

VAL HOYLE  
COMMISSIONER



DUKE SHEPARD  
DEPUTY COMMISSIONER

**BUREAU OF LABOR AND INDUSTRIES**

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

In the Matter of:

Case No. 12-21

**SUNLAN LIGHTING, INC.,**

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER

Respondent.

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**SYNOPSIS**

Respondent violated ORS 659A.142(4) when it refused to allow Complainant, an individual with a disability, to shop in its store in April 2019 while accompanied by her assistance animal. The allergies of the Respondent's owner to animal dander was not a valid reason to exclude Complainant from the Respondent's retail store, a place of public accommodation, because the Complainant was accompanied by an assistance animal. The forum awarded Complainant \$8,000 in damages for physical, emotional, and mental suffering.

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The above-entitled case came on regularly for hearing before Caroline A. Holien, designated as Administrative Law Judge ("ALJ") by, Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 5, 2022, via Zoom.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Chief Administrative Prosecutor Adam Jeffries, an employee of the Agency. Respondent Sunlan Lighting, Inc. ("Sunlan") was represented by Steven Parker, attorney at law. Complainant Molly Neher ("Neher") was present throughout the hearing, as was Sunlan owner Kay Newell ("K. Newell").

1 The Agency called Zachary Zerzan ("Zerzan"), Senior Investigator, BOLI's Civil  
2 Rights Division; Kevin Cardoza ("Cardoza"); and Neher as witnesses. Sunlan called K.  
3 Newell and Sunlan employee and K. Newell's son, Dennis Newell ("D. Newell") as  
4 witnesses. The forum received into evidence Administrative Exhibits X1-X14 and  
5 Agency Exhibits A1-A12<sup>1</sup>, A14 (pages 4-5 only), A15 and A22-A24. Respondent  
6 offered no exhibits at hearing.

7  
8 Having fully considered the entire record in this matter, I, Val Hoyle,  
9 Commissioner of the Bureau of Labor and Industries, hereby make the following  
10 Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,<sup>2</sup> Conclusions  
11 of Law, Proposed Opinion, and Order.

#### 12 FINDINGS OF FACT – PROCEDURAL

13 1) On May 20, 2019, Neher filed a complaint with the Agency's Civil Rights  
14 Division ("CRD") alleging "unlawful discrimination in a place of public accommodation in  
15 that [Sunlan] made a distinction, discrimination, or restriction because of [her] disability."  
16 (Ex. A1)

17 2) On May 20, 2020, the Agency's Civil Rights Division issued a Notice of  
18 Substantial Evidence Determination ("SED") in which it found substantial evidence of  
19 the unlawful practice of discrimination in a place of public accommodation on the basis  
20 of disability in violation of ORS 659A.142. (Ex. A9)

21 3) On September 10, 2021, the Agency submitted a request for hearing.  
22 (Ex. X1)

23  
24 <sup>1</sup> Exs. A11 and A15 are subject to the provisions of the Protective Order issued on February 9, 2022. See  
25 Findings of Fact – Procedural # 12.

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

1           4)     On September 10, 2021, the forum issued a Notice of Hearing to  
2 Respondents, the Agency, and Complainant stating the time and place of the hearing as  
3 April 5, 2022, beginning at 9:30 a.m., at the W. W. Gregg Hearing Room of the Oregon  
4 Bureau of Labor and Industries, located at 800 NE Oregon Street, 10th floor, Portland,  
5 Oregon. Together with the Notice of Hearing, the forum sent a copy of the Agency's  
6 Formal Charges, a document entitled "Summary of Contested Case Rights and  
7 Procedures" containing the information required by ORS 183.413, a document entitled  
8 "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice  
9 explaining the significance of the Notice of Hearing, and a copy of the forum's contested  
10 case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

11           5)     The Formal Charges alleged Sunlan engaged in unlawful practices, as  
12 defined under ORS 659A.001(14), in violation of ORS 659A.142(4), ORS  
13 659A.142(6)(a), ORS 659A.142(7), and OAR 839-006-0345(8)(a),(9). The Formal  
14 Charges sought damages for physical, mental, and emotional distress of at least  
15 \$8,000. The Formal Charges also asked that Sunlan be required to be trained, at its  
16 expense, "on accommodating individuals with disabilities including accommodating  
17 individuals with disabilities who utilize service animals" and that Respondents be  
18 enjoined from violating laws. The Formal Charges stated that the forum's order may  
19 include such other relief as appropriate to eliminate the effects of the unlawful practices  
20 found as to Complainant and others similarly situated. (Ex. 2b)

21           6)     On September 30, 2021, Sunlan filed Respondent Sunlan Lighting, Inc.'s  
22 Answer and Affirmative Defenses to Formal Charges, in which it denied the allegations  
23 set forth in the Formal Charges. (Ex. 3)

24           7)     On September 30, 2021, the forum issued an Interim Order Re Temporary  
25 Procedures and Requiring Case Summaries that included notice to the parties that

1 documents were to be filed by email only and set March 22, 2022, as the deadline for  
2 filing Case Summaries. (Ex. X4)

3 8) On December 29, 2021, the Agency filed its Agency Motion to Compel  
4 seeking an order compelling the production of documents and responses to  
5 interrogatories pursuant to OAR 839-050-0150 and OAR 839-050-0200(5). (Ex. X5)

6 9) On January 5, 2022, Sunlan filed the Declaration of Steven Parker in  
7 Opposition to the Agency's Motion to Compel Discovery arguing that Agency's motion  
8 was premature as the Respondent had failed to timely respond to the Agency's  
9 discovery request due to an oversight and it intended to respond to the discovery  
10 requests. (Ex. X6)

11 10) On January 14, 2022, the forum issued an Interim Order Re Agency's  
12 Motion to Compel:

13 "The Agency filed a Motion to Compel Discovery on December 29, 2021.  
14 In the motion, the Agency represented that it served discovery requests on  
15 Respondent, but had not received a response at the time the motion was filed.  
The motion asked that the forum require Respondent to respond to the discovery  
requests by January 19, 2022.

