed in a series of cases
8 involving prohibited speech, and there are no Oregon cases that have come to
9 the forum’s attention in which compelled speech was the issue. However, the
10 U.S. Supreme Court has addressed that issue in a line of cases involving the
11 First Amendment and compelled speech. In the absence of Oregon case law,
12 the forum turns to those decisions for guidance.

13 “As a preliminary matter, the forum addresses Respondents’ argument,
14 made in their response to the Agency’s cross-motions for summary judgment,
15 that the ‘forbidden effect’ involved in a *Robertson* category three analysis of the
16 constitutionality of ORS 659A.403 is ‘Respondents’ choice not to be involved in
17 Complainants’ same-sex ceremony, which is alleged to be a denial of services
18 based on sexual orientation.’ Respondents argue that their ‘choice not to be
19 involved’ cannot be a ‘forbidden effect’ because Article XV, section 5a of the
20 Oregon Constitution expressly prohibited legal recognition of same-sex
21 marriages in January 2013,³⁹ making it ‘clear [that] opposition to same-sex
22 marriage is not a ‘forbidden effect.’” Respondents misread *Babson*, *Robertson*,
23 and the statute. The ‘forbidden effect’ under ORS 659A.403 is not its impact on
24 Respondents, but Respondents’ denial of services to Complainants based on
25 their sexual orientation. Respondents were not asked to issue a marriage
license, perform a wedding ceremony, or in any way legally recognize
Complainants’ planned same-sex wedding in contravention of Article XV, Section
5a. Furthermore, there is no evidence in the record, as submitted for summary
judgment, that they communicated to Respondents where they intended to be
married, that they intended to be married in the state of Oregon, or, for that
matter, that Complainants were ever married.⁴⁰

19 “The right to refrain from speaking was established in *West Virginia State*
20 *Board of Education v. Barnette*, 319 U.S. 624 (1943), in which the U. S. Supreme

21 _____
22 ³⁹ In January 2013, Article XV, section 5a, of the Oregon Constitution provided: “It is the policy of Oregon,
23 and its political subdivisions, that only a marriage between one man and one woman shall be valid or
24 legally recognized as a marriage.”

25 ⁴⁰ The forum takes judicial notice that a law granting full marriage rights for same-sex couples in the state
of Washington, which is immediately adjacent to the State of Oregon and only separated from the City of
Portland by the Columbia River, took effect on December 6, 2012. See Revised Code of Washington
26.04.010. A. Klein was aware of that on January 17, 2013, as shown by his statement during the
Perkins interview, quoted in Finding of Fact #14.

1 Court held that the State of West Virginia could not constitutionally require
2 students to salute the American flag and recite the Pledge of Allegiance. The
3 Court held that a state could not require 'affirmation of a belief and an attitude of
4 mind,' noting that 'the right of freedom of thought protected by the First
5 Amendment against state action includes both the right to speak freely and the
6 right to refrain from speaking at all.' *Id.* at 633-34.

7 "In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), the
8 Court considered whether a Florida statute that required newspapers that
9 'assailed' the 'personal character or official record' of any political candidate to
10 give that candidate the 'right to demand that the newspaper print, free of cost to
11 the candidate, any reply the candidate may make to the newspaper's charges,'
12 and to print the reply 'in as conspicuous a place and in the same kind of type as
13 the charges which prompted the reply.' *Id.* at 243. The Court found the statute
14 was unconstitutional because it deprived the newspaper and its editors of the
15 fundamental right to decide what to print or omit. *Id.* at 258.

16 "In 1977, the Court was asked to decide whether the State of New
17 Hampshire could constitutionally enforce criminal sanctions against persons who
18 covered the motto 'Live Free or Die' on their passenger vehicle license plates
19 because that motto was repugnant to their moral and religious beliefs. *Wooley v.*
20 *Maynard*, 430 U.S. 705 (1977). In its discussion of the nature of compelled
21 speech, the Court noted that New Hampshire's statute 'in effect requires that
22 appellees used their private property as a "mobile billboard" for the State's
23 ideological message or suffer a penalty' and that driving an automobile was a
24 'virtual necessity for most Americans.' *Id.* at 715. The Court found New
25 Hampshire's statute unconstitutional, holding as follows:

'We are thus faced with the question of whether the State may
constitutionally require an individual to participate in the dissemination of
an ideological message by displaying it on his private property in a
manner and for the express purpose that it be observed and read by the
public. We hold that the State may not do so.'

Id. at 713.

"In 1986, the Court was asked to decide whether a regulated public utility
company that had traditionally distributed a company newsletter in its quarterly
billing statements was required to enclose newsletters published by TURN, a
group expressing views opposite to the utility, in the same billing statements.
Pacific Gas & Electric Co. v. Public Utilities Commission of California ("PUC"),
475 U.S. 1 (1986). The Court held that the PUC's requirement unconstitutionally
compelled Pacific Gas to accommodate TURN's speech by requiring it to
disseminate messages hostile to Pacific's own interests. *Id.* at 20-21.

1 "Hurley v. Irish-American GLIB, 515 U.S. 557 (1995), presented the
2 question of whether private citizens in Massachusetts who organized a St.
3 Patrick's Day parade were required to include GLIB, a group 'celebrat[ing] its
4 members' identity as openly gay, lesbian, and bisexual descendants of the Irish
5 immigrants,' thereby imparting a message that the organizers did not wish to
6 convey among the marchers. *Id.* at 570. The requirement was based on a
7 provision of Massachusetts' public accommodation law that included a prohibition
8 on discrimination on the basis of sexual orientation. The Court found that a
9 parade is a form of expression, stating that a 'parade' indicates 'marchers who
10 are making some sort of collective point, not just to each other but to bystanders
11 along the way: Indeed, a parade's dependence on watchers is so extreme that
12 nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or
13 demonstration receives no media coverage, it may as well not have happened."
14 *Id.* at 568. The Court also determined that:

9 [GLIB]'s participation as a unit in the parade was equally expressive.
10 GLIB was formed for the very purpose of marching in it, as the trial court
11 found, in order to celebrate its members' identity as openly gay, lesbian,
12 and bisexual descendants of the Irish immigrants, to show that there are
13 such individuals in the community, and to support the like men and women
14 who sought to march in the New York parade. The organization distributed
15 a fact sheet describing the members' intentions, and the record otherwise
16 corroborates the expressive nature of GLIB's participation. In 1993,
17 members of GLIB marched behind a shamrock-strewn banner with the
18 simple inscription "Irish American Gay, Lesbian and Bisexual Group of
19 Boston." GLIB understandably seeks to communicate its ideas as part of
20 the existing parade, rather than staging one of its own.' (internal citations
21 omitted)

16 *Id.* at 570. The Court further determined that '[s]ince every participating unit
17 affects the message conveyed by the private organizers, the state courts'
18 application of the statute produced an order essentially requiring petitioners to
19 alter the expressive content of their parade'⁴¹ and held the state's application of
20 the statute unconstitutional because 'this use of the State's power violates the
21 fundamental rule of protection under the First Amendment, that a speaker has
22 the autonomy to choose the content of his own message.' *Id.* at 573.

21 "In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ('FAIR'),
22 547 U.S. 47 (2006), a group of law school associations objected to the
23 application of the Solomon Amendment, which required campuses receiving
24 federal funds to provide equal access to military recruiters. The Court held that
25 there was no First Amendment violation, distinguishing *Hurley*, *Tornillo*, and
Pacific Gas because in those cases 'the complaining speaker's own message
was affected by the speech it was forced to accommodate' or 'interfere[d] with a

⁴¹ *Hurley v. Irish-American GLIB*, 515 U.S. 557, 572-73 (1995).

1 speaker's desired message.' *Id.* at 63-64. The Court noted that '[c]ompelling a
2 law school that sends scheduling e-mails for other recruiters to send one for a
3 military recruiter is simply not the same as forcing a student to pledge allegiance,
4 or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it
5 trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.' *Id.*
6 at 62. Of additional significance to this case, the Court stated:

7 'Nothing about recruiting suggests that law schools agree with any speech
8 by recruiters, and nothing in the Solomon Amendment restricts what the
9 law schools may say about the military's policies. We have held that high
10 school students can appreciate the difference between speech a school
11 sponsors and speech the school permits because legally required to do
12 so, pursuant to an equal access policy.'

13 *Id.* at 65.

14 'Wooley and *Barnette* do not support Respondents because Respondents
15 are under no compulsion to publicly 'speak the government's message'⁴² in an
16 affirmative manner that demonstrates their support for same-sex marriage.
17 Unlike the laws at issue in *Wooley* and *Barnette*, ORS 659A.403 does not require
18 Respondents to recite or display any message. It only mandates that if
19 Respondents operate a business as a place of public accommodation, they
20 cannot discriminate against potential clients based on their sexual orientation.
21 *Elane Photography* at 64.

22 'Tornillo and *Pacific Gas* are distinctly different from this case. In both
23 cases, the government commandeered a speaker's means of reaching its
24 audience and required the speaker to disseminate an opposing point of view.
25 Here, the state has not compelled Respondents to publish or distribute anything
expressing a view.

'Hurley is distinguishable because Respondents' provision of a wedding
cake for Complainants was not for a public event, but for a private event.
Whatever message the cake conveyed was expressed only to Complainants and
the persons they invited to their wedding ceremony, not to the public at large. In
addition, the forum notes that, whether or not making a wedding cake may be
expressive, the operation of Respondents' bakery, including Respondents'
decision not to offer services to a protected class of persons, is not. *Elane
Photography* at 68.

'Finally, *Rumsfeld* does not aid Respondents because it rejected the law
schools' arguments that they were forced to speak the government's message

⁴² *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

1 and that they were required to host the recruiters' speech in a way that violated
2 compelled speech principles. *Rumsfeld* at 64-65.

3 "For the reasons stated above, the forum concludes that the application of
4 ORS 659A.403 to Respondents so as to require them to provide a wedding cake
5 for Complainants does not constitute compelled speech that violates Article I,
6 section 8 of the Oregon Constitution.

7 **"United States Constitution**

8 **"First Amendment: Unlawfully infringing on Respondents' right to free**
9 **speech.**

10 "Respondents contend that the First Amendment to the U. S. Constitution,
11 as applied to the State of Oregon under the Fourteenth Amendment, prohibits
12 BOLI from enforcing the provisions of ORS 659A.403 against Respondents
13 because that statute unlawfully infringes on Respondents' free speech rights. In
14 pertinent part, the First Amendment provides: 'Congress shall make no law * * *
15 abridging the freedom of speech * * *.'

16 "Based on the discussion in the previous section, the forum concludes that
17 the requirement in ORS 659A.403 that Respondents bake a wedding cake for
18 Complainants is not 'compelled speech' that violates the free speech clause of
19 the First Amendment to the U. S. Constitution.

20 **"CONCLUSION**

21 "Respondents' motion for summary judgment is **GRANTED** with respect to
22 the Agency's allegations in the Amended Formal Charges that Respondent M.
23 Klein violated ORS 659A.403 by denying full and equal accommodations,
24 advantages, facilities and privileges to Complainants Rachel Cryer and Laurel
25 Bowman-Cryer.

"Respondents' motion for summary judgment is **GRANTED** with respect to
the Agency's allegations in the Amended Formal Charges that Respondent A.
Klein violated ORS 659A.406.

"Respondents' motion for summary judgment is **GRANTED** with respect to
the Agency's allegations in the Amended Formal Charges that Respondents
violated ORS 659A.409.

