

BRAD AVAKIAN
COMMISSIONER



CHRISTIE HAMMOND
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

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

In the Matter of

**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,**

Respondents.

Case Nos. 44-14 & 45-14

**ORDER DENYING RESPONDENTS'
RENEWED REQUEST FOR STAY OF
ENFORCEMENT OF FINAL ORDER**

On July 10, 2015, Respondents filed a request for a stay of my Final Order dated July 2, 2015 pursuant to ORS 183.482(3) and OAR 137-003-0090. On July 14, 2015, I denied Respondents' request because Respondents had not yet filed a petition for reconsideration or rehearing with BOLI or a petition for judicial review with the Oregon Court of Appeals as required by law. OAR 137-003-0090(1).

On July 17, 2015, Respondents filed a renewed motion for a stay, stating that they had filed a petition with the Court of Appeals for judicial review of the Final Order that same day. In their motion, Respondents asserted that the Final Order contains "multiple colorable claims of error," that Respondents "will suffer irreparable injury if the

1 order is not stayed," and that granting the stay will not result in public harm. On July 23,
2 2015, the Agency filed a response opposing Respondents' stay request.

3 ORS 183.482(3)(a) provides that an agency may grant a motion staying
4 enforcement of its order "upon a showing of: (A) Irreparable injury to the petitioner; and
5 (B) A colorable claim of error in the order." When a petitioner makes this showing, an
6 agency must grant the stay "unless the agency determines that substantial public harm
7 will result if the order is stayed." ORS 183.482(3)(b).

8 ***Irreparable Injury***

9 Respondents assert that my Final Order deprives them of their "Constitutional
10 rights to free speech, free exercise of religion, and to due process of law under both the
11 Oregon and Federal Constitutions" and that Respondents "face * * * financial ruin" if a
12 stay is not granted. In particular, Respondents single out the cease and desist order in
13 the "Order" section of the Final order, characterizing it as a "patently unconstitutional
14 gag order." Respondents further argue that "[e]ach day's restraint on Respondent's [sic]
15 speech constitutes irreparable harm." Respondents' characterization is inaccurate and
16 their argument is flawed. My cease and desist order reads as follows:

17 "C. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to
18 further eliminate the effect of the violations of ORS 659A.409 by **Respondents**
19 **Aaron Klein and Melissa Klein**, the Commissioner of the Bureau of Labor and
20 Industries hereby orders **Respondents Aaron Klein and Melissa Klein** to
21 cease and desist from publishing, circulating, issuing or displaying, or causing to
22 be published, circulated, issued or displayed, any communication, notice,
advertisement or sign of any kind to the effect that any of the accommodations,
advantages, facilities, services or privileges of a 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."

23 This language is taken from that in ORS 659A.409. As such, its scope is to prohibit
24 Respondents from engaging in the same unlawful behavior that every other person in
25 the state of Oregon is similarly prohibited from engaging in. In essence, Respondents

1 argue that they should be able to violate ORS 659A.409 at will until an appellate court
2 has “properly addressed” the issues in this case. Since my Order only orders
3 Respondents to refrain from engaging in the behavior that the Legislature has already
4 made unlawful, it can hardly be construed as causing irreparable injury to Respondents
5 and I do not construe it as such.

6 As to Respondents’ assertion of financial harm, Respondents present no specific
7 evidence to support their claim that they face “financial ruin” except to state that
8 Respondents’ business is closed.

9 An injury is “irreparable” if the party cannot receive reasonable or complete
10 redress in a court of law. *Arlington Sch. Dist. No. 3 v. Arlington Educ. Ass’n*, 184 Or
11 App 97, 101-102, 55 P3d 546 (2002), citing *Winslow v. Fleischner*, et al., 110 Or 554,
12 563, 223 P 922 (1924). A showing of irreparable injury “must at least demonstrate that
13 irreparable injury *probably* would result if a stay is denied.” *Id.* (Emphasis in original).
14 Respondents have not made that showing. In addition, Respondents have raised
15 nearly half a million dollars through various internet fundraising sites in response to the
16 monetary award in the Final Order. Their argument of financial hardship, therefore,
17 lacks merit.