16 "Respondent's counsel filed a declaration in response to the motion on  
17 January 5, 2022. In the declaration, Respondent's counsel 'acknowledge[d] that  
18 the Agency is entitled to responses to discovery it previously served on  
19 Respondent,' but stated that Respondent needed additional time to respond. In  
subsequent email communication, Respondent's counsel informed the ALJ that  
Respondent would be able to respond to the requests by January 12, 2022.

20 "The Administrative Law Judge has the sole discretion to order discovery  
21 by a participant in appropriate cases.' OAR 839-050-0200(1). 'Any discovery  
22 request must be reasonably likely to produce information that is generally  
relevant to the case.' OAR 839-050-0200(7).

23 "In its motion, the Agency sought to compel answers and responses to the  
24 Agency's discovery requests, a copy of which is attached to this interim order.  
25 The forum determines that the requests for production and interrogatories appear  
to seek information that is "reasonably likely to produce information that is  
generally relevant to the case," and Respondent acknowledge that the Agency  
was entitled to a response. Accordingly, the Agency's motion is GRANTED. If

1 Respondent has not already done so, it must respond to all of the discovery  
2 requests on or before January 19, 2022.

3 "Failure to comply with this interim order may result in sanctions as  
4 described in OAR 839-050-0200(11), including the refusal to admit evidence that  
5 was not disclosed in response to this order. Pursuant to OAR 839-050-0200(8),  
6 Respondent has a continuing obligation, through the close of the hearing, to  
7 provide the Agency with any newly discovered material that is within the scope of  
8 this order.

9 "IT IS SO ORDERED."

10 (Ex. X7)

11 11) On February 9, 2022, the Agency filed an Unopposed Agency Motion for  
12 Protective Order seeking a protective order permitting the parties to designate  
13 documents as being subject to its terms. (Ex. X8)

14 12) On February 9, 2022, the forum issued an Interim Protective Order  
15 granting the parties' request and ordering that "[m]edical records contain[ing]  
16 information that is of a personal nature" were exempt from disclosure under the Public  
17 Records law pursuant to ORS 192.355(2)(a). (Ex. X9)

18 13) On March 18, 2022, the Agency issued Amended Formal Charges that  
19 identified additional statutory grounds for the Agency's jurisdiction. The allegations  
20 remained the same but were amended as follows, in pertinent part:

21 "UNLAWFUL DISCRIMINATION AGAINST CUSTOMER OR PATRON WITH  
22 DISABILITY

23 "18. The Agency re-alleges Sections I through V, paragraphs 1 through  
24 18 and further alleges: Respondent made a distinction,  
25 discrimination, and/or restriction because Complainant is an  
individual with a disability in violation of ORS 659A.142(4).

"DENIAL OF A PERSON WITH A DISABILITY THE RIGHT TO BE  
ACCOMPANIED BY AN ASSISTANCE ANIMAL

VI.

1  
2 "19. The Agency re-alleges Sections I through V, paragraphs 1 through  
3 18 and further alleges: Respondent denied Complainant the right  
4 to be accompanied by an assistance animal in a place of public  
5 accommodation that is open to the public in violation of  
6 ORS 659A.142(6)(a) and OAR 839-006-0345(8)(a). ORS  
7 659A.142(4); **ORS 659A.400(1)**; **ORS 659.805(1)(a)**; ORS  
8 659A.139(1). This is an unlawful practice.

9  
10 "FAILURE TO MAKE REASONABLE MODIFICATIONS TO ALLOW AN  
11 OPPORTUNITY FOR A PERSON WITH A DISABILITY WHO IS BENEFITTED  
12 BY THE USE OF AN ASSISTANCE ANIMAL TO OBTAIN GOODS, SERVICES,  
13 AND/OR THE USE OF A PLACE OF PUBLIC ACCOMMODATION

14 VII.

15 "20. The Agency re-alleges Sections I through VI, paragraphs 1 through  
16 19 and further alleges: Respondent failed to make reasonable  
17 modifications as necessary to allow an opportunity for Complainant,  
18 a person with a disability who benefits from the use of an  
19 assistance animal, to obtain goods, services, and/or the use of the  
20 advantages, facilities, and privileges of a place of public  
21 accommodation in violation of ORS 659A.142(7) and  
22 OAR 839-006-0345(9). ORS 659A.142(4); **ORS 659A.400(1)**;  
23 **ORS 659.805(1)(a)**; ORS 659A.139(1). This is an unlawful  
24 practice.