"The Agency's cross-motion for summary judgment is **GRANTED** with
respect to the Agency's allegations in the Amended Formal Charges that
Respondent A. Klein violated ORS 659A.403 by denying the full and equal
accommodations, advantages, facilities and privileges of a place of public
accommodation to Complainants Rachel Cryer and Laurel Bowman-Cryer based
on their sexual orientation.

1 “The Agency’s cross-motion for summary judgment is **GRANTED** with
2 respect to the Agency’s allegations in the Formal Charges that Respondents A.
3 Klein and M. Klein are jointly and severally liable for A. Klein’s violation of ORS
4 659A.403.

5 “The Agency’s cross-motion for summary judgment is **GRANTED** with
6 respect to Respondents’ affirmative defenses.

7 “The Forum has **NO JURISDICTION** to adjudicate the counterclaims
8 raised by Respondents in paragraphs ##31-42 in Respondents’ Amended
9 Answers.

10 **“Case Status**

11 “The hearing will convene as currently scheduled. The scope of the
12 evidentiary portion of the hearing will be limited to the damages, if any, suffered
13 by Complainants as a result of A. Klein’s ORS 659A.403 violation.

14 **IT IS SO ORDERED”**

15 (Ex. X65)

16 29) On February 4, 2015, the ALJ granted the Agency’s second motion for a
17 protective order. (Ex. X65)

18 30) On February 5, 2015, the ALJ granted Respondents’ renewed motion to
19 depose Complainants. The ALJ’s interim order read as follows:

20 **“Introduction**

21 “On January 15, 2015, Respondents filed a renewed motion to depose
22 Complainants. On January 22, 2015, the Agency timely filed objections.
23 Respondents’ motion is based on part on their assertion that (1) the 25 additional
24 interrogatories they were allowed to serve on the Agency pursuant to my
25 September 29, 2014, interim order that allowed Respondents to serve additional
interrogatories as a potential means of eliminating the need for a deposition, (2)
coupled with the Agency’s responses to Respondents’ prior interrogatories and
the Agency’s answers to the 25 additional interrogatories, (3) are inadequate to
address Complainants’ damages, leaving Respondents substantially prejudiced
as a result.

 “On January 22, 2015, the Agency filed objections, arguing that
Respondents’ have not clearly articulated how they will be substantially
prejudiced in the absence of depositions, that Complainants should not be

1 subjected to depositions 'due to Respondents' inability to adequately craft their
2 interrogatories,' and that Respondents' 'discovery tactics are an abuse of
3 process.'

3 "Discussion

4 "On October 14, 2014, the Agency complied with the forum's September
5 25, 2014, discovery order requiring the Agency to answer Respondents' August
6 5, 2014, interrogatory seeking a detailed explanation of Complainants' emotional,
7 physical and mental suffering 'caused by Respondents' actions. The Agency's
8 interrogatory response listed a total of 88 discrete types of harm suffered by
9 Complainant Cryer and 90 discrete types of harm suffered by Complainant
10 Bowman-Cryer. In support of their motion, Respondents argue that:

11 [The listed symptoms], some of which are inconsistent with each other,
12 raise more questions than they answer. Respondents attempted to
13 address some of these nearly 200 symptoms in their 25 interrogatories,
14 but were unable to even begin to address the questions raised by this
15 exhaustive list of symptoms, much less get clear answers from
16 Complainants.'

17 Among its objections to Respondents' motion for depositions, the Agency asserts
18 that 'many of the listed symptoms are interrelated to one another and would
19 hardly require Respondents to explore them individually.' The Agency further
20 notes that Respondents will have an adequate opportunity to 'cross-examine
21 Complainants on all symptoms at hearing.'

22 "To more clearly illustrate the points raised by Respondents and the
23 Agency, the types of harm alleged by each Complainant are reprinted below in
24 their entirety. As will be seen, they permeate all aspects of Complainants' lives.

25 Complainant Rachel Cryer

[88 symptoms listed]

Complainant Laurel Bowman-Cryer

[90 symptoms listed]

OAR 839-050-0200(3) governs depositions in this forum. It provides:

'Depositions are strongly disfavored and will be allowed only when the
requesting participant demonstrates that other methods of discovery are
so inadequate that the participant will be substantially prejudiced by the
denial of the motion to depose a particular witness.'

1 "Since OAR 839-050-0200(3) was adopted, the forum has been extremely
2 reluctant to grant depositions, and has uniformly denied respondents' requests
3 for depositions when respondents have not first sought informal discovery
4 through interrogatories. See, e.g., *In the Matter of Oak Harbor Freight Lines,*
5 *Inc.*, 33 BOLI 1 (2014), *In the Matter of Columbia Components, Inc.*, 32 BOLI 257
6 (2013), *In the Matter of Blachana, LLC*, 32 BOLI 220 (2013), *In the Matter of*
7 *From the Wilderness, Inc.*, 30 BOLI 227 (2009). The only occasion when the
8 forum has allowed a deposition to take place was in the *Columbia Components*
9 case, under the following circumstances:

6 'During the hearing it became clear that Complainant possessed
7 documents either requested by Respondent and/or set out in the [ALJ's]
8 discovery order that Complainant did not provide until Respondent was
9 able to ascertain existence of those documents during Complainant's
10 testimony * * * [and] that Complainant had been less than forthcoming with
11 regard to the existence of those documents.'

10 "In this case, Respondents have satisfied the forum's requirement of
11 seeking discovery by means of informal request before requesting a deposition.
12 Before initially requesting a deposition, Respondents made informal document
13 discovery requests, requested admissions, and served 25 interrogatories on the
14 Agency, all before Respondents received the Agency's interrogatory answer
15 setting out the alleged 178 types of harm suffered by Complainants as a result of
16 Respondents' actions.

14 "On September 25, 2014, the forum granted Respondents' motion to
15 depose Complainants, with the scope of the depositions limited to 'Complainants'
16 claim for damages.' That ruling was predicated on my conclusion that
17 Respondents '[had] sought informal discovery on the issue of damages through
18 other methods and do not have adequate information on damages.'

18 "At a prehearing conference held on September 29, 2014, discovery was
19 discussed at length. As noted earlier, it was agreed that Respondents would be
20 allowed to serve 25 additional interrogatories on the Agency as a potential
21 means of eliminating the need for a deposition. On October 14, 2014, the
22 Agency sent Respondents its interrogatory response listing the 178 types of
23 alleged harm. In the absence of depositions, that left 25 interrogatories for
24 Respondents to explore those 178 listed harms. On December 31, 2014,
25 Respondents served the interrogatories that were allowed in my September 29,
2014, ruling. The Agency timely responded on January 13, 2015.

23 "Since Respondents filed their motion on January 15, 2015, the Agency
24 was granted summary judgment as to Respondents' alleged ORS 659A.403
25 violation. In the interim order granting summary judgment, I ruled that the only
evidentiary issue at hearing will be the amount of damages, if any, to which
Complainants are entitled. The amount of damages sought on Complainants'

1 behalf is 'at least \$75,000' for each Complainant. In addition, it appears from the
2 Agency's February 3, 2015, filing in response to the forum's inquiry regarding a
3 Protective Order sought by the Agency that the Agency may intend to present
4 evidence at hearing that Complainants are entitled to damages for mental and
5 emotional suffering up to the present day, more than two years after the date of
6 discrimination.

7 "I have reviewed prior BOLI Final Orders in which damages were awarded
8 for emotional and mental suffering and find that this case stands well apart from
9 all its predecessors in the exhaustive list of harms alleged by Complainants for
10 which the Agency seeks damages. No other case comes even remotely close.
11 In defending themselves, Respondents have a right to inquire into each type of
12 harm alleged by Complainants to determine the extent of the harm and whether
13 Complainants' physical, mental, and emotional suffering was caused, at least in
14 part, if not in whole, by events and circumstances that were unrelated to Aaron
15 Klein's ORS 659A.403 violation. Based on the sheer number and variety of
16 types of alleged harm, there is no practical way Respondents can accomplish an
17 effective inquiry using interrogatories. I find that Respondents will be
18 substantially prejudiced if they are not allowed to depose Complainants.

19 "Based on the above, Respondents' motion to depose Complainants is
20 **GRANTED**, with the following limitations:

21 '1. Respondents are allowed a maximum of three hours, not counting
22 breaks, to question each Complainant.

23 '2. The Agency may choose where the depositions are to be
24 conducted and is instructed to cooperate in making Complainants
25 available for deposition as soon as practical, given that the hearing is
scheduled to begin next month. If the Agency and Respondents cannot
agree on a date, they are instructed to contact me and I will choose a
date. I do not intend to postpone this hearing again because of a
discovery issue.

'3. Respondents are responsible for any costs associated with
conducting the deposition. Respondents and Agency must each pay for
their own copy of the transcript if a transcript is prepared.

'4. Respondents and the Agency are ordered to notify me at least
seven days in advance of the date and time for the depositions so that I
can be available if necessary. As of today, the only dates I will be
unavailable between now and March 1 are the afternoon of February 11
and all day February 16.

5. The scope of Respondents' questioning is limited to damages.
Respondents may not engage in a fishing expedition by inquiring into

1 matters totally irrelevant to the issue of physical, emotional, and mental
2 suffering.”

3 (Ex. X72)

4 31) On February 11, 2015, “in view of the national attention and attendant
5 publicity these cases have already received and the likelihood that Complainants will be
6 questioned about the protected health information in the records produced under the
7 protective order,” the ALJ issued a protective order regarding Complainants'
8 depositions. The order prohibited the deposition transcripts or notes made of the
9 deposition testimony from being made available to “non-qualified” persons or from being
10 used “for any other purpose than the preparation for litigation of [the] proceeding.” (Ex.
11 X74)

12 32) On February 17, 2015, Respondents filed a motion for reconsideration of
13 the ALJ's ruling on summary judgment. The ALJ denied Respondents' motion. (Exs.
14 X73, X75, X79)

15 33) On February 23, 2015, the Agency issued Second Amended Formal
16 Charges in both cases. Respondents filed answers on February 27, 2015. (Exs. X78,
17 X82)

18 34) Respondents and Agency timely submitted case summaries. (Exs. X76,
19 77)

20 35) On February 26, 2015, Respondents filed a motion for discovery sanctions
21 that was opposed by the Agency. On March 5, 2015, the ALJ ruled on Respondents'
22 motion as follows:

23 “On February 26, 2015, Respondents filed a motion requesting discovery
24 sanctions related to the Agency's failure to provide discovery subject to my
25 Discovery Order dated September 25, 2014, until February 24, 2015. The
Agency filed a response on February 27, 2015, and Respondents supplemented
their motion on March 3, 2015.

1 "The discovery in question relates to my September 25, 2014, Order
requiring that the Agency provide Respondents with:

2 'all posting by Complainants to any social media website, including but not
3 limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and
4 SnapChat from January 2013 to the present that contain comments about
the facts of this case, comments about Respondents, or comments that
5 relate to their alleged damages.'

6 "Specifically, Respondents allege that on February 24, 2015, less than
7 three hours before the Agency filed its case summary, the Agency turned over
8 109 pages of documents ('subject documents') to Respondents that were subject
9 to my discovery order. Respondents further allege that the 109 pages were
10 included in the Agency's case summary. The Agency does not dispute these
11 allegations, acknowledges it received the subject documents from Complainants
in August 2014, and attempts to explain the reason for its late disclosure in its
response. After reviewing the subject documents, I conclude that they contain
Complainants' social media conversations that fall within the scope of my
September 25, 2014, Discovery Order.