18 ***Colorable Claim of Error***

19 A colorable claim of error is one “that is substantial and nonfrivolous, or
20 seemingly valid, genuine, or plausible.” *Bergerson v. Salem-Keizer School District*, 185
21 Or App 649, 660, 60 P3d 1126 (2003). Respondents assert “multiple colorable claims
22 of error,” including:

23 (a) Lack of due process under ORS 183.482(7) and the United States
24 Constitution;

25 (b) Respondents did not deny services on the basis of sexual orientation;

1 (c) Designing and creating a wedding cake compels Respondents' participation in
Complainants' same-sex ceremony against Respondents' religious beliefs;

2 (d) Respondents' design and creation of a wedding cake is artistic expression
3 entitled to protection under the United States and Oregon Constitutions;

4 (e) The Commissioner's finding that Respondents violated ORS 659A.409 is
5 clearly erroneous; and

6 (f) The order to cease and desist violation of ORS 659A.409 is unconstitutional.

7 Based on the reasoning in the different sections of the Final Order that have already
8 addressed these claims, I conclude that Respondents have not shown a "colorable
9 claim of error" under *Bergerson* and ORS 183.482(a)(B).

10 ***Substantial Public Harm***

11 Once showings of a colorable claim of error and irreparable injury have been
12 made, ORS 183.482(3)(b) requires an administrative agency to grant the stay "unless
13 the agency determines that substantial public harm will result if the order is stayed."
14 Since Respondents have not made these showings, I need not make this determination.
15 I do note, however, that if Respondents had made this showing and the cease and
16 desist order was stayed, Respondents would be allowed to continue discriminating
17 against people in the same manner as that presented in this case. As such, substantial
18 public harm would occur and Respondents' request for a stay would have failed for that
19 reason.

20 ***Order***

21 Respondents' Renewed Request to Stay Enforcement of Final Order is **DENIED**.

22
23 **IT IS SO ORDERED.**

1 Entered at Portland, Oregon, with copies mailed or hand-delivered to:

2 Jennifer Gaddis, Chief Prosecutor, BOLI/APU, 1045 State Office Building, 800 NE Oregon Street,
3 Portland, OR 97232-2180

4 Cristin Casey, Administrative Prosecutor, BOLI/APU, 1045 State Office Building, 800 NE Oregon
5 Street, Portland, OR 97232-2180


6 Herbert G. Grey, Attorney at Law, 4800 SW Griffith Drive, Suite 320, Beaverton, OR 97005-8716

7 Tyler D. Smith and Anna Harmon, Attorneys at Law, 181 N. Grant Street, Suite 212, Canby, OR
8 97013

9 Paul Thompson, Attorney at Law, 1207 SW 6th Ave., Portland, OR 97204

10 Johanna Riemenschneider, Sr. Asst. Attorney General, Oregon Department of Justice, 1162
11 Court Street NE, Salem, Oregon 97301-4096

12 Dated this 29 day of July, 2015

13 
14 _____
15 Brad Avakian, Commissioner
16 Bureau of Labor and Industries
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BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I SERVED A COPY OF THE ATTACHED

**ORDER DENYING RENEWED REQUEST FOR STAY OF
ENFORCEMENT OF FINAL ORDER**

In the Matter of

**MELISSA ELAINE KLEIN, DBA SWEETCAKES BY MELISSA, AND AARON
WAYNE KLEIN, INDIVIDUALLY**

Case #44-14 & 45-14

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

<p>Jenn Gaddis, Chief Prosecutor Bureau of Labor and Industries 1045 State Office Building 800 NE Oregon Street Portland, OR 97232</p>	<p>Amy Klare, Civil Rights Division Administrator Bureau of Labor and Industries 1045 State Office Building 800 NE Oregon Street Portland, OR 97232</p>	<p>Johanna Riemenschneider Sr. Assistant Attorney General Oregon Department of Justice 1162 Court St NE Salem, OR 97301-4096 via Regular Mail</p>
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AND BY PREPARING AND PLACING IT IN THE OUTGOING BUREAU OF LABOR AND INDUSTRIES MAIL TO EACH PERSON OR ENTITY AT THE ADDRESSES LISTED BELOW:

<p>Rachel Bowman-Cryer via Regular Mail</p>	<p>Paul Thompson, Attorney at Law Thompson Law, LLC 1207 SW 6th Ave. Portland, OR 97204 via Regular Mail</p>	<p>Aaron Wayne Klein via Regular Mail</p>
<p>Laurel Bowman-Cryer via Regular Mail-</p>	<p>Herbert Grey Attorney at Law 4800 SW Griffith Dr, #320 Beaverton, OR 97005 via Regular Mail</p>	<p>Melissa Elaine Klein via Regular Mail</p>
<p>Tyler D Smith and Anna Harmon, Attorneys at Law 181 N. Grant Street, Suite 212 Canby OR 97013 via Regular Mail</p>		

On Monday, July 27, 2015

Diane M. Anicker, Contested Case Coordinator, Bureau of Labor and Industries