25 (Ex. X10)(Amendments are bolded))

14) On March 16, 2022, the Agency filed the Agency's Second Motion to  
Compel Discovery seeking an order compelling a complete answer to several  
Interrogatories and Requests for Production. (Ex. X11)

15) On March 21, 2022, Respondent filed a Declaration of Steven Parker in  
Opposition to Agency's Second Motion to Compel Discovery arguing that it had  
provided the responses sought in the Agency's First Motion to Compel Discovery and it  
had provided all nonprivileged documents in its possession or control. (Ex. X12)

16) On March 23, 2022, the forum issued an Interim Order Re Agency's  
Motion to Compel:

1 "On March 16, 2021, the Agency filed its Second Motion to Compel  
2 Discovery seeking the production of any remaining non-privileged documents  
3 responsive to the Agency's Requests for Production (RFP's) Nos. 1 through 22;  
4 as well as a complete answer to Agency Interrogatory No. 1 and any  
5 supplemental responses to the Agency's Interrogatories Nos. 2, 3, 4, 5, and 6  
6 that may be necessary in the manner prescribed by OAR 839-050-0200(6). The  
7 Agency represented in its motion that Respondent had not fully complied with the  
8 Interim Order issued on January 14, 2022, which ordered Respondent to respond  
9 to all of the Agency's discovery requests by January 19, 2022, and included  
10 notice that failure to do so could result in sanctions as described in OAR 839-  
11 050-0200(11).

12 "Respondent's counsel filed a declaration in response to the Agency's  
13 motion on March 22, 2022. Respondent's counsel represented that all  
14 nonprivileged documents in its possession or control had been produced in  
15 response to the Agency's discovery requests, with the exception of RFP No. 15.  
16 Respondent argues that RFP No. 15 seeks information that is personal to  
17 individuals who are not parties to the matter nor are potential witnesses.  
18 Respondent further argues that production of such documents is oppressive  
19 given that there has been no allegation of improper wage and practices.  
20 Respondent also argues that the Agency's motion is unnecessary as to  
21 Interrogatory No. 1 because it has identified all employees having any relation to  
22 the incident at issue in this matter and provided the contact information of those  
23 employees.

24 "The Administrative Law Judge has the sole discretion to order discovery  
25 by a participant in appropriate cases.' OAR 839-050-0200(1). 'Any discovery  
request must be reasonably likely to produce information that is generally  
relevant to the case.' OAR 839-050-0200(7).

#### **"Requests for Production Nos. 1 through 22**

18 "In its motion, the Agency sought to compel the Respondent to 'produce  
19 all remaining non-privileged documents responsive to Agency's RFPS [1 through  
20 22] in its possession, custody, or control.' Specifically, the Agency sought to  
21 compel Respondent to provide a copy of its "payroll records from April 1, 2019,  
22 to the present showing each employee's occupation, each employee's hours  
23 worked by workday, each employee's hours worked by work week, and each  
24 employee's rate of pay" in response to its RFP No. 15. The Agency argues the  
25 information sought in RFP No. 15 will provide information relevant to the  
requirements set forth in ORS 659A.112 to 659A.139. The Agency contends the  
information sought is relevant to whether the significant risk of harm Respondent  
alleges Complainant and/or her assistance animal posed could be eliminated or  
reduced by a modification of staffing policies, practices, or procedures. See  
OAR 839-006-0335(1). The Agency further contends that such information is

1 relevant as to whether Respondent was required to accommodate the disabilities  
2 of its employee(s) under ORS 659A.118.

3 "The forum finds that the information sought in the Agency's RFP Nos. 1  
4 through 22, and, in particular, RFP No. 15, appear to seek information that is  
5 'reasonably likely to produce information that is generally relevant to the case.'  
6 OAR 839-050-0200(7). Further, the production of such information is not  
7 oppressive as argued by Respondent, because it is information that it is generally  
8 required to maintain and to make available to the Oregon Bureau of Labor and  
9 Industries. OAR 839-020-0080(1)(a), (d), (f), (g), (h); OAR 839-020-0083(3). It is  
10 therefore ordered that the Respondent must produce all remaining non-privileged  
11 documents responsive to the Agency's Requests for Production Nos. 1 through  
12 22 no later than March 28, 2022. The forum is confident counsel can mutually  
13 agree as to how to best address the privacy concerns noted in the Respondent's  
14 declaration.

#### 10 "Interrogatories

11 "In its motion, the Agency sought to compel the Respondent to provide the  
12 contact information sought in the Agency's Interrogatory No. 1 for each employee  
13 employed between April 1, 2019, and the present, including the start and end  
14 dates of employment for each employee. The Agency argues such information is  
15 relevant as to whether the significant risk of harm Respondent alleges  
16 Complainant and/or her assistance animal posed could be eliminated or reduced  
17 by a modification of staffing policies, practices, or procedures pursuant to OAR  
18 839-006-0335(1). The Agency also argues such information is relevant to  
19 determine whether the requirements of ORS 659A.112 to 659A.139 applied to  
20 Respondent and whether it had an obligation to accommodate the disabilities of  
21 its employee(s) under ORS 659A.118.

17 "The Agency argues Interrogatories Nos. 2 through 6 are reasonably likely  
18 to produce relevant information to this matter, noting that the interrogatories seek  
19 information as to how individuals who have entered the store with an assistance  
20 animal have been treated and information pertaining Respondent's third  
21 affirmative defense concerning OAR 839-006-0335(1).

21 "The forum determines that the Agency's Interrogatories Nos. 1 through 6  
22 seek information that is reasonably likely to produce information generally  
23 relevant to the case. OAR 839-050-0200(7). It is therefore ordered that  
24 Respondent must provide a complete response to the Agency's Interrogatory No.  
25 1 in the manner prescribed by OAR 839-050-0200(6) no later than March 28,  
2022. It is therefore further ordered that Respondent must provide any  
supplemental responses to the Agency's Interrogatories Nos. 2, 3, 4, 5, or 6 that  
may be necessary in the manner prescribed by OAR 839-050-0200(6) no later  
than March 28, 2022.