12 "Respondents allege that the Agency's untimely disclosure of these
13 documents establishes bad faith on the part of the Agency and/or Complainants,
14 particularly since the disclosure occurred after Respondents completed their
depositions of Complainants, and that Respondents are irreparably prejudiced as
a result. Respondents ask that the forum sanction the Agency in a number of
different ways.

15 "In my September 25, 2014, Discovery Order, I ruled as follows:

16 'After the scheduled September 29, 2014, prehearing conference in this
17 matter, the forum will issue a subsequent order stating the Agency's
18 deadline for complying with the terms of this order. The Agency has a
19 continuing obligation, through the close of the hearing, to provide
20 Respondents' counsel with any newly discovered material that responds
to the responses and production ordered in this interim order. The
Agency's failure to comply with this order may result in the sanction
described in OAR 839-050-0200(11).'

21 In the interim order I issued on September 30, 2014, that summarized the
22 September 29, 2014, prehearing conference, I ordered that "[t]he Discovery
23 ordered in my rulings on * * * Respondents' motions for Discovery Orders must
be mailed or hand-delivered no later than October 14, 2014." That was not done.

24 "As a prelude to my ruling, I note that the forum has no authority to impose
25 the vast majority of sanctions sought by Respondents. The forum's authority in
this matter is not derived from the ORCP, but from provisions in the Oregon APA,

1 the Oregon Attorney General's Administrative Rules (OAR 137-003-0000 to -
2 0092), and the forum's own rules, OAR 839-050-000 *et seq.* The ALJ's authority
3 to impose sanctions for violations of discovery orders is set out in OAR 839-050-
4 0020(11):⁴³

5 'The administrative law judge may refuse to admit evidence that has not
6 been disclosed in response to a discovery order or subpoena, unless the
7 participant that failed to provide discovery shows good cause for having
8 failed to do so or unless excluding the evidence would violate the duty to
9 conduct a full and fair inquiry under ORS 183.415(10)⁴³. If the
10 administrative law judge admits evidence that was not disclosed as
11 ordered or subpoenaed, the administrative law judge may grant a
12 continuance to allow an opportunity for the other participant(s) to
13 respond.'

14 In brief, the Agency frankly admits that it 'cannot determine why the [subject
15 records] were not produced [earlier] in discovery, but they were in a location
16 unlikely to be accessed' and characterizes its 'oversight' as an 'inadvertent error.'
17 The Agency also notes, in a supporting declaration by * * * the Agency's Chief
18 Prosecutor, that '[i]t appears that on or about October 3, 2014, in anticipation of
19 discovery, the subject documents were partially redacted. I have no other
20 recollection as to why they were not provided in discovery.'

21 "OAR 839-050-0020(16) provides:

22 "Good cause" means, unless otherwise specifically stated, that a
23 participant failed to perform a required act due to an excusable mistake or
24 a circumstance over which the participant had no control. "Good cause"
25 does not include a lack of knowledge of the law, including these rules.'

For the reasons stated below, the forum concludes that the Agency's failure to
provide the subject records by October 14, 2014, as ordered by the forum, does
not meet the 'good cause' standard. Participants in all cases are responsible for
keeping track of documents that constitute potential evidence, particularly
documents subject to an existing discovery order. In this case, the subject
records were accessed by BOLI's Administrative Prosecutions Unit on October 3,
2014, eight days after a discovery order was issued requiring the production of
those records, and only 11 days before their production was due pursuant to the
forum's September 30, 2014, order. The Agency's 'oversight' or storage of the
documents in a place where they were 'unlikely to be accessed' does not
constitute 'an excusable mistake or a circumstance over which the [Agency] had
no control.'

⁴³ This statutory reference in the current rule is in error. The APA was amended in 2007 and the "full and fair inquiry" requirement was moved to ORS 183.417(8).

1 "Ordinarily, the forum's sanction for failing to provide documents pursuant
2 to a discovery order would be to prohibit the introduction of the documents as
3 evidence.[^] However, Respondents assert that some of the subject records will
4 potentially assist Respondents' defense and explain why in their motion. Based
5 on Respondents' assertion, it appears that a blanket prohibition on the
6 introduction of the subject records may prejudice Respondents and prevent a 'full
7 and fair inquiry' by the forum. The forum's order is crafted with this in mind.

8 "ORDER

9 "1. **Sanctions:** (a) The Agency may not offer or otherwise utilize any
10 of the subject documents as evidence until such time as Respondents have
11 offered the subject documents into evidence or otherwise utilized them during the
12 hearing while eliciting testimony in support of their case; (b) Respondents, should
13 they elect to do so, may offer or utilize the subject documents in support of their
14 case.

15 "2. **Discovery Order**

16 "To the extent these records have not already been provided, the forum
17 hereby issues a discovery order requiring the Agency to provide responsive
18 documents to items ##1, 5-6, 8, 13-15, and 21 listed on pages 9 and 10 of
19 Respondents' Motion for Discovery Sanctions, with the caveat that the Agency is
20 not required to produce statements made to Ms. Gaddis or Ms. Casey, the
21 Agency's administrative prosecutors in this case, in any response to item #5.
22 The Agency's responsibility to produce any such records begins as soon as this
23 order is issued and continues until the hearing is concluded. The forum will apply
24 OAR 839-050-0020(11) if an issue arises regarding an alleged failure by the
25 Agency to produce such records in a timely manner.

"3. Respondents' request that the forum dismiss the Agency's Second
Amended Formal Charges is **DENIED**.

"4. Respondents may amend their Case Summary witness list and
exhibit list. * * *

"5. Respondents' request to 'reopen discovery to allow for depositions
of Complainants and other BOLI witnesses with knowledge of these matters' is
DENIED.

"6. Respondents' request that the cases be dismissed or that the
Agency's claim for damages of Complainants' behalf be dismissed is **DENIED**.

"7. Respondents' request for costs is **DENIED**.

1 “8. Respondents’ request for any other sanctions not specifically
discussed in this interim order is **DENIED.**”

2 (Exs. X81, X83, X86, X87)

3 36) The general public was allowed to attend the hearing. Because of this
4 and potential security issues, the ALJ issued guidelines prior to the hearing that, among
5 other things: prohibited the public from bringing backpacks, briefcases, satchels,
6 carrying cases any type, or handbags into the building in which the hearing was held;
7 prohibited the use of audio recorders and cameras, including cell phone cameras and
8 recorders; and required cell phones to be turned off during the hearing. (Ex. X85;
9 Statement of ALJ)

10 37) At the start of the hearing, the ALJ orally advised the Agency and
11 Respondents of the issues to be addressed, the matters to be proved, and the
12 procedures governing the conduct of the hearing. (Statement of ALJ)

13 38) During the hearing, the Agency offered Exhibits A24 and A26.
14 Respondents objected to their admission and the ALJ reserved ruling on their
15 admissibility for the Proposed Order. Respondents objected on the basis of relevancy.
16 Exhibits A24 and A26 are received because they are relevant to show the impact that
17 the media exposure spawned by this case had on Complainants. (Exs. A24, A26)

18 39) During the hearing, the ALJ stated he would consider LBC’s testimony
19 about the “handfasting cord” used in LBC’s and RBC’s commitment⁴⁴ ceremony as an
20 offer of proof and rule on its admissibility in the Proposed Order. That testimony is
21 admitted because it is not evidence that was required to be disclosed by the ALJ’s
22 discovery orders and it is relevant to show the extent of Complainants’ commitment to
23 their relationship. (Testimony of LBC; Statement of ALJ)

24 _____
25 ⁴⁴ The forum uses the term “commitment” because the handfasting cord was used in Complainants’ June
27, 2013, ceremony at the West End Ballroom, when same-sex marriage was not yet permitted in the
state of Oregon.

1 40) On March 16, after the Agency had concluded its case-in-chief,
2 Respondents filed a motion for an order to Dismiss or Reopen Discovery and Keep
3 Record Open. Respondents argued that this was necessary in order:

4 "to allow Respondents a full and fair opportunity to reopen discovery concerning
5 possible undisclosed collusion among Complainants, Basic Rights Oregon and/or
6 the Agency in light of the testimony of Agency witness Aaron Cryer elicited at the
hearing on Friday, March 13, 2015."

7 The ALJ allowed Respondents and the Agency to present oral argument on
8 Respondents' motion when the hearing re-convened on March 17, 2015, then denied
9 Respondents' motion. (Ex. X94; Statement of ALJ)

10 41) Respondents called AK, MK, and RBC as witnesses in support of their
11 case in chief. At the conclusion of RBC's testimony on March 17, 2015, Respondents'
12 counsel Grey made the following statement:

13 "That's all of the witnesses that we have to present at this time. However, for
14 purposes of the record I'd like to make it clear that Respondents did not intend to
15 rest their case in chief for the reasons we discussed in connection with the
motion that we presented this morning, which the forum denied. So simply for
purposes of the record, we are not planning on closing our case in chief."

16 (Statement of Grey)

17
18 **PROPOSED FINDINGS OF FACT – THE MERITS⁴⁵**

19 1) LBC and RBC are both homosexual females. They met in 2004 while they
20 attended the same college and considered themselves a "couple" for the 11 years
21 preceding the hearing. They lived together in Texas until 2009, when they moved to
22

23
24 ⁴⁵ The Proposed Findings of Fact -- The Merits that are relevant to the forum's determination of whether
25 Respondents violated ORS 659A.403, ORS 659A.406, and ORS 659A.409 are set out in the forum's
ruling on Respondents' Renewed Motion for Summary Judgment and the Agency's Cross-Motion for
Summary Judgment. See Proposed Findings of Fact #28 – Procedural, *supra*. They are duplicated only
to the extent necessary to provide context to Complainants' claim for damages.

1 Portland, Oregon, and have lived together continuously since moving to Portland.

2 (Testimony of LBC, RBC, McPherson)

3 2) LBC first asked RBC to marry her soon after they met and was turned
4 down. LBC continued to propose on a regular basis until October 2012, when RBC
5 finally agreed to marry her. (Testimony of RBC, LBC)

6 3) Before October 2012, RBC did not want to get married because of her
7 personal experience of failed marriages that "tended to do more damage than good."

8 (Testimony of RBC, LBC, McPherson)

9 4) In November 2011, Complainants became foster parents for "E" and "A,"⁴⁶
10 two disabled children with very high special needs, after the death of their mother,
11 LBC's best friend. At the time, Complainants were already the children's godparents.
12 When they became the children's foster parents, Complainants decided that they
13 wanted to adopt the children. Subsequently, Complainants became involved in a bitter
14 and emotional custody battle for the children with the children's great-grandparents that
15 continued until sometime after December 2013, when Complainants' December 2013
16 adoption application was formally approved by the state of Oregon.⁴⁷ (Testimony of

17 LBC, RBC, McPherson)

18 5) In October 2012, RBC decided that she and LBC should get married in
19 order to give their foster children "permanency and commitment" by showing them how
20 much she and LBC loved one another and were committed to one another. RBC told
21 LBC that she wanted to get married, which made LBC "extremely happy." After her
22 long-standing matrimonial reticence, RBC then became excited to get married and to

23
24

⁴⁶ The forum uses the children's first name initials instead of their full names to protect their privacy.

25 ⁴⁷ Although it is undisputed that Complainants eventually adopted the children, there is no evidence as to what date the adoptions were finalized.