1 "Failure to comply with this interim order may result in sanctions as  
2 described in OAR 839-050-0200(11), including the refusal to admit evidence that  
3 was not disclosed in response to this order. Pursuant to OAR 839-050-0200(8),  
4 Respondent has a continuing obligation, through the close of the hearing, to  
provide the Agency with any newly discovered material that is within the scope of  
this order.

5 "IT IS SO ORDERED."

6 (Ex. X13)

7 17) On March 29, 2022, the Agency filed an Addendum to Agency Case  
8 Summary adding documents A23-A26 to the Agency's Case Summary. (Ex. X14)

9 18) On May 19, 2022, the ALJ issued a proposed order that notified the  
10 participants they were entitled to file exceptions to the proposed order within ten days of  
11 its issuance. Respondent and the Agency both filed exceptions on May 31, 2022<sup>3</sup>. The  
12 exceptions are addressed in the Opinion section of this Final Order.

13 **FINDINGS OF FACT – THE MERITS**

14 1) At all times material herein, Sunlan was an active business domestic  
15 corporation registered with the Oregon Secretary of State Business Registry. (Ex. A4)

16 2) Sunlan is a retail establishment open to the general public that specializes  
17 in selling lightbulbs. Sunlan is located on Mississippi Avenue in Portland, Oregon, and  
18 has been in operation since 1989. K. Newell owns both the business and the building in  
19 which the business is located. K. Newell operates Sunlan with her son, D. Newell.

20 (Testimony of K. Newell)  
21  
22  
23  
24

25 <sup>3</sup> As the 10<sup>th</sup> day following the issuance of the Proposed Order fell on a holiday, the parties timely filed  
their exceptions on the next business day.

1           3) Sunlan has an employee handbook that is focused primarily on rest and  
2 meal periods and includes information regarding Portland's Sick Time Ordinance. The  
3 employee handbook does not include any reference to assistance animals. (Ex. A13)

4           4) K. Newell suffers from severe allergies to animal dander, which causes  
5 her to lose her voice and her eyes to swell, which she believes has led to permanent  
6 damage to her vision. It can take K. Newell several days to recover after being exposed  
7 to animal dander. At times, she has been required to use a portable speaker in order to  
8 be heard due to the swelling in her throat. K. Newell has determined over the years that  
9 she is especially sensitive to dog dander. As a result, K. Newell avoids dogs and does  
10 not allow them in her store. (Exs. A6, p. 11; A14; A15; Testimony of K. Newell)

11           5) Each Sunlan employee has an air purifier at his or her desk. There is also  
12 an air purifier in the store's heating and cooling system. Despite these modifications, K.  
13 Newell continues to suffer an allergic reaction if she is exposed to animal dander.  
14 (Testimony of K. Newell)

15           6) A sign with an image of a dog in a red circle with a red line across the dog  
16 image is posted on the front door of the store. Under the image, the sign reads, "NO  
17 DOGS ALLOWED \* \* \* Scent Free Building." (Ex. A24)(capital letters used in original)

18           7) There is a second sign on the door that reads, "No Dogs allowed due to  
19 server [sic] Allergies. Thank you!" There is also a note on the door that reads:

20           "I am sure your dog is cute, but to me it is a health hazard. If I were to pet your  
21 dog, I would break out in a rash.

22             
23           "If you bring your dog in to [sic] the building, he will leave dander behind. That  
24 dander will float into my lungs causing my throat to swell and my voice to  
25 become a whisper. As I breathe in the dander my lungs will begin to burn and I  
will hurt. Just a few minutes exposure to your dog will cause me to lose the  
ability to talk on the phone. The problems will start to occur shortly after your dog

1 leaves and will get worse until I can breathe clean fresh air that has no dog  
2 dander.

3 "You are welcome to explore the store, but please leave your dog outside."

4 (Ex. A6, pp. 17-21)

5 8) Sunlan's procedure has traditionally been to inform customers who bring a  
6 dog inside of the store that exposure to dogs can cause K. Newell to lose her voice and  
7 to ask the customer to take the dog outside. Sunlan employees have assisted  
8 customers with assistance animals in picking out their items and completing the sale  
9 while the customer or another person waits outside of the store with the animal. There  
10 is an attached breezeway in which customers with dogs have been asked to wait while  
11 a Sunlan employee retrieves their items. (Ex. A6, p. 4; Testimony of K. Newell)

12 9) K. Newell typically sits at a desk where she can observe the front door and  
13 greet customers. K. Newell has limited mobility and requires the use of two canes to  
14 walk safely so she usually stays at her desk while other employees work the floor and  
15 assist customers. (Testimony of K. Newell and D. Newell)

16 10) On April 20, 2019, Neher and Cardoza entered Sunlan accompanied by  
17 Neher's assistance animal Reid. (Testimony of Neher and Cardoza)

18 11) Neher suffered a traumatic brain injury ("TBI") in 2014, which resulted in  
19 Neher having a seizure disorder that causes her to have grand mal seizures once or  
20 twice a week. Reid is trained to alert Neher prior to a seizure so she can protect herself  
21 and others during a seizure by moving to a safe area. (Ex. A11; Testimony of Neher)

22 12) Neher's condition causes her sensory difficulties; affects her  
23 concentration; and causes her to suffer from fatigue and migraines. Neher is limited in  
24  
25

1 her ability to stand for extended periods, interact with people, or run simple errands.  
2 Neher's condition has impacted her ability to work. (Exs. A3; A11; Testimony of Neher)

3 13) Reid is a Labradoodle and weighs approximately 70 pounds. Reid is  
4 hypoallergenic and housebroken. At all times material to this case, Reid was certified to  
5 serve as an assistance animal having passed the annual Public Access Test. (Ex. 8;  
6 Testimony of Neher)

7 14) K. Newell did not observe Neher and Cardoza enter the store as she was  
8 busy working with customers. Sunlan employee Robert Plumb ("Plumb") approached  
9 Neher while she was inside of the store and told her that dogs were not allowed in the  
10 store. Neher told Plumb that she had a right to be in the store with her assistance  
11 animal. The situation quickly escalated with both Plumb and Neher raising their voices  
12 while addressing one another. Plumb told Neher several times that dogs were not  
13 allowed in the store. At one point, Plumb pointed at K. Newell, who was still at her  
14 desk, and told Neher that K. Newell was allergic and she could not have dogs in the  
15 store. Plumb then yelled at K. Newell that there was a dog in the store. K. Newell  
16 responded by telling Plumb to get the dog out of the store. As Plumb continued to direct  
17 Neher to leave the store, K. Newell announced that she would leave the store. Neher  
18 and Cardoza then left the store. (Testimony of Neher and K. Newell)

19 20 21 22 23 24 25  
15) Reid did not act in an aggressive or disruptive manner at any time he was  
in the store and was under Neher's control throughout her interaction with Plumb.  
There is no evidence showing Reid was not in an appropriate harness or leash while in  
the store or that he caused any damage to Sunlan property or that of Sunlan's  
customers. (Testimony of Neher and K. Newell)



1           2)     Respondent Sunlan is a retail establishment open to the public that is a  
2 "place of public accommodation," as defined in ORS 659A.400(1).

3           3)     At all times material herein, Complainant's condition substantially limited  
4 one or more of her major life activities. Complainant was an individual with a disability  
5 under ORS 659A.104(1)(a).

6           4)     Complainant has an assistance animal that has been individually trained  
7 to assist Complainant with seizure response. Complainant's assistance animal is an  
8 "assistance animal" as defined by ORS 659A.143(1)(a) and OAR 839-006-0345(1).

9           5)     On April 20, 2019, Respondent Sunlan engaged in an unlawful practice,  
10 as defined by ORS 659A.001(14), by refusing to allow Complainant to remain in the  
11 store while accompanied by her assistance animal thereby making a distinction,  
12 discrimination, and/or restriction against Complainant because of her disability in  
13 violation of ORS 659A.142(4).

14           6)     Respondent denied Complainant the right to be accompanied by an  
15 assistance animal in a place of public accommodation that is open to the public in  
16 violation of ORS 659A.143(6)(a) and OAR 839-006-0345(8)(a). ORS 659A.142(4);  
17 ORS 659A.400(1); ORS 659.805(1)(a); ORS 659A.139(1).

18           7)     Respondent failed to make reasonable modifications as necessary to  
19 allow Complainant, a person with a disability who benefits from the use of an assistance  
20 animal, an opportunity to obtain goods, services, and/or the use of the advantages,  
21 facilities, and privileges of a place of public accommodation in violation of ORS  
22 659A.143(7) and OAR 839-006-0345(9). ORS 659A.142(4); ORS 659A.400(1); ORS  
23 659.805(1)(a); ORS 659A.139(1).



1 a disability; and (4) Neher was harmed by Sunlan's conduct. *In the Matter of Kara*  
2 *Johnson dba Duck Stop Market*, 34 BOLI 2, 30 (2014).

3 **1. Sunlan is a "Place of Public Accommodation"**

4 ORS 659A.142(4) provides that "It is an unlawful practice for any place of public  
5 accommodation, resort or amusement as defined in ORS 659A.400, or any person  
6 acting on behalf of such place, to make any distinction, discrimination or restriction  
7 because a customer or patron is an individual with a disability." ORS 659A.400(1)(a)  
8 defines "place of public accommodation" as "[a]ny place or service offering to the public  
9 accommodations, advantages, facilities or privileges whether in the nature of goods,  
10 services, lodgings, amusements, transportation or otherwise."

11  
12 Sunlan is a retail establishment that is open to the general public. As such,  
13 Sunlan constitutes a "place of public accommodation" pursuant to ORS 659A.400(1)(a).

14 **2. Neher is an Individual with a Disability**

15 ORS 659A.104(1)(a) defines "an individual with a disability" as an individual who  
16 "has a physical or mental impairment that substantially limits one or more major life  
17 activities." Neher suffered a TBI that causes her to experience grand mal seizures once  
18 or twice a week. Neher's condition causes her sensory difficulties; affects her  
19 concentration; and causes her to suffer from fatigue and migraines. Neher is limited in  
20 her ability to stand for extended periods, interact with people, or run simple errands.  
21 Neher's condition has impacted her ability to work. (Findings of Fact ## 11-12) Neher's  
22 condition substantially limits one or more of her major life activities. ORS 659A.104(2)  
23 Neher is, therefore, an individual with a disability under ORS 659A.104(1)(a).  
24  
25



1           **3.       *Sunlan Made a Distinction, Discrimination or Restriction Against***  
2           ***Neher Because she is an Individual with a Disability***

3           The Agency alleges that Sunlan denied Neher the right to be accompanied by  
4 her assistance animal by ordering her out of the store on April 20, 2019, in violation  
5 ORS 659A.143(6)(a) and OAR 839-006-0345(8)(a). ORS 659A.143(6)(a) provides:

6           “(a)   Except as provided in this subsection, a place of public accommodation or  
7           of access to state government services, programs or activities may not  
8           deny a person with a disability or an assistance animal trainer the right to  
9           be accompanied by an assistance animal or assistance animal trainee in  
10          any area of the place that is open to the public or to business invitees. A  
11          place of public accommodation or of access to state government services,  
12          programs or activities may require a person with a disability or an  
13          assistance animal trainer to remove an assistance animal or assistance  
14          animal trainee if:

11                   “(A)   The animal is not housebroken; or

12                   “(B)   The animal is out of control and effective action is not taken to  
13                   control the animal.”