1 start planning the wedding, wanting a wedding that was as "big and grand" as they
2 could afford. (Testimony of RBC, LBC)

3 6) Sometime between October 2012 and January 17, 2013, RBC and Cheryl
4 McPherson ("CM"), RBC's mother, attended a Portland bridal show. MK had a booth at
5 the show to advertise wedding cakes made by Sweetcakes by Melissa ("Sweetcakes").
6 Two years earlier, Sweetcakes had designed, created, and decorated a wedding cake
7 for CM and RBC that RBC really liked. At the show, RBC and CM visited Sweetcakes's
8 booth and told MK they would like to order a cake from her. After the show, RBC made
9 an appointment via email for a cake tasting at Sweetcakes. (Testimony of RBC, CM,
10 MK; Ex. R16)

11 7) Complainants were both excited about the cake tasting at Sweetcakes
12 because the cake Respondents had made for CM's wedding had been so good and
13 RBC wanted to order a cake like CM's cake. (Testimony of RBC, A. Cryer)

14 9) On January 17, 2013, RBC and CM visited Sweetcakes's bakery shop in
15 Gresham, Oregon for their cake tasting appointment, intending to order a cake for
16 RBC's wedding to LBC. (Respondents' Admission; Affidavit of AK; Testimony of RBC,
17 CM, AK)

18 9) In January 2013, AK and MK were alternately caring for their infant twins
19 at their home. At the time of the tasting, MK was at home and AK conducted the
20 tasting. During the tasting, AK asked for the names of the bride and groom, and RBC
21 told him there would be two brides and their names were "Rachel and Laurel." At that
22 point, AK stated that he was sorry, but that Sweetcakes did not make wedding cakes for
23 same-sex ceremonies because of AK's and MK's religious convictions. In response,
24 RBC began crying. She felt that she had humiliated her mother and was anxious
25 whether CM was ashamed of her, in that CM had believed that being a homosexual was

1 wrong until only a few years earlier. CM then took RBC by the arm and walked her out
2 of Sweetcakes to their car. On the way out to their car and in the car, RBC became
3 hysterical and kept telling CM "I'm sorry" because she felt that she had humiliated CM.
4 (Respondents' Admission; Affidavit of AK; Testimony of RBC, CM)

5 10) In the car, CM hugged RBC and assured her they would find someone to
6 make a wedding cake. CM drove a short distance, then returned to Sweetcakes and re-
7 entered Sweetcakes by herself to talk to AK. During their subsequent conversation, CM
8 told AK that she used to think like him, but her "truth had changed" as a result of having
9 "two gay children." AK quoted Leviticus 18:22 to CM, saying "You shall not lie with a
10 male as one lies with a female; it is an abomination."⁴⁸ CM then left Sweetcakes and
11 returned to the car. While CM was in Sweetcakes, RBC remained sitting in the car,
12 "holding [her] head in her hands, just bawling." (Affidavit of AK; Testimony of RBC, CM)

13 11) When CM returned to the car, she told RBC that AK had told her that "her
14 children were an abomination unto God." (Testimony of RBC; CM)

15 12) When CM told RBC that AK had called her "an abomination," this made
16 RBC cry even more. RBC was raised as a Southern Baptist. From past experience,
17 the word "abomination" made her feel that God made a mistake when he made her, that
18 she wasn't supposed to exist, and that she had no right to love or be loved, have a
19 family, or go to heaven. (Testimony of RBC)

20 13) CM and RBC then drove home. RBC was crying when they arrived home
21 and immediately went upstairs to her bedroom, followed by LBC and CM, where she lay
22

23 ⁴⁸ See Finding of Fact #9 in the forum's January 29, 2015, interim order ruling on Respondents' motion for
24 summary judgment and the Agency's cross-motion for summary judgment, in which the forum concluded
25 that AK had quoted Leviticus based on an undisputed statement in AK's affidavit. In contrast, at hearing,
CM testified that AK did not quote a Bible verse, but simply stated that her children were an
"abomination." Because the forum previously determined the text of AK's statement in its January 29
interim order, the forum need not resolve the contradiction between AK's affidavit and CM's testimony.

1 in her bed, crying.⁴⁹ In the bedroom, LBC asked CM what had happened, and CM told
2 her that AK had told them that Sweetcakes did "not do same-sex weddings" and that AK
3 had told CM that "your children are an abomination." LBC was "flabbergasted" at AK's
4 statement about same-sex weddings. This upset her and made her very angry.
5 (Testimony of RBC, LBC, CM)

6 14) LBC, who was raised as a Roman Catholic, recognized Klein's statement
7 as a reference from Leviticus. She was "shocked" to hear that AK had referred to her
8 as an "abomination," and thought CM may have heard wrong. Based on her religious
9 background, she understood the term "abomination" to mean "this is a creature not
10 created by God, not created with a soul. They are unworthy of holy love. They are not
11 worthy of life." She immediately thought that this never would have happened if she
12 had not asked RBC to marry her and felt shame because of it. She also worried that
13 this might negatively impact CM's acceptance of RBC's sexual orientation. (Testimony
14 of LBC)

15 15) LBC, who had always viewed herself as RBC's protector, got into bed with
16 RBC and tried to soothe her. RBC became even more upset and pushed RBC away.
17 In response, LBC lost her temper and started yelling that she "could not believe this had
18 happened" and that she could "fix" things if RBC would just let her. After LBC left the
19 room, RBC continued crying and spent much of that evening in bed. (Testimony of
20 RBC, LBC, CM)

21 16) Back downstairs, E, the older of Complainants' foster daughters was
22 extremely agitated from events at school that day. LBC tried to calm her, but she
23

24 ⁴⁹ RBC credibly testified as follows:

25 "I was beyond upset. I just wanted everybody to leave me alone. I couldn't face looking at my
mom, and I didn't even know if I still wanted to go through with getting married anymore. So I just
told everybody to leave me alone as much as possible, and I went to my room."

1 refused to be calmed, repeatedly calling out for RBC, with whom she had a special
2 bond. Eventually, E cried herself to sleep. LBC's inability to calm E was very frustrating
3 to her. She felt overwhelmed because she didn't know how to handle the situation.
4 That night, LBC was very upset, cried a lot, and was hurt and angry. (Testimony LBC,
5 A. Cryer)

6 17) After CM returned home on January 17, 2013, she telephoned "Lauren" at
7 the West End Ballroom ("WEB"), the venue where Complainants planned to have their
8 commitment ceremony, and told Lauren that Sweetcakes had refused them cake
9 service for their wedding. CM also posted a review on Sweetcakes Facebook wedding
10 page and on another wedding website with a message stating: "If you're a gay couple
11 and having a commitment ceremony or wedding, don't go to this place because they
12 discriminate against gay people." (Testimony of CM; Ex. R22)

13 18) At 8:22 p.m. on January 17, 2013, Lauren from WEB emailed RBC and
14 LBC to say she had heard from CM and wanted to know the details of the refusal at
15 Sweetcakes. (Testimony of LBC; Ex. R32)

16 19) At 9:10 p.m. on January 17, 2013, RBC sent a return email to Lauren at
17 WEB in which she stated:

18 "Hi Lauren,

19 "I am sorry to have to bring this to your attention. I want to assure you that we
20 would have gone with Sweet Cakes regardless (sic) of your recommendation,
21 because we purchased my mother's wedding cake from them and were very
22 happy with the cake. My girlfriend and I purchased my mother's cake as a
wedding gift for her. At that time Melissa said nothing about not wanting to work
for us because we were gay.

23 "I even spoke with them at the Portland Wedding Show and made an
24 appointment then for 1pm today. When we showed up for the appointment it was
25 with Melissa's husband. I did not catch his name because the appointment did
not last long enough for me to ask. He took us in the office and asked what the
bride and groom names were. When we told him that our names were Rachel

1 and Laurel, he quickly said that they don't do gay weddings because they are
2 Christians and don't believe same-sex marriage is right. My mother asked why
3 they had no problem taking my money when I purchased her cake. She told them
4 that we are a christian family as well and that she used to believe like he believed
5 until God blessed her with two gay children.

6 "I was stunned and crying. This is twice in this wedding process that we have
7 faced this kind of bigotry. It saddens me because we moved from Texas so that
8 my brother and I could be more accepted in the community.

9 "We wanted to inform you of all of this because you have a right to know so that
10 other same-sex couples don't have to go through this in the future. It surprisingly
11 that both the West End Ballroom and the caterers we chose, Premier Catering,
12 recommend (sic) Sweet Cakes and yet neither mentioned to us that they don't
13 do gay weddings. I figure that this must be because no one ever speaks up to let
14 you know. I didn't want to let this pass without saying something.

15 "My fiancé and I have been together for 10 years. We are adopting our two foster
16 children and wanted to get married as a sign of our commitment to each other
17 and the family that we are creating. It saddens me that my children will grow up
18 in a world where people are an abomination because they love each other. It is
19 my responsibility to set an example for them that you should speak up when you
20 see injustice because that is how we make progress.

21 "Thank you for your fast response to both my mother and I. I realize that you are
22 not responsible for their poor behavior, and thank you for your understanding. If
23 there is anymore info that I can provide for you please let me know.

24 "Sincerely,
25 Rachel Cryer & Laurel Bowman"

(Testimony of LBC; Ex. R32)

20) Later that same evening, LBC filled out an "Oregon Department of Justice
("DOJ") Consumer Complaint Form," using her smart phone to access DOJ's website.
In hard copy,⁵⁰ the complaint was two pages long. On the first page, she provided her
name, address, phone number and email address, Sweetcakes's name, address, and

⁵⁰ The record lacks substantial evidence to establish what the digital format for the complaint form looked like, but Ex. R3 is a hard copy of the complaint that Respondents received. The forum relies on that copy in describing the contents and format of the complaint.

1 phone number. On the first page, immediately above the space where LBC wrote her
2 name, the following text was printed:

3 "By submitting this complaint, I understand a) this complaint will become part of
4 DOJ's permanent records and is subject to Oregon's Public Records Law; b) this
5 complaint may be released to the business or person about whom I am
6 complaining; c) this complaint may be referred to another governmental agency.
By submitting this complaint, I authorize any party to release to the DOJ any
information and documentation relative to this complaint."

7 This public records disclaimer was not visible on LBC's smart phone view of DOJ's
8 form. On the second page, LBC described the details of her complaint as follows:

9 "In november of 2011 my fiance and I purchased a wedding cake from this
10 establishment for her mother's wedding. We spent 250. When we decided to get
11 married ourselves chose to back and purchase a second cake. Today, January
12 17, 2013, we went for our cake tasting. When asked for a grooms name my
13 soon to be mother in law informed them of my name. The owner then proceeded
14 to say we were abominations unto the lord and refused to make another cake for
15 us despite having already paid 250 once and having done business in the past.
16 We were then informed that our money was not equal, my fiancé reduced to
17 tears. This is absolutely unacceptable."