14          Neher was accompanied by Reid, an “assistance animal” as defined under OAR  
15 839-006-0345(1), when she tried to access the goods and services offered by Sunlan  
16 as a customer and/or patron on April 20, 2019. ORS 659A.142(4) There is no evidence  
17 showing that Reid was not wearing a harness or was otherwise not under Neher’s  
18 control while they were in the business. Further, there is no evidence showing Reid  
19 was not housebroken. ORS 659A.143(6)(a) and OAR 839-006-0345(7) and (8)(b)

20          There is no dispute that a Sunlan employee ordered Neher out of the store on  
21 April 20, 2019, simply because she was accompanied by Reid, a service animal.  
22 Therefore, the forum concludes that Sunlan denied Neher “the right to be accompanied  
23 by an assistance animal or assistance animal trainee in any area of the place that is  
24 open to the public” in violation of ORS 659A.143(6)(a) OAR 839-006-0345(8)(a).  
25

1 The Agency further alleges that Sunlan unlawfully discriminated against Neher by  
2 failing to make reasonable modifications as necessary to allow Neher "the opportunity to  
3 obtain goods, services, and/or the use of the advantages, facilities, and privileges of a  
4 place of public accommodation" in violation of ORS 659A.143(7) and OAR 839-006-  
5 0345(9). "[A]llowing the presence of the assistance animal is a reasonable  
6 modification." *Id.*

7  
8 K. Newell testified in detail as to the modifications made at Sunlan to allow her to  
9 safely remain in the store, including air purifiers at each employee's desk and an air  
10 purifier in the store's HVAC system, should an animal enter the store. K. Newell  
11 outlined various measures store employees have taken when customers have  
12 attempted to enter the store while accompanied by an animal, including asking the  
13 customer to wait outside while an employee assisted the customer in purchasing the  
14 items sought and having the dog wait outside or in a breezeway connected to the store  
15 while the customer shopped in the store without the animal. K. Newell also described  
16 one occasion when a Sunlan employee helped a customer accompanied by an  
17 assistance animal in gathering the items the customer wished to purchase while the  
18 customer and the assistance animal remained outside of the store.

19  
20 While Sunlan has made efforts in the past to accommodate customers  
21 accompanied by assistance animals in the past, it is clear that it did not do so in this  
22 particular case. While sympathetic to Plumb's circumstances, as well as K. Newell's, it  
23 is clear that, rather than attempting to make a modification when Neher and Reid were  
24 observed in the store, Plumb, as a Sunlan employee, immediately ordered Neher to  
25 leave the store. K. Newell offered to leave the store and to allow Neher to remain, but

1 only when Neher began leaving the store after having been repeatedly ordered to do so  
2 by Plumb, thereby rendering K. Newell's gesture futile. It is therefore determined that  
3 Sunlan failed to make reasonable modifications as necessary to allow Neher "the  
4 opportunity to obtain goods, services, and/or the use of the advantages, facilities, and  
5 privileges of a place of public accommodation" in violation of ORS 659A.143(7) and  
6 OAR 839-006-0345(9).

7  
8 **a. *Allergies to Animal Dander are not a Proper Reason for***  
9 ***Excluding a Customer or Patron Accompanied by an***  
10 ***Assistance Animal***

11 Sunlan argued that Reid's presence posed a direct threat of harm to K. Newell.  
12 K. Newell testified in great detail as to the detrimental effects she experiences after  
13 exposure to dog dander, including swelling of her eyes and throat, which affects her  
14 vision and ability to be heard when speaking. K. Newell has no doubt that such effects  
15 are directly caused by the exposure to dog dander.

16 OAR 839-006-0335 provides:

17 "(1) Notwithstanding other provisions of these rules, places of public  
18 accommodation may refuse to permit an individual with a disability to  
19 participate in or benefit from the goods, services, facilities, privileges,  
20 advantages and accommodations of the public accommodation if the  
21 individual with a disability poses a direct threat to the health or safety of  
22 others. Direct threat means significant risk of substantial harm that cannot  
23 be eliminated or reduced below the level of significant risk of substantial  
24 harm by a modification of policies, practices or procedures, or by the  
25 provision of auxiliary aids or services.

"(2) In determining whether an individual with a disability poses a direct  
threat to the health or safety of others, places of public accommodation  
must make an individualized assessment, based on reasonable judgment  
that relies on the most current medical knowledge, or on the best available  
objective evidence, to ascertain:

- "(a) The duration of risk;
- "(b) The nature and severity of potential harm;

- 1                   “(c) The likelihood that potential harm will occur;
- 2                   “(d) The imminence of potential harm; and
- 3                   “(e) Whether reasonable modifications of policies, practices or  
                      procedures will mitigate the risk.”