18 (Testimony of LBC; Exhibit R3)

19 21) Aaron Cryer, RBC's brother, also lived with Complainants at this time.
20 Later on the evening of January 17, 2013, he arrived home from school and work and
21 he and Complainants had a 30 minute conversation about what happened at
22 Sweetcakes that day. (Testimony of A. Cryer)

23 22) On January 18, 2013, RBC felt depressed and questioned whether there
24 was something inherently wrong with the sexual orientation she was born with and if
25 she and LBC deserved to be married like a heterosexual couple. She spent most of her
day in her room, trying to sleep. (Testimony of RBC)

26 23) In the days following January 17, 2013, RBC had difficulty controlling her
emotions and cried a lot, and Complainants argued because of RBC's inability to control
her emotions. They had not argued previously since moving to Oregon. RBC also

1 became more introverted and distant in her family relationships. She and A. Cryer,
2 have always been very close, and their connection was not as close "for a little bit" after
3 January 17, 2013. RBC questioned whether she had the ability to be a good mother
4 because of the difficulty she was having in controlling her emotions. A week later, RBC
5 still felt "very sad and stressed," felt concerned about still having to plan her wedding,
6 and felt less exuberant about the wedding. Previous to that time, she had been "very
7 friendly and happy" in her communications with Candice Ericksen, A and E's great aunt,
8 about her wedding. After January 17, 2013, although RBC relied on CM to contact
9 potential wedding vendors, she experienced anxiety over possible rejection because her
10 wedding was a same-sex wedding. (Testimony of RBC, LBC, CM, A. Cryer, Ericksen)

11 24) In the days following January 17, 2013, LBC experienced extreme anger,
12 outrage, embarrassment, exhaustion, frustration, intense sorrow, and shame as a
13 reaction to AK's refusal to provide a cake. She felt sorrow because she couldn't
14 console E, she could not protect RBC, and because RBC was no longer sure she
15 wanted be married. Her excitement about getting married was also lessened because
16 she was not sure she could protect RBC if any similar incidents occurred. (Testimony of
17 RBC, LBC, Ericksen)

18 25) After January 17, 2013, CM assumed the responsibility for contacting the
19 vendors who would be needed for Complainants' ceremony. Shortly thereafter, she
20 arranged for a cake tasting at Pastry Girl ("PG"), another local bakery. While making
21 the appointment, CM asked Laura Widener, PG's owner/baker, if she was okay with
22 providing a cake for a same-sex wedding ceremony. Widener assured her that this was
23 not a problem. (Testimony of RBC, CM, Widener; Ex. R4)

1 26) On January 21, 2013, CM and RBC went to PG and met with Widener.
2 While at PG, CM and RBC were both anxious, and CM did most of the talking, while
3 RBC tried not to cry until they started talking about the design of the cake. At that point,
4 RBC became more animated and was able to explain the design she wanted on the
5 cake. By the end of the meeting, the design they settled on was a cake with three tiers
6 that had a peacock's body on top and the peacock's tail feathers trailing down over tiers
7 to the cake plate. When completed, the peacock and its feathers were hand-created
8 and hand-painted by Widener. Widener charged Complainants \$250 for the cake.
9 (Testimony of Widener, RBC, CM)

10 27) Respondents would have charged \$600 for making and delivering the
11 same cake. (Testimony of AK)

12 28) On January 28, 2013, DOJ mailed a copy of LBC's Consumer Complaint
13 to Respondents, along with a cover letter. In pertinent part, DOJ's cover letter stated:

14
15 "We have received the enclosed consumer complaint about your business. We
16 understand that there are often two sides to a problem, and we would appreciate
17 your prompt review of this matter.

18 "We do not represent the complainant. We do, however, review all complaints to
19 determine whether grounds exist to warrant action by us. Your response to the
20 allegations in the complaint would help us to make that determination.

21 "In the interest of efficiency, we prefer that you respond directly to the
22 complainant and e-mail copy of the response to our office. Please include the file
23 number shown above on the subject line of your e-mail. Alternatively, you may
24 respond to us by regular mail."

25 On January 29, AK posted a copy of the first page of LBC's DOJ complaint on his
Facebook page, prefaced by his comment "[t]his is what happens when you tell gay
people you won't do their 'wedding cake.'" At that time, AK only had 17 "friends" on his
Facebook page. (Testimony of LBC, AK; Exs. R3, A4)

1 29) On the same day that AK posted her DOJ complaint, LBC received an
2 email telling her of the posting and that she should look at it. LBC did so, then called
3 Paul Thompson, Complainants' attorney in this proceeding. Later that day, the posting
4 was removed. (Testimony of LBC, AK)

5 30) On February 1, 2013, LBC went to the emergency room of a local hospital
6 at approximately 8:00 p.m. because of an injury to her shoulder that she had suffered
7 three weeks earlier when lifting one of her foster children above her head when they
8 were playing. While in the hospital, she became aware that AK's refusal to make their
9 wedding cake was on the news. This made her very upset and she cried when she was
10 examined by a doctor, telling the doctor that she had an "unpleasant interaction with a
11 business owner, and now this information is on the news." (Testimony of LBC; Exs. A6,
12 R7)

13 31) On February 1, 2013, RBC became aware that the media was aware of
14 AK's refusal to make a wedding cake for Complainants when she received a telephone
15 call from Lars Larson, an American conservative talk radio show host based in Portland,
16 Oregon, who told her that he had spoken with AK and wanted to see what RBC "had to
17 say about the pending case." RBC refused to talk with Larson and called LBC, who was
18 at the hospital having her shoulder examined. (Testimony of RBC, LBC)

19 32) As soon as they became aware that LBC's DOJ complaint had become
20 public knowledge through the media, both Complainants greatly feared that E and A
21 would be taken away from them by the state of Oregon's foster care system.⁵¹ Earlier,
22

23 ⁵¹ The level of Complainants' concern over their foster parent status was vividly illustrated in RBC's and
24 LBC's testimony on direct examination by the Agency:

25 **R. Bowman-Cryer**

Q: "So how did you react? How did you react to hearing about your case, I guess, or your situation in the news?"

1 they had been instructed that it was their responsibility to make sure that the girls'
2 information was protected and that the state would "have to readdress placement" of the
3 girls with Complainants if any information was released concerning the girls.
4 (Testimony of RBC, LBC)

5 33) Based on the media or potential media exposure about the case after
6 February 1, 2013, LBC's headaches increased. She felt intimidated and became
7 fearful. (Testimony of LBC; Ex. A12)

8 34) At some point after February 1, 2013, one of RBC's Facebook "friends"
9 saw an article about the case in her local Florida paper and posted it on Facebook,
10 adding in her comments that RBC and LBC had children. RBC immediately responded,
11 writing: "Jessica – I know you were trying to defend us, but you released information
12 about our kids. The public doesn't know we have kids; that is the whole point of being
13 silent. Please remove your comment immediately." RBC's "friend" responded and said
14 she removed her comment as soon as she read RBC's response. (Testimony of RBC;
15 Ex. A26)

16 35) On February 8, 2013, Paul Thompson sent a letter regarding
17 Complainants and their situation to the following media sources: KGW, KOIN, The
18

19 A: "My first concern was that nobody could know that we had these children and that whatever we did
20 had to be to protect them. We did not want their names in the media. We did not want any information
about them or our foster parent status or the status of their case to be public knowledge to anyone."

21 **L. Bowman-Cryer**

22 Q: "Was the fear from that initial media release ever lessened for you?"

23 A: "No, ma'am. That fear was paramount to everything."

24 Q: "When you say paramount, was it greater for you than the actual refusal of service?"

25 A: "At that point in time, yes, ma'am."

Q: "Did you still feel emotional effects from the refusal of service?"

A: "Absolutely, yes, ma'am. My children were still suffering. My wife was still suffering, and that was tearing me apart."

1 Oregonian, OPB, KATU, KPTV, the Lars Larson Radio Show, The Wall Street Journal,
2 Willamette Week, and Reuters. The letter read as follows:

3 "Members of the Media:

4 "I would like to begin by thanking each of you for your interest in this story. As
5 you know, I represent the lesbian couple who were denied a wedding cake by
6 Sweet Cakes by Melissa. I ask that their names not be printed in regards to this
statement, as they would appreciate privacy in this matter.

7 "The Press Release reads:

8 "We are grateful for the outpouring of support we have received from friends,
9 family, members of the LGBT community, and our allies. We are especially
10 thankful that LGBT-supportive companies have graciously offered their services
to make our special day perfect.

11 "At this time, the support of the community and other well-wishers is all we
12 require. We ask that individuals and companies that want to provide support,
13 direct their donations in our name to Pride Northwest, our pride organization in
14 Portland, Oregon. They have accepted our request to direct donations and gifts
to further awareness of issues affecting the LGBT community, including marriage
equality and families. Interested parties can contact Cory L. Murphy of Pride
Northwest with any questions. * * *

15 "We have decided to accept the gracious offer from Mr. Duff Goldman of Charm
16 City Cakes and the TV show 'Ace of Cakes.' At the time Mr. Goldman made his
17 offer we had already contracted with and paid for another local bakery, Pastrygirl,
18 to make our wedding cake. It is extremely important to us to honor that contract.
19 With that in mind we have humbly asked Mr. Goldman and Charm City Cakes to
prepare a Bride's cake for us in place of the traditional Groom's cake. We are
grateful to both bakeries for being a part of making our wedding date incredibly
special.

20 "While we are humbled by the support and mindful of people's interest, this
21 matter has placed us in the media spotlight against our wishes. In order to
22 maintain our privacy, we will not be granting interviews and are asking everyone
to respect our privacy at this time.

23 "Please direct any media inquiries to our attorney, Paul Thompson[.]"

24 (Exs. A7, R28)

1 36) On February 9, 2013, there was an organized protest outside
2 Respondents' bakery that was reported by KATU.com. The protest was organized by a
3 person or persons who started a Facebook page called
4 "BoycottSweetCakesByMelissaGRESHAM" ("Boycott") on February 6, 2013, and posted
5 a photo from KATU.com that shows "protesters gathered Saturday outside a Gresham
6 bakery that's at the center of a wedding cake controversy." Complainants were not
7 involved in the protest or subsequent boycott. However, on February 10, 2013, both
8 Complainants made comments on Boycott's Facebook page in which they indirectly
9 identified themselves as the persons who sought the wedding cake and thanked people
10 for their support. (Exs. R9, R13)

11 37) On February 8, 2013, Herbert Grey, Respondents' lead counsel in this
12 case, sent a letter to DOJ that responded to LBC's January 17, 2013, consumer
13 complaint. In the letter, Grey identified himself as representing Respondents
14 concerning the complaint filed by "Laurel Bowman" and addressed the issues raised in
15 the complaint. Grey also cc'd a copy of his letter to LBC. (Ex. R10)

16 38) On February 12, 2013, DOJ emailed a copy of LBC's DOJ consumer
17 complaint to a number of media sources, along with a note stating:

18 "Hey everyone,

19 "Please pardon the mob email. But it seems the most efficient and fair thing to
20 do. Attached is the initial Sweet Cakes complaint as well as the newly received
21 response from the bakery owners' lawyer. The other new development is that
22 the complainants have informed the DOJ and BOLI that they plan on filing a
complaint with BOLI. That has yet to happen as early this afternoon. But we're
told it's the plan. At that point, the DOJ's involvement in the saga will end."

23 On February 13, 2013, this email was forwarded to Herb Grey, Respondents' attorney,
24 by Tony King, the executive producer of the Lars Larson Show. (Ex. R15)

1 39) After LBC's DOJ complaint was publicized in the media, Complainants
2 both had negative confrontations from relatives who learned about their complaint
3 against Respondents through the media. In January 2013, LBC had just begun to re-
4 establish a relationship with an aunt who had physically and emotionally abused her as
5 a child and also owned all of the family property. Shortly after LBC's complaint became
6 public, the aunt insisted through social media that LBC drop the complaint. She also
7 called LBC and told her she was not welcome on family property and she would shoot
8 LBC "in the face" if LBC ever set foot on the family's property in Ireland or the United
9 States. This threat "devastated" LBC, as it meant she could not visit her mother or
10 grandmother, both of whom lived on family property. RBC's sister, who believed that
11 homosexuals should not be allowed to get married, wrote a Facebook message to the
12 Kleins to tell them that she supported them. This was a "crushing blow" to RBC, and it
13 hurt her and made her very angry at her sister. (Testimony of LBC, RBC, CM; Ex. A16)

14 40) On June 27, 2013, Complainants had a commitment ceremony at the
15 West End Ballroom, a venue located at 1220 S.W. Taylor in downtown Portland. On the
16 day of the ceremony, the words "ROMANCE BY CANDLELIGHT – STARRING
17 RACHEL AND LAUREL – JUNE 27, 2013" were posted on a large billboard on the
18 street-facing wall of the WEB. Only invited guests were allowed to attend the
19 ceremony. Just prior to the ceremony, Duff Goldman's free cake was delivered by an
20 incognito motorcyclist. At the ceremony, Complainants and their guests celebrated with
21 their cakes from Pastry Girl and Goldman. After the ceremony, Complainants
22 considered themselves to be married even though they could not be legally married in
23 the state of Oregon at that time. (Testimony of RBC, LBC, Widener; Exs. R18, R19)

1 41) On August 8, 2013, RBC filed a verified complaint with BOLI alleged that
2 Sweetcakes by Melissa had discriminated against her by refusing to make her a
3 wedding cake because of her sexual orientation. (Testimony of RBC; Ex. A27)

4 42) On August 14, 2013, BOLI's Communications Director issued a press
5 release related to RBC's complaint. The first paragraph read: "Portland, OR – A same-
6 sex couple has filed an anti-discrimination complaint with the Oregon Bureau of Labor
7 and Industries (BOLI) against a Gresham bakery, Sweet Cakes by Melissa, for allegedly
8 refusing service based on sexual orientation." (Ex. R20)

9 43) On November 7, 2013, LBC filed a verified complaint with BOLI alleging
10 that Sweetcakes by Melissa had discriminated against her by refusing to make her a
11 wedding cake because of her sexual orientation. (Testimony of LBC; Ex. A28)

12 44) On January 17, 2014, BOLI's Communications Director issued a press
13 release that began and ended with the following statements:

14 **"BOLI finds substantial evidence of unlawful discrimination in bakery civil rights complaint**
15 *Sweet Cakes complaint will now move into conciliation to determine whether settlement can be*
 reached

16 "Portland, OR – A Gresham bakery violated the civil rights of a same-sex couple
17 when it denied service based on sexual orientation, a Bureau of Labor and
Industries (BOLI) investigation has found.

18 "The couple filed the complaint against Sweetcakes by Melissa under the Oregon
19 Equality Act of 2007, a law that protects the rights of gays, lesbians, bisexual and
transgender Oregonians in employment, housing and public places.

20 "* * * * *

21 "Copies of the complaint are available upon request. * * *"

22
23 (Ex. R24)

1 45) Complainants were legally married by signing a "legal document of
2 marriage" in 2014, a few days after Oregon's ban on same-sex marriage was struck
3 down in federal court. (Testimony of RBC)

4 46) From February 1, 2013, until the time of the hearing, many people have
5 made "hate-filled" comments through social media and in the comments sections of
6 various websites that were supportive of Respondents and critical of or threatening to
7 Complainants. These comments and the media attention caused RBC stress, anger,
8 pain, frustration, suffering, torture, shame, humiliation, degradation, fear that she would
9 be harassed at home because the DOJ complaint with Complainants' home address
10 had been posted on Facebook, and the feeling that her reputation was being destroyed.
11 (Testimony of RBC, LBC, CM; Ex. A24)

12 47) The publicity from the case and accompanying threats from third parties
13 on social media made RBC "scared" for the lives of A, E, LBC, and herself. (Testimony
14 of RBC)

15 48) Although AK has been interviewed by the media on a number of
16 occasions about the case, he did not initiate any contacts with the media. Other than
17 posting LBC's DOJ complaint on his Facebook page, there is no evidence that AK gave
18 Complainants' names to the media. Finally, there is no evidence in the record of any
19 untruthful statements that AK or MK made to public media regarding their case.⁵²
20 (Testimony of AK; Entire Record)

21
22
23
24 ⁵² Complainants testified that they were upset by Respondents' repeated untruthful statements about
25 them in the media, but did not testify as to any specific incident in which Respondents made untruthful
statements of which they were aware and the Agency presented no other evidence of any such
statements.

1 49) Except for Paul Thompson's February 8, 2013, press release,
2 Complainants have never solicited media attention nor been interviewed by the media
3 with regard to this case. (Testimony of RBC, LBC)

4 50) Candice Ericksen, Laura Widener, Melissa Klein, Jessica Ponaman, and
5 Aaron Cryer were credible witnesses and the forum has credited their testimony in its
6 entirety. (Testimony of Ericksen, Widener, M. Klein, RBC, Ponaman)

7 51) For the most part, CM's testimony was credible, even though her answers
8 frequently strayed from the subject of the questions. However, the forum did not believe
9 her earlier statements to Ponaman that RBC was "throwing up" because she was so
10 nervous and that "for days [RBC] couldn't get out of bed" because RBC did not testify to
11 those facts and because RBC spent 30 minutes talking with LBC and A. Cryer the night
12 of January 17, 2013, and went to a cake tasting at Pastry Girl on January 21, 2013.
13 Due to these exaggerations, the forum has only credited CM's testimony when it was
14 either (a) undisputed, or (b) disputed but corroborated by other credible testimony.
15 (Testimony of CM)

16 52) AK was a credible witness except for his testimony that he did not realize
17 that LBC's name and address were on the DOJ complaint that he posted on his
18 Facebook page. LBC's name, address, and phone number are conspicuously printed
19 on the complaint immediately above Sweetcakes's name, address, and phone number,
20 and the forum finds it extremely unlikely that AK would have posted the complaint
21 without reading it, particularly since he posted a comment immediately above it that
22 read: "This is what happens when you tell gay people you won't do their 'wedding'
23 cake." Apart from that testimony, the forum has credited AK's testimony in its entirety.
24 (Testimony of AK)

25

1 53) RBC was an extremely emotional witness who was in tears or close to
2 tears during most of her testimony. Despite her emotional state, she answered
3 questions directly in a forthright manner. She did not try to minimize the effect of media
4 exposure on her emotional state as compared to how the cake denial affected her. The
5 forum has credited RBC's testimony about her emotional suffering in its entirety.
6 However, the forum has only credited her testimony about media exposure when she
7 testified about specific incidents. (Testimony of RBC)

8 54) LBC was a very bitter and angry witness who had a strong tendency to
9 exaggerate and over-dramatize events. On cross examination, she argued repeatedly
10 with Respondents' counsel and had to be counseled by the ALJ to answer the questions
11 asked of her instead of editorializing about the cake refusal and how it affected her. Her
12 testimony was inconsistent in several respects with more credible evidence. First, she
13 testified that she had a "major blowout" and "really bad fight" with A. Cryer between
14 January 17 and January 21, 2013. In contrast, A. Cryer testified, when asked if he
15 fought with LBC, "I wouldn't say we fought." He also testified that this case did not
16 affect his relationship with LBC. Second, she testified that her blood pressure spiked in
17 the hospital to 210/165 on February 1, 2013, when she learned that her DOJ complaint
18 had hit the media, requiring the immediate attention of a doctor and four nurses. Her
19 treating doctor's report notes that she was upset and crying about her situation hitting
20 the news, but there is no mention of a blood pressure spike. Third, she testified that the
21 media were standing outside her and RBC's apartment on February 1, 2013, when she
22 talked to RBC from the hospital. RBC, who was at the apartment at that time, testified
23 that the media were not outside their apartment at that time. Fourth, LBC testified that
24 RBC stayed in bed the rest of the day after she returned from the cake tasting at
25 Sweetcakes. In contrast, A. Cryer testified that he, LBC, and RBC had a 30 minute

1 conversation that evening. Like RBC, the forum has only credited her testimony about
2 media exposure when she testified about specific incidents. The forum has only
3 credited LBC's testimony when it was either (a) undisputed, or (b) disputed but
4 corroborated by other credible testimony. (Testimony of LBC)

5
6 **PROPOSED CONCLUSIONS OF LAW**

7 1) At all times material herein, Respondents AK and MK owned and operated
8 a bakery in Gresham, Oregon as a partnership under the assumed business name of
9 Sweetcakes by Melissa.

10 2) At all times material herein, Sweetcakes by Melissa was a "place of public
11 accommodation" as defined in ORS 659A.400.

12 3) At all times material herein, AK and MK were individuals and "person[s]"
13 under ORS 659A.010(9), ORS 659A.403, ORS 659A.406, and ORS 659A.409.

14 4) At all times material herein, Complainants' sexual orientation was
15 homosexual.

16 5) AK denied the full and equal accommodations, advantages, facilities and
17 privileges of Sweetcakes by Melissa to Complainants based on their sexual orientation,
18 thereby violating ORS 659A.403.

19 6) AK did not aid or abet MK in violations of ORS 659A.403 or ORS
20 659A.409 and did not thereby violate ORS 659A.406.

21 7) MK did not violate ORS 659A.403, ORS 659A.406, or ORS 659A.409.

22 8) Complainants suffered emotional and mental suffering as a result of AK's
23 violation of ORS 659A.403.

24 9) AK and MK, as partners, are jointly and severally liable for A. Klein's
25 violation of ORS 659A.403.

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

4 11) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the
5 Bureau of Labor and Industries has the authority under the facts and circumstances of
6 this case to issue an appropriate cease and desist order. The sum of money awarded
7 to Complainants and order to cease and desist violating ORS 659A.403 is an
8 appropriate exercise of that authority.

PROPOSED OPINION

INTRODUCTION

12 The Formal Charges seek damages for emotional, mental and physical suffering
13 in the amount of "at least \$75,000" for each Complainant. In addition to any emotional
14 suffering experienced by Complainants as a direct result of Sweetcakes' refusal to bake
15 them a cake ("cake refusal"), the Agency also seeks damages for suffering caused to
16 Complainants by media publicity and social media responses to this case.

17 In order, the forum considers: (1) the amount and extent of Complainants'
18 emotional suffering and the cause of that suffering; (2) whether the law provides a
19 remedy for the suffering they experienced as a result of media and social media
20 attention; and (3) the appropriate amount of damages.

1. Amount, Extent, and Cause of Complainants' Emotional Suffering

A. *R. Bowman-Cryer*

a. Emotional suffering from the cake refusal

24 Prior to the cake tasting, LBC had been asking RBC to marry her for nine years.
25 Until October 2012, RBC did not want to be married because of her personal

1 experience of failed marriages. At that time, RBC decided that they should get married
2 to give their foster children a sense of "permanency and commitment." After her long-
3 standing matrimonial reticence, RBC became excited to get married and to start
4 planning the wedding,⁵³ wanting a wedding that was as "big and grand" as they could
5 afford. Obtaining a cake from Sweetcakes like the one purchased for CM's wedding
6 two years earlier was part of that grand scheme, and both Complainants were excited
7 about the cake tasting at Sweetcakes because of how much they liked the cake
8 Respondents had made for CM's wedding.

9 RBC's emotional suffering began at the January 17, 2013, cake tasting when AK
10 told RBC and CM that Sweetcakes did not make wedding cakes for same-sex
11 ceremonies. In response, RBC began to cry. She felt that she had humiliated her
12 mother and was concerned that CM, who had believed that homosexuality was wrong
13 until only a few years earlier, was ashamed of her. Walking out to the car and in the
14 car, RBC became hysterical and kept apologizing to CM. When CM returned to the car
15 after talking with AK, RBC was still "bawling" in the car. When CM told her that AK had
16 called her "an abomination," this made RBC cry even more. RBC, who was brought up
17 as a Southern Baptist, interpreted AK's use of the word "abomination" her mean that
18 God made a mistake when he made her, that she wasn't supposed to exist, and that
19 she had no right to love or be loved, have a family, or go to heaven. She continued to
20 cry all the way home and after she arrived at home, where she immediately went
21 upstairs to her bedroom and lay in her bed, crying.