4                   A respondent asserting a “direct threat” as a basis for excluding an individual  
5 bears a heavy burden of demonstrating that the individual poses a significant risk to the  
6 health and safety of others. *Lockett v. Catalina Channel Express*, 496 F3d 1061, 1066  
7 (9th Cir 2007). In *Lockett*, the defendants operated a public ferry boat service. The  
8 defendant had a policy that prohibited all animals from a small, semi-private lounge area  
9 called the Commodore Lounge, which offered more comfortable seats and  
10 complimentary beverages, upon the request of a frequent passenger who required an  
11 area free of animal dander due to allergies. Defendant refused to sell a ticket to the  
12 lounge area to the plaintiff because she was accompanied by an assistance animal.  
13 Defendant changed its policy two weeks later to allow access to the lounge.

14                   The court in *Lockett* noted that defendant’s policy was adopted in response to a  
15 frequent passenger’s allergies. *Id.* at 1065. “Accordingly, [defendant’s] employees had  
16 to decide on the spot whether to potentially expose passengers in the Commodore  
17 Lounge to dander or to ask [the plaintiff] to ride in the general passenger area.” *Id.* The  
18 court held that the defendant made a reasonable decision based upon the objective  
19 evidence before them that it would pose a direct threat to the safety of others to allow  
20 the plaintiff to enter the Commodore Lounge with her assistance animal. The court  
21 noted that the “single decision” to exclude an individual accompanied by an assistance  
22 animal from the lounge area was not a violation of the ADA. *Id.* at 1067. However, the  
23  
24  
25

1 court cautioned that an ongoing policy of exclusion may well violate the ADA even when  
2 a one-time exclusion does not.<sup>4</sup> *Id.* at 1066.

3 It has been the practice of Sunlan to treat those individuals who benefit from the  
4 services of an assistance animal differently than those individuals who do not. Those  
5 individuals are made to wait outside or to separate themselves from their assistance  
6 animal in order to access the goods and services that Sunlan makes available to the  
7 general public. The forum has no doubt that such actions are taken out of a real and  
8 sincere concern about the health and welfare of K. Newell. However, the forum does  
9 not believe that K. Newell and her employees acted with any ill intent. Rather, the  
10 evidence suggests that the events of April 20, 2019, were a perfect storm of  
11 circumstances that resulted in a circumstance not wanted or sought by anyone involved.  
12 However, that result included the exclusion of Neher, an individual with a disability,  
13 solely because of her disability.  
14

15 In determining whether Neher and her assistance animal posed a direct threat to  
16 the health and safety of others, namely K. Newell, an individualized assessment was  
17 required pursuant to OAR 839-006-0335. There is no evidence that an individualized  
18 assessment was performed before Plumb ordered Neher to leave the store. Plumb and  
19 other Sunlan employees clearly know that K. Newell will experience significant issues if  
20 exposed to animal dander, particularly dog dander. However, the evidence in this case  
21 shows a pattern and practice of Sunlan employees treating individuals with disabilities  
22 differently by subjecting them to different treatment than other individuals not similarly  
23

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24  
25 <sup>4</sup> ORS 659A.139(1) provides that ORS 659A.103 to 659A.144 "shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended by the federal ADA Amendments Act of 2008 and as otherwise amended.

1 situated which is not consistent with the stated policy of the laws at issue in this case.  
2 This is contrary to the prohibition against any place of public accommodation or any  
3 person acting on behalf of such a place making any distinction, discrimination or  
4 restriction because a customer or patron is an individual with a disability.<sup>5</sup> ORS  
5 659A.142(4)

6 ORS 659A.103, the Oregon Legislature's statement of policy with regard to  
7 individuals with a disability and access to places of public accommodation provides, in  
8 pertinent part:  
9

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

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

17 This policy statement clearly establishes that the State of Oregon considers  
18 access by individuals with a disability to places of public accommodation to be a  
19 fundamental human right. *Kara Johnson*, 34 BOLI at 39. The forum concludes that  
20 Respondent's denial of that right was an affront to Neher's fundamental human dignity,  
21 which Neher experienced when she was ordered to leave Sunlan on April 20, 2019,  
22 strictly for the reason she was accompanied by her assistance animal. Respondent  
23 Sunlan has not shown that Neher represented a direct threat or her presence while  
24 accompanied by an assistance animal fundamentally or that it properly conducted an

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25 <sup>5</sup> "Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals," U.S. Dept. of Justice, Civil Rights Div., Service Animals (July 12, 2011)(last updated February 24, 2020), [https://www.ada.gov/service\\_animals\\_2010.htm](https://www.ada.gov/service_animals_2010.htm).

1 individualized assessment to determine whether an accommodation was possible to  
2 allow Neher the opportunity to access the goods and services offered by Sunlan before  
3 she was ordered to leave the store.

4 It is therefore determined that Respondent Sunlan violated ORS 659A.142(4) by  
5 denying Neher, a person with a disability, the right to be accompanied by an assistance  
6 animal in a place of public accommodation in violation of ORS 659A.143(6)(a) and OAR  
7 839-006-0345(8)(a) and by failing to make reasonable accommodations as necessary  
8 to allow Neher and her assistance animal to obtain goods, services, and/or the use of  
9 the advantages, facilities, and privileges of a place of public accommodation in violation  
10 of ORS 659A.143(7) and OAR 839-006-0345(9). ORS 659A.142(4); ORS 659A.400(1);  
11 ORS 659A.805(1)(a); ORS 659A.139(1).

12  
13 **4. *Neher was Harmed as a Result of the Conduct of Respondent Sunlan  
14 and is Entitled to Physical, Mental and Emotional Distress Damages***

15 Neher was distressed and anxious following the incident on April 20, 2019.. The  
16 Agency established that Neher experienced the physical, mental and emotional distress  
17 as a result of Respondent's unlawful discrimination. The Formal Charges and Amended  
18 Formal Charges seek damages for "physical, mental and emotional distress in an  
19 amount to be proven at hearing, estimated to be at least \$8,000.00."