22 On January 18, 2013, RBC felt depressed and questioned whether there was
23 something inherently wrong with the sexual orientation she was born with and if she and
24

25 ⁵³ The forum again acknowledges that Complainants' "wedding" on June 27, 2013, was only a
commitment ceremony, not a legal "marriage." See footnote 39.

1 LBC deserved to be married like a heterosexual couple. She spent most of that day in
2 her room, trying to sleep.

3 In the days following January 17, 2013, RBC had difficulty controlling her
4 emotions and cried a lot, and Complainants argued with each other because of RBC's
5 inability to control her emotions. They had not argued previously since moving to
6 Oregon. In addition, RBC also became more introverted and distant in her family
7 relationships. She and A. Cryer have always been very close, and their connection was
8 not as close "for a little bit" after January 17, 2013. A week later, RBC still felt "very sad
9 and stressed," felt concerned about still having to plan her wedding, and felt less
10 exuberant about the wedding. On January 21, 2013, she experienced anxiety during
11 her cake tasting at Pastry Girl because of AK's January 17, 2013, refusal and her fear of
12 subsequent refusals. After January 17, 2013, although RBC relied on CM to contact
13 potential wedding vendors, RBC still experienced some anxiety over possible rejection
14 because her wedding was a same-sex wedding. During this same period of time, A.
15 Cryer credibly analogized RBC's demeanor as similar to that of a dog who had been
16 abused.

17 b. Emotional suffering from publicity about the case

18 On February 1, 2013, RBC became aware that the media was aware of AK's
19 refusal to make a wedding cake for Complainants when she received a telephone call
20 from Lars Larson, an American conservative talk radio show host based in Portland,
21 Oregon, who told her that he had spoken with AK and wanted to see what RBC "had to
22 say about the pending case." This upset RBC, and she became greatly concerned that
23 E and A would be taken away from them by the foster care system because they had
24 been told that the girls' information had to be protected and that the state would "have to
25 readdress placement" of the girls with Complainants if any information was released

1 concerning the girls. This concern continued until their adoption became final sometime
2 after December 2013.

3 From February 1, 2013, until the time of the hearing, many people have made
4 "hate-filled" comments through social media and in the comments sections of various
5 websites that were supportive of Respondents and critical of or threatening to
6 Complainants. These comments and the media attention caused RBC stress, anger,
7 pain, frustration, suffering, torture, shame, humiliation, degradation, fear that she would
8 be harassed at home because the DOJ complaint with Complainants' home address
9 had been posted on Facebook, and the feeling that her reputation was being destroyed.
10 The publicity from the case and accompanying threats on social media from third parties
11 made RBC "scared" for the lives of A, E, LBC, and herself. In addition, RBC was also
12 upset by a confrontation with her sister who learned about the DOJ complaint through
13 the media and posted a comment in support of Respondents on Respondents'
14 Facebook.

15 Without giving any specific examples, RBC credibly testified that, in a general
16 sense,⁵⁴ the cake refusal has caused her continued emotional suffering up to the time
17 of hearing. Other than that, she did not testify as to any specific suffering she
18

19 ⁵⁴ The following is RBC's only testimony about her emotional suffering due to the cake refusal after the
20 case began to be publicized. It occurred during the Agency's redirect examination:

21 Q: "You testified earlier about the media attention being sort of a secondary layer of stress, and I believe
22 that that term you used during Mr. Smith's cross examination of you. During my examination of you, you
23 testified at length as to the emotional harm that you suffered directly from the refusal of service alone. Do
24 you still feel that harm from the refusal itself -- the January 17, 2013 refusal?"

25 *****

26 A. "Yes, I still experience that."

27 Q. "Was the primary harm, the harm that resulted from the refusal of service itself, persistent throughout
28 the times where you experienced media attention?"

29 A. "Yes, the harm was still present during the media attention."

1 experienced after February 1 that was directly attributable to the cake refusal. Rather,
2 her descriptions of the particular types of suffering she experienced after February 1
3 were all in response to questions about how she felt as a result of identifiable media or
4 social media exposures.

5 **B. L. Bowman-Cryer**

6 a. Emotional suffering from the cake refusal

7 LBC had been asking RBC to marry her for nine years before RBC finally
8 accepted in October 2012. RBC's acceptance in October 2012 of LBC's marriage
9 proposal made LBC "extremely happy." Both Complainants were excited about the
10 cake tasting at Sweetcakes because of how much they liked the cake Respondents had
11 made for CM's earlier wedding. However, LBC, unlike RBC, did not go to the cake
12 tasting.

13 When CM and RBC arrived home on January 17, 2013, after their cake tasting at
14 Sweetcakes, CM told LBC that AK had told them that Sweetcakes did "not do same-sex
15 weddings" and that AK had told CM that "your children are an abomination." LBC was
16 "flabbergasted" and she became very upset and very angry. LBC, who was raised as a
17 Roman Catholic, recognized AK's statement as a reference from Leviticus. She was
18 "shocked" to hear that AK had referred to her as an "abomination." Based on her
19 religious background, she understood the term "abomination" to mean "this is a creature
20 not created by God, not created with a soul. They are unworthy of holy love. They are
21 not worthy of life." Her immediate thought was that this never would have happened,
22 had she had not asked RBC to marry her. Because of that, she felt shame. Like RBC,
23 she also worried about how it would affect CM's relatively recent acceptance of RBC's
24 sexual orientation.

1 LBC views herself as RBC's protector. After RBC climbed into bed, crying, LBC
2 got into bed with RBC and tried to soothe her. RBC became even more upset and
3 pushed RBC away. In response, LBC lost her temper because she could not "fix"
4 things.

5 When LBC went back downstairs, E, the older of Complainants' foster daughters
6 was extremely agitated from events at school that day. LBC tried to calm her, but she
7 refused to be calmed, repeatedly calling out for RBC, with whom she had a special
8 bond. Eventually, E cried herself to sleep. LBC's inability to calm E was very frustrating
9 to her. That night, LBC was very upset, cried a lot, and was hurt and angry. Later that
10 same evening, she filed her DOJ complaint.

11 In the days immediately following January 17, 2013, LBC experienced anger,
12 outrage, embarrassment, exhaustion, frustration, sorrow, and shame as a reaction to
13 AK's refusal to provide a cake. She felt sorrow because she couldn't console E, she
14 could not protect RBC, and because RBC was no longer sure she wanted to be
15 married. Her excitement about getting married was also lessened because she was not
16 sure she could protect RBC if any similar incidents occurred.

17 b. Emotional suffering from publicity about the case

18 On February 1, 2013, LBC went to the emergency room of a local hospital
19 because of pain from a shoulder injury that she had suffered three weeks earlier and
20 her concern that she might have a broken shoulder. While in the hospital, she heard
21 that AK's refusal to make their wedding cake was on the news. This made her very
22 upset and she was crying when she was examined by a doctor. Based on the media,
23 potential media exposure, and social media attention related to her DOJ complaint after
24 February 1, 2013, LBC's headaches increased. She also felt intimidated and became
25 fearful.

1 After LBC's DOJ complaint was publicized in the media, LBC also had an
2 "devastating" confrontation with her aunt who had learned about her DOJ complaint
3 against Respondents through the media and threatened to shoot LBC in the face if she
4 ever set foot on LBC's family's property again.⁵⁵

5 After February 1, 2013, LBC, like RBC, was also greatly concerned that their
6 foster children would be taken away from them because of media exposure.

7 LBC testified that she still feels emotional effects from the cake refusal because
8 E, A, and RBC "were" still suffering and that "was" tearing me apart.⁵⁶ Other than that,
9 she did not testify as to any particular suffering she experienced after February 1 that
10 was directly attributable to the cake refusal. Rather, her descriptions of the particular
11 types of suffering she experienced after February 1 were all in response to questions
12 about how she felt as a result of identifiable media or social media exposures.

13 **2. Emotional suffering damages based on media and social media attention**

14 In its closing argument, the Agency asked the forum to award Complainants
15 \$75,000 each in emotional suffering damages stemming directly from the cake refusal,
16 In addition, the Agency asked the forum to award damages to Complainants for
17 emotional suffering they experienced as a result of the media and social media attention
18 generated by the case from January 29, 2013, the date AK posted LBC's DOJ
19 complaint on his Facebook page, up to the date of hearing. The Agency's theory of
20 liability is that since Respondents brought the case to the media's attention and kept it
21 there by repeatedly appearing in public to make statements deriding Complainants, it

22
23
24 ⁵⁵ LBC's intense and visceral display of emotions while testifying about her aunt's behavior made it clear
that her aunt's behavior caused her extreme upset.

25 ⁵⁶ See footnote 51, *supra*. LBC testified in the past tense.

1 was foreseeable that this attention would negatively impact Complainants, making
2 Respondents liable for any resultant emotional suffering experienced by Complainants.
3 The Agency also argues that Respondents are liable for negative third party social
4 media directed at Complainants because it was a foreseeable consequence of the
5 media attention. Accordingly, the forum examines the evidence to determine the extent,
6 if any, of Respondents' responsibility for the attention, then whether existing law
7 supports this theory of liability

8 ***Respondents' responsibility for the attention***

9 Respondents' January 17, 2013, cake refusal was first brought to the attention of
10 a third party on January 17, when LBC filed a consumer complaint with DOJ. Although
11 LBC did not see DOJ's disclaimer on her smart phone view of DOJ's form, her
12 complaint was a public record under Oregon law, as noted on the hard copy and cover
13 letter that DOJ mailed to AK on January 28. On January 29, AK posted a copy of the
14 first page of the complaint on his personal Facebook account, prefaced with his
15 comment "[t]his is what happens when you tell gay people you won't do their 'wedding
16 cake.'" That page had LBC's name, address, phone number, and email and
17 Sweetcakes' address and phone number printed on it. On January 29, LBC received an
18 email telling her about AK's posting. LBC did so, and called Paul Thompson,
19 Complainants' attorney. Later that day, AK's posting was removed, apparently through
20 Thompson's efforts.

21 On February 1, RBC received a telephone call from Lars Larson, a talk radio
22 show host based in Portland who told her that he had spoken with AK and wanted to
23 see what RBC "had to say about the pending case." However, there is no evidence in
24 the record to show how Larson acquired that awareness or what, if anything, that AK
25 told him.

1 There is no evidence in the record about any publicity that occurred between
2 February 1 and February 8, except for: (1) a February 4 comment by LBC on her
3 Facebook page stating "I did NOT go 2 news, or conduct interviews despite what
4 articles Elude to. No comment, talk 2 my lawyer Paul Thompson" and (2) LBC's
5 statement that she overheard news about the cake refusal being broadcast on television
6 while she was in the hospital on February 1.

7 From February 1, 2013, until the time of the hearing, many people have made
8 "hate-filled" comments through social media and in the comments sections of various
9 websites that were supportive of Respondents and critical of or threatening to
10 Complainants.

11 On February 8, 2013, Paul Thompson sent a letter regarding Complainants and
12 their situation, without disclosing their names, to KGW, KOIN, The Oregonian, OPB,
13 KATU, KPTV, the Lars Larson Radio Show, The Wall Street Journal, Willamette Week,
14 and Reuters. Four days later, DOJ emailed a copy of LBC's complaint to a number of
15 media sources, including the executive producer of the Lars Larson Show. As noted
16 earlier, that complaint contained LBC's address, phone number, and email address.

17 On February 9, 2013, there was a protest outside Respondents' bakery that was
18 reported by KATU.com, organized by a person or persons who started a Facebook
19 page called "BoycottSweetCakesByMelissaGRESHAM" ("Boycott") a few days earlier.
20 KATU.com posted a photo captioned as "protesters gathered Saturday outside a
21 Gresham bakery that's at the center of a wedding cake controversy." Complainants
22 were not involved in the protest or subsequent boycott. However, on February 10,
23 2013, both Complainants made comments on Boycott's Facebook page in which they
24 indirectly identified themselves as the persons who sought the wedding cake and
25 thanked people for their support.

1 The fact that Complainants had foster children was first exposed to the public on
2 an undetermined date by one of RBC's Facebook "friends" who saw an article about the
3 case in her local Florida paper and posted it on Facebook, adding in her comments that
4 Complainants had children.

5 After February 8, the case took on a life of its own in the media, generating
6 media articles, comments to those articles, and social media "tweets" and Facebook
7 comments from people throughout the United States that continued after Complainants
8 filed their BOLI complaints.

9 On August 14, 2013, BOLI itself issued a press release publicizing the fact that
10 "[a] same-sex couple has filed an anti-discrimination complaint with the Oregon Bureau
11 of Labor and Industries (BOLI) against a Gresham bakery, Sweet Cakes by Melissa, for
12 allegedly refusing service based on sexual orientation." On January 17, 2014, BOLI
13 issued a second stating that a BOLI investigation has found that "[a] Gresham bakery
14 violated the civil rights of a same-sex couple when it denied service based on sexual
15 orientation * * * "The couple filed the complaint against Sweetcakes by Melissa under
16 the Oregon Equality Act of 2007[.]"

17 After February 1, 2013, despite general testimony by Complainants about
18 Respondents' extensive public comments concerning the case, the record contains
19 limited evidence of any events involving Respondents in the media or social media that
20 publicized the cake refusal. First, AK's and MK's September 2, 2013, CBN appearance.
21 Second, AK's February 13, 2014, radio interview with Tony Perkins. Third, an article in
22 the "Blade" that RBC read that referred to an interview with AK in which AK had said
23 "that he did not want to support something that he considered a bad decision."⁵⁷ There
24

25 ⁵⁷ There is no other evidence to show what kind of media the "Blade" is, the context of the article, the date
AK was interviewed, or the date the article was published.

1 is no evidence that either Complainant watched the CBN broadcast or heard the
2 Perkins' interview. LBC testified that she watched some interviews "where Mr. Klein
3 admitted to calling us abominations and admitted he would no longer nor would he
4 serve any gay couple" but there was no evidence of when she watched the interviews or
5 in what media the interviews appeared. There is also no evidence that Respondents
6 ever solicited attention from the media or contacted any of the persons who sent
7 negative "tweets" or Facebook comments to Complainants. On the other hand, the
8 media and social media firestorm that followed the cake refusal may not have been lit,
9 but was certainly torched, by DOJ's release of LBC's complaint to the media, Paul
10 Thompson's press release, the Boycott Sweetcakes website and protests, and BOLI's
11 own press releases.

12 As the case was being widely publicized, AK testified that he allowed himself to
13 be interviewed by different media sources, but he also credibly testified that he did not
14 seek out any interviews and there is no evidence that he mentioned Complainants'
15 names in any of his interviews.

16 Based on the above, the forum concludes that Respondents' responsibility for the
17 media and social media attention that caused Complainants to experience emotional
18 suffering was limited to that attributable to AK's January 29, 2013, post of LBC's DOJ
19 complaint. Assuming, arguendo, that this responsibility was enough to trigger potential
20 liability, the forum next examines analogous common law tort cases to determine if the
21 law allows recovery for emotional suffering damages stemming from the media and
22 social media attention such as that directed at Complainants.

1 ***Emotional Suffering Damages Related to Media and Social Media Attention Not Recoverable***

2 In a 1986 case involving unwanted publicity, the Oregon Supreme Court set forth
3 the following test to be used in deciding whether truthful publication of a fact about a
4 private individual that the individual reasonably prefers to keep private gives rise to
5 common-law tort liability for damages for mental or emotional distress. *Anderson v.*
6 *Fisher Broad. Companies, Inc.*, 300 Or. 452, 712 P.2d 803, 804 (1986).

7
8 "To summarize, we conclude that in Oregon the truthful presentation of facts
9 concerning a person, even facts that a reasonable person would wish to keep
10 private and that are not 'newsworthy,' does not give rise to common-law tort
11 liability for damages for mental or emotional distress, unless the manner or
12 purpose of defendant's conduct is wrongful in some respect apart from causing
13 the plaintiff's hurt feelings. For instance, a defendant might incur liability for
14 purposely inflicting emotional distress by publishing private information in a
15 socially intolerable way, *cf. Hall v. The May Dept. Stores, supra*; or the publicized
16 information might be wrongfully obtained by conversion, bribery, false pretenses,
17 or trespassory intrusion, *see McLain v. Boise Cascade Corp., supra*, or published
18 by a photographer who has been paid for what the subject reasonably expects to
19 be the exclusive use of a picture; or when a defendant disregards a duty of
20 confidentiality or other statutory duty, *see Humphers v. First Interstate Bank,*
21 *supra*, or exploits a distinctive economic value of an individual's identity or image
22 beyond that of other similar persons for purposes of associating it with a
23 commercial product or service, although this court has not decided all such
24 issues. And, of course, the distressing report or presentation of a person's private
25 affairs might not be truthful, *see Tollefson v. Price, supra; Hinish v. Meier &*
Frank, supra."

19 *Id.* at 469.

20 In subsequent decisions, the Oregon Court of Appeals has consistently held that
21 a person cannot recover for negligent infliction of emotional distress if the person is not
22 also physically injured, threatened with physical injury, or physically impacted by the
23 tortious conduct "unless the defendant's conduct infringes on some legally protected
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25

1 interest apart from causing the claimed distress.”⁵⁸ The term “legally protected interest”
2 refers to “an independent basis of liability separate from the general duty to avoid
3 foreseeable risk of harm.”⁵⁹ In this case, the Agency has identified no untruthful
4 statements made by Respondents, has not shown that the manner or purpose of
5 Respondents’ conduct with respect to the media or social media was wrongful in some
6 respect apart from causing the Complainants’ hurt feelings, and has not identified an
7 “an independent basis of liability separate from the general duty to avoid foreseeable
8 risk of harm.” Accordingly, the forum concludes that there is no basis in law for
9 awarding damages to Complainants for their emotional suffering caused by media and
10 social media attention related to this case.

11 **3. Amount of Damages**

12 There is ample evidence in the record of specific, identifiable types of emotional
13 suffering both Complainants experienced between the date of the cake refusal and the
14 date that LBC’s DOJ complaint was first publicized in the media. After that, both
15 Complainants testified that they continued to suffer because of the cake refusal, but did
16 not identify that suffering with any particularity. In contrast, both Complainants testified
17 in great detail about the specific suffering they experienced due to media and social
18 media attention after the cases were publicized. However, as stated above,
19 Complainants are not entitled to damages for any emotional suffering related to media
20 and social media attention from the cake refusal.

23 ⁵⁸ See e.g., *Phillips v. Lincoln County School District*, 161 Or.App. 429, 433, 984 P.2d 947 (1999); *Lockett*
24 *v. Hill*, 182 Or. App. 377, 380, 51 P.3d 5, 6-7 (2002); *Rustvold v. Taylor*, 171 Or. App. 128, 134-36, 14
P.3d 675, 679-80 (2000).

25 ⁵⁹ *Phillips* at 432-33.

1 In determining an award for emotional and mental suffering, the forum considers
2 the type of discriminatory conduct, and the duration, frequency, and severity of the
3 conduct. It also considers the type and duration of the mental distress and the
4 vulnerability of the aggrieved persons. The actual amount depends on the facts
5 presented by each aggrieved person. An aggrieved person's testimony, if believed, is
6 sufficient to support a claim for mental suffering damages. *In the Matter of C. C.*
7 *Slaughters, Ltd.*, 26 BOLI 186, 196 (2005). In public accommodation cases, "the
8 duration of the discrimination does not determine either the degree or duration of the
9 effects of discrimination." *In the Matter of Westwind Group of Oregon, Inc.*, 17 BOLI 46,
10 53 (1998).

11 In this case, the forum concludes that \$75,000 and \$60,000, are appropriate
12 awards to compensate Complainants RBC and LBC, respectively, for the emotional
13 suffering they experienced from Respondents' cake refusal. LBC is awarded the lesser
14 amount because she was not present at the cake refusal and the forum found her
15 testimony about the extent and severity of her emotional suffering to be exaggerated in
16 some respects.

17
18 **PROPOSED ORDER**

19 A. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate
20 the effects of the violation of ORS 659A.403 by **Respondent Aaron Klein**, and as
21 payment of the damages awarded, the Commissioner of the Bureau of Labor and
22 Industries hereby orders **Respondents Aaron Klein and Melissa Klein** to deliver to
23 the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State
24 Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check
25

1 payable to the Bureau of Labor and Industries in trust for **Complainants Rachel**
2 **Bowman-Cryer and Laurel Bowman-Cryer** in the amount of:

3
4 1) ONE HUNDRED THIRTY FIVE THOUSAND DOLLARS (\$135,000),
5 representing compensatory damages for emotional and mental physical suffering, to be
6 apportioned as follows:

7 Rachel Bowman-Cryer: \$75,000

8 Laurel. Bowman-Cryer: \$60,000

9 *plus,*

10 2) Interest at the legal rate on the sum of \$135,000 from the date of issuance
11 of the Final Order until Respondents comply with the requirements of the Order herein.

12 B. NOW, THEREFORE, as authorized by ORS 659A.850 and ORS
13 659A.855, and to further eliminate the effect of the violation of ORS 659A.403 by
14 **Respondent Aaron Klein**, the Commissioner of the Bureau of Labor and Industries
15 hereby orders **Respondents Aaron Klein and Melissa Klein** to cease and desist from
16 denying the full and equal accommodations, advantages, facilities and privileges of
17 Sweetcakes by Melissa to any person based on that person's sexual orientation

18 DATED this 21st day of April, 2015.

19 

20 _____
21 Alan McCullough, Administrative Law Judge
22 Bureau of Labor and Industries

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24 ISSUED ON: _____
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EXCEPTIONS NOTICE

The Commissioner of the Bureau of Labor and Industries can adopt all or any part of this Proposed Order in the Final Order. The Commissioner may provide in the Final Order for a different determination of liability, damages, means of enforcement, or, where appropriate, penalties than are set forth in this Proposed Order.

Pursuant to ORS chapter 183 and OAR 839-050-0380, you are entitled to file exceptions to this Proposed Order. For exceptions to be considered, you must file them within ten (10) days from the date of issuance of this Proposed Order.

If you file exceptions to this Proposed Order, THEY MUST BE FILED AT THE FOLLOWING ADDRESS:

Bureau of Labor and Industries
ATTN: Contested Case Coordinator
1045 State Office Building
800 NE Oregon Street
Portland, Oregon 97232-2180

You also must serve all other participants or their representatives with a copy of any exceptions you file with the Contested Case Coordinator.

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

PO-CRD/Sweetcakes, ##44-14 & 45-14.doc