20 In determining an award for emotional and mental suffering, the forum considers  
21 the type of discriminatory conduct, and the duration, frequency, and severity of the  
22 conduct. It also considers the type and duration of the mental distress and the  
23 vulnerability of the Complainant. The actual amount depends on the facts presented by  
24 each complainant. A complainant's testimony, if believed, is sufficient to support a  
25 claim for mental suffering damages. *In the Matter of Dr. Andrew Engel, DMD, PC, 32*

1 BOLI 100, 152 (2012). Additionally, this forum has long held that Respondents must  
2 take Complainants "as they find them."<sup>6</sup>

3 Given the confrontational nature of the events leading to Neher's ouster from  
4 Sunlan, as well as the distress Neher experienced thereafter, the forum concludes that  
5 \$8,000 is an appropriate award to compensate Neher for her physical, emotional, and  
6 mental suffering.

7 **EXCEPTIONS TO PROPOSED ORDER**

8 ***AGENCY'S EXCEPTIONS***

9  
10 The Agency filed 12 exceptions to the Proposed Final Order. Exceptions 1, 2, 4,  
11 and 5 seek corrections to statutory citations. Those exceptions are well taken and  
12 GRANTED as reflected above. The Agency's Exceptions 6-9 seek corrections to  
13 scrivener's errors. The Agency's Exceptions 6-9 are GRANTED, as reflected above.

14 Agency's Exception 3 requests the forum remove language pertaining to whether  
15 Reid was wearing a vest or anything identifying him as a service animal. Given that  
16 such identification is not required under the law, the Agency's Exception 3 is  
17 GRANTED. Findings of Fact – the Merits, # 10 is modified as reflected above.

18 Agency's Exception 10 argues that language referring to a "single incident"  
19 should be removed as neither ORS 659A.142(4) or ORS 659A.103(1) includes any  
20 reference to an exception for a "single incident." The Agency's Exception 10 is  
21 GRANTED, and the Final Order has been modified as reflected above.

22  
23 Agency's Exceptions 11 and 12 seek the inclusion of a timeframe in which the  
24

25  

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<sup>6</sup> See, e.g., *In the Matter of Charles Edward Minor*, 31 BOLI 88, 104 (2010) (with regard to the particular sensitivity of a complainant who was sexually harassed by respondent).



1 Respondent is required to complete the ordered training and to develop the applicable  
2 policy. The Agency's Exceptions 11 and 12 are well taken. The Order is modified to  
3 require the ordered training to be completed within 150 days of the date of issuance of  
4 the Final Order. Similarly, the Order is modified to require the applicable policy to be  
5 implemented within 180 days of the date of issuance of the Final Order.

6 ***RESPONDENT'S EXCEPTIONS***

7 The Respondent filed three exceptions. The issues in Respondent's Exception 1  
8 were addressed by the removal of the language in Findings of Fact – the Merits #10 as  
9 requested by the Agency in its Exception 3. Similarly, the removal of that language  
10 resolves the issue raised in Respondent's Exception 2. Respondent's Exception 3 is  
11 addressed by the corrections requested in Agency's Exceptions 6 through 8. Therefore,  
12 each of the Respondent's Exceptions are hereby GRANTED.  
13

14 **ORDER**

15 A. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate  
16 the effects of violations of ORS 659A.142(4) by **Respondent Sunlan Lighting, Inc.**,  
17 and as payment of the damages awarded, the Commissioner of the Bureau of Labor  
18 and Industries hereby orders **Respondent Sunlan Lighting, Inc.** to deliver to the  
19 Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office  
20 Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check  
21 payable to the Bureau of Labor and Industries in trust for Complainant **Molly Neher** in  
22 the amount of:  
23

24 1) EIGHT THOUSAND DOLLARS (\$8,000), representing  
25 compensatory damages for emotional, mental, and physical suffering  
experienced by Molly Neher as a result of Respondent's unlawful practices found  
herein,

1            *plus,*

2                    2) Interest at the legal rate on the sum of \$8,000 from the date of  
3 issuance of the Final Order until Respondent complies with the requirements of  
4 the Order herein.

5            B.        NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate  
6 the effects of violations of ORS 659A.142(4) by **Respondent Sunlan Lighting, Inc.**, the  
7 Commissioner of the Bureau of Labor and Industries hereby orders **Respondent**  
8 **Sunlan Lighting, Inc.:**

9                    1) At Respondent's expense, undergo training, along with her  
10 employees, on the correct interpretation and application of Oregon laws  
11 pertaining to disability and service animals in places of public accommodation,  
12 with the training to be conducted by the Technical Assistance Unit of the Bureau  
13 of Labor and Industries or another trainer agreeable to the Agency. Such training  
14 shall be completed within 150 days from the issuance of the Final Order.

15                    2) Create and implement a public accommodation policy that  
16 accurately reflects Oregon law, to be approved by the Bureau of Labor and  
17 Industries, Civil Rights Division, within 180 days from the issuance of the Final  
18 Order

19                    3) Cease and desist from violating laws pertaining to unlawful  
20 discrimination against persons with disabilities in the scope of the operation of  
21 Sunlan Lighting.

22                    DATED this 14<sup>th</sup> day of July, 2022.

23                    Val T. Hoyle

24                    Val Hoyle, Commissioner  
25                    Bureau of Labor and Industries

26                    Issued ON: July 14, 